II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 27 November 2002

on the aid scheme implemented by Germany: Thuringia consolidation programme

(notified under document number C(2002) 4357)

(Only the German text is authentic)

(Text with EEA relevance)

(2004/165/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to Article 88(2) of the EC Treaty,

Whereas:

1. PROCEDURE

(1) The rules governing the Thuringia consolidation programme (hereinafter referred to as the rules) entered into force on 20 July 1993 [1]. The Thuringian authorities took the view that the rules complied with the *de minimis* provisions introduced in the Community's 1992 guidelines on state aid for small and medium-sized enterprises [2] (hereinafter referred to as the SME guidelines) and so did not notify them under Article 88(3) of the EC Treaty.

(2) On 16 January 1996 the rules were replaced by the Thuringia loan programme for small and medium-sized enterprises.

(3) By letter dated 26 January 1999 (ref. SG(99) D/580), the Commission informed Germany that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid scheme.

(4) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* [3]. The Commission called on interested parties to submit their comments on the scheme but did not receive any comments from interested parties.

By letter dated 2 March 1999, Germany requested an extension of the deadline for submitting its comments, which the Commission granted by letter dated 11 March 1999. Germany's comments were sent by letters dated 29 March, 19 August and 26 August 1999.

(5) Germany submitted its final comments by letter of 26 November 2001.

2. DESCRIPTION OF THE MEASURE

2.1. Title and legal basis

(6) The aid is granted by the public-sector Thüringer Aufbaubank (Thuringia Reconstruction Bank), acting on behalf of the Thuringia Ministry for Economic Affairs and Transport on the basis of Sections 23, 44 and 44a of the Land Budget Order, in accordance with the rules on the Thuringia consolidation programme.

[1] Thüringer Staatsanzeiger No 33/1993, p. 1414.
[2] OJ C 213, 19.8.1992, p. 2.
[3] OJ C 108, 17.4.1999, p. 26.

2.2. **Recipients**

(7) The rules are directed at small and medium-sized enterprises (SMEs) defined according to the 'turnover' and 'employees' criteria, but not the 'independence' criterion, set out in the 1992 SME guidelines ([4]), including firms administered by the Treuhandanstalt. The eligibility for aid of the foodstuffs industry is expressly provided for under point 3 of the rules (Recipients); the other sensitive sectors (steel, shipbuilding, synthetic fibres, the motor industry, agriculture, fisheries, transport and the coal industry) are not excluded. In exceptional cases (by decision of the relevant minister), aid may also be granted to firms which exceed the turnover and employee thresholds laid down in the SME guidelines.

2.3. **Duration**

(8) The rules on the Thuringia consolidation programme entered into force on 20 July 1993 for an unlimited period and were replaced on 16 January 1996 by the Thuringia loan programme for small and medium-sized enterprises.

2.4. **Objective**

(9) The aid is granted by the Thüringer Aufbaubank in the form of soft loans, which are paid to the recipient firm via its main bank at the latter's primary risk. The main bank may receive a guarantee of up to 60 % of the amount of the loan (the rules do not provide for a fee). The Thüringer Aufbaubank and the main bank may charge a processing fee of 0,1 % of the amount of the loan.

(10) The rules are directed at firms with liquidity and profitability problems and are designed to allow the rescheduling of short-term indebtedness at subsidised rates. Rescheduling at the expense of the Thüringer Aufbaubank is ruled out.

(11) Loans are granted on condition that the firm submit a viable overall consolidation plan which, taking account of the rescheduling loan, makes it likely that profitability can be restored on a long-term basis. The plan must indicate the firm's consolidation requirements and existing liquidity and profitability problems, together with the contributions which the recipient and its main bank will make.

(12) The loans are granted for between three and twelve years at an interest rate of between 5 % and 8 % and with a grace period of two or three years. The relevant minister can approve exceptions to these conditions.

2.5. **Intensity**

(13) Point 5 of the rules (Nature, scope and amount of the payment) refers expressly to the aid's *de minimis* nature.

(14) According to the wording of the rules, the amount of aid resulting from the interest-rate advantage is calculated on the basis of the difference between the effective interest rate and an accepted reference rate. No account is taken of the aid element resulting from the guarantee or the special-risk status of the recipient firms. There is no direct limit on the amount of the loan; however, the amount of aid granted to the firm (i.e. the aid element resulting from the soft loan only) may not exceed the *de minimis* threshold laid down in the SME guidelines.

(15) According to a letter from Germany dated 7 December 1998, a total of 741 loans amounting to DEM 312,4 million were granted from 1993 to 1996; some 80 of these loans went to the foodstuffs industry.

2.6. **Cumulation**

(16) Public financial aid already granted to a firm must be declared when it applies for a loan.

2.7. **Grounds for initiating the procedure**

(17) The procedure was initiated on the grounds that the rules were also directed at firms in difficulty and, in applying the *de minimis* provisions, did not take account of the aid intensity resulting from the guarantee or the special difficulties of recipient firms. In as much as the rules were aimed at firms in difficulty and the *de minimis* amounts were exceeded, the Commission took the view that the relevant Community guidelines should be applied.

(18) Furthermore, sensitive sectors were not excluded from the rules, even though the *de minimis* provisions do not apply to such sectors, for which special provisions exist.

(19) For all these reasons, the rules and the cases in which they were applied where the *de minimis* threshold or the *de minimis* scope were exceeded constituted state aid

([4]) OJ C 213, 19.8.1992, p. 2.

within the meaning of Article 87(1) of the EC Treaty (formerly Article 92(1)) that had been granted or implemented unlawfully.

(20) As is clear from the objectives and wording of the rules, the scheme was devised for firms in difficulty. Germany contested this interpretation, arguing that the loans were granted by the main banks at their primary risk and that — after deduction of the 60 % guarantee — the banks' risk would in any event be 40 %. According to Germany, this residual risk could not be covered by any other guarantee. It argued that a bank would not normally be prepared to grant a loan to a firm in difficulty without sufficient guarantees and bank security.

(21) This argument cannot be considered sound, for the following reasons:

(a) firms in difficulty are not excluded from the scheme. In identical circumstances in a similar case (Thuringia loan programme for SMEs), firms in difficulty were found to have received aid;

(b) the scheme allows rescheduling of the liabilities of firms in difficulty towards their main bank or other financial institutions. In the Commission's view, this rescheduling of the liabilities of firms in difficulty under the rules had, in some cases, considerably reduced the risks to which the banks had originally been exposed.

(22) The Commission therefore took the view that the rules were directed at firms in difficulty and had to be assessed on the bases of the applicable provisions.

(23) As regards the rescue of firms in difficulty (this possibility is not formally excluded from the rules, though it seems rather unlikely in reality), established practice has been to make it a precondition of compatibility with the common market that rescue aid be granted either in the form of public loans on market terms or in the form of a state guarantee on a private-sector loan. This condition was not met in the case in point since the loans in question were soft loans.

(24) In as much as it was possible for rescue aid to be granted, the Commission accordingly had doubts about the compatibility of the rules with the common market.

(25) In as much as the rules were concerned with restructuring firms in difficulty, the Commission's practice to date has been to require the following main conditions for compatibility:

(a) submission and implementation of a restructuring plan capable of restoring the long-term viability of the firm;

(b) limitation of the aid to the strict minimum required;

(c) a significant contribution from the recipient firm and its shareholders;

(d) compliance with the special rules governing the sensitive sectors, requiring in principle the notification of individual cases;

(e) individual notification of aid to large firms;

(f) restructuring aid to be granted only once in so far as there are no unforeseen circumstances for which the company is not responsible.

(26) The rules did not require individual notification of aid for large firms, did not prohibit repeated restructuring aid, did not include special rules for sensitive sectors and did not limit the aid amount to the minimum necessary to achieve the objective.

(27) As far as the granting of restructuring aid was concerned, the Commission accordingly had doubts about the compatibility of the rules with the common market.

3. **COMMENTS FROM GERMANY**

(28) Contrary to what was indicated in the decision initiating proceedings, Germany put the number of consolidation loans granted in the period from 1993 to 1995 at 485, amounting to a total of EUR 112,2 million. The figure of 741 mentioned in the decision initiating proceedings included, according to Germany, a further 248 loans granted in 1996 under the Thuringia loan programme for SMEs. This programme is the subject of proceedings in case C 87/98 (ex NN 137/98).

(29) Germany agreed with the Commission that the aid intensity had been calculated only on the basis of the aid element contained in the soft loan. The reason for this, it said, was that from 1993 to early 1996 the German authorities did not know that the aid element

associated with the guarantee should have been taken into account in the case of firms in difficulty.

(30) In so far as consolidation loans were granted in sensitive sectors, Germany considered the loans under the Thuringia consolidation programme to have been granted in accordance with the Community SME guidelines in force at the time. In Germany's view, the special aid rules contained in the 1996 Community guidelines for state aid in connection with investments in the processing and marketing of agricultural products ([5]) were applicable only as from 1998. They had become applicable in 1998 pursuant to Commission Decision 1999/183/EC of 20 May 1998 concerning state aid for the processing and marketing of German agricultural products which might be granted on the basis of existing regional aid schemes ([6]), with the consequence that no special rules applied to the food and tobacco industry between 1993 and 1995 and this sensitive sector did not have to be taken into consideration in the granting of loans.

(31) Germany contested the Commission's view that the main bank's own risk could be reduced by the rescheduling of the liabilities of firms in difficulty. Instead, the 40 % co-liability on the part of the main bank constituted a genuine risk on its part. If such a loan were transferred to another, private bank at the main bank's primary risk, a rescheduling of the main bank's existing loan commitments by the Thüringer Aufbaubank was possible only without the latter's co-liability. The possibility of rescheduling the existing loan commitments of the firm's main bank with co-liability on the part of the Thüringer Aufbaubank was ruled out.

(32) Germany does acknowledge in its comments that the Thuringia consolidation programme was directed at both viable firms and firms in difficulty. However, provided that the aid intensity of a loan, taking account of any other *de minimis* aid, remained below the *de minimis* ceiling, it considered the rules to be compatible with the *de minimis* provisions.

(33) Germany provided the Commission in its letters of 26 August 1999 and 26 November 2001 with lists of all consolidation loans granted from 1993 to 1995. These individual lists show that three loans were granted to firms in difficulty in 1994, and nine in 1995. They also show that only two loans were granted in 1994, and two in 1995, to firms in the sensitive sector of agriculture, although, according to Germany's letter of 7 December 1998, some 80 loans were made to firms in the foodstuffs industry. It is not clear from the documents provided by Germany what criteria were used to define the sensitive sector of agriculture or firms in difficulty.

4. ASSESSMENT OF THE MEASURE

4.1. Existence of state aid

(34) Although any financial payment to a firm alters the conditions of competition to some extent, not all aid has a perceptible impact on trade and competition between Member States. Against this background, the notification requirement under Article 88(3) of the EC Treaty does not apply to aid that does not exceed an absolute maximum amount and, as *de minimis* aid, does not fall within the scope of Article 87(1) of the EC Treaty.

(35) A definition of what the Commission understood by *de minimis* aid was first set out in the 1992 SME guidelines ([7]). The scope of the *de minimis* provisions is defined at point 3.2 of the guidelines as payments of EUR 50 000 to any one firm in respect of a given broad type of expenditure (e.g. investment and training) over a three-year period. Therefore, one-off payments of aid of up to EUR 50 000 in respect of a given type of expenditure and schemes under which the amount of aid that a given firm may receive in respect of a given type of expenditure over a three-year period was limited to that figure were no longer considered notifiable under Article 88(3) (formerly Article 93(3)) of the EC Treaty. However, there had to be an express condition in the grant decision or scheme that any further aid which the same firm might receive in respect of the same type of expenditure from other sources or under other schemes did not take the total aid received over the EUR 50 000 limit. It was made clear in point 3.2 that the *de minimis* facility was not available in sensitive sectors (steel, shipbuilding, synthetic fibres, the motor industry, agriculture, fisheries, transport and the coal industry).

(36) The 1996 Commission notice on the *de minimis* rule for state aid ([8]) amended the *de minimis* provisions of the

([5]) OJ C 29, 2.2.1996, p. 4.
([6]) OJ L 60, 9.3.1999, p. 61.
([7]) See footnote 2.
([8]) OJ C 68, 6.3.1996, p. 9.

1992 SME guidelines. The ceiling for aid covered by the *de minimis* rule was set at EUR 100 000 over a three-year period beginning when the first *de minimis* aid was granted. This ceiling applied to all types of public assistance considered to be *de minimis* aid and did not affect the possibility of the recipient obtaining other aid under schemes approved by the Commission.

(37) The provision did not apply to the industries covered by the ECSC Treaty, to shipbuilding, to transport or to aid towards expenditure in connection with agriculture or fisheries.

(38) Article 1 of Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid ([9]) extended the scope of the *de minimis* rule, albeit still to the exclusion of aid granted to the transport sector and to activities linked to the production, processing or marketing of products listed in Annex I to the EC Treaty. Similarly, the Regulation does not apply to aid for export-related activities, i.e. aid directly linked to the quantities exported, to the establishment and operation of a distribution network or to other current expenditure linked to an export activity. Lastly, aid contingent upon the use of domestic over imported goods is also excluded from the scope of the Regulation.

(39) Article 2 of the Regulation stipulates that the total *de minimis* aid granted to any one enterprise must not exceed EUR 100 000 over any period of three years. This ceiling applies irrespective of the form of the aid or the objective pursued.

(40) Since Regulation (EC) No 69/2001 entered into force only on 2 February 2001, whereas the rules under examination applied from 20 July 1993 to 16 January 1996, the question arises whether the Commission, for the purposes of this Decision, can apply the Regulation retroactively to financial assistance paid before it entered into force or whether the *de minimis* rule in the 1992 SME guidelines in force in the relevant period should be taken into account (*consecutio legis*).

(41) Commission Regulation (EC) No 69/2001 does not indicate whether it is applicable to the assessment of aid granted before its entry into force. However, its wording does not rule out its application to previous cases, which in any event are subject to the control mechanism under Article 3. The Commission has reached the conclusion that, given the absence of any other express provision, Regulation (EC) No 69/2001 should apply to *de minimis* aid granted before its entry into force. For one thing, the Regulation, in so far as it exempts a particular category of measure from the notification requirement, is a procedural regulation and should thus apply immediately to all pending proceedings. For another, the immediate application of the Regulation is in line with the underlying objectives of procedural simplification and decentralisation. Only in respect of aid not caught by the Regulation and thus not eligible for exemption on this basis will the Commission take account of the provisions that were in force when the aid was granted. Since the Regulation is, in principle, more generous than its *de minimis* predecessors and since the latter apply in any event to cases where the aid concerned is not exempt under the Regulation, the general legal principles of legitimate expectation and legal certainty are suitably accounted for. From an economic standpoint, the Commission takes the view that a financial measure which cannot be classed as aid within the meaning of Article 87(1) of the EC Treaty under Regulation (EC) No 69/2001, in force today in an integrated market, cannot in the past have given rise to any aid in a less integrated market. It will therefore base its further assessment of the financial measures on Regulation (EC) No 69/2001, which does not rule out the possibility of the provisions in force at the time the measures were implemented being applied, provided that the measures concerned are not exempt under Regulation (EC) No 69/2001.

(42) The proceedings initiated thus cover both the rules at issue and the cases of application which do not fall within the scope of Regulation (EC) No 69/2001 or the other relevant *de minimis* provisions and the cases which do fall within the scope of the Regulation or of the other relevant *de minimis* provisions but in which cumulation with other aid has led to the *de minimis* ceiling being exceeded.

(43) Aid for the transport sector and for all activities relating to the manufacture, processing or marketing of the goods listed in Annex I to the EC Treaty are excluded from the scope of Regulation (EC) No 69/2001 and of the previous *de minimis* provisions.

([9]) OJ L 10, 13.1.2001, p. 30.

(44) The Commission therefore takes the view that all the consolidation loans granted to the foodstuffs industry fall outside the scope of Regulation (EC) No 69/2001 or of the other *de minimis* provisions in so far as they were granted for the manufacture of the goods listed in Annex I to the EC Treaty and must thus be classed in the sensitive agricultural sector.

(45) Germany's argument that the special aid rules contained in the 1996 Community guidelines for state aid in connection with investments in the processing and marketing of agricultural products were applicable only as from 1998 is immaterial here since the special rules did not affect the scope of the *de minimis* provisions ([10]).

(46) In the Commission's view, the residual scope of Regulation (EC) No 69/2001 or the relevant previous *de minimis* provisions might be exceeded because failure to take account of the aid element contained in the guarantee might mean that, in granting consolidation loans, the ceilings laid down in the Regulation and the *de minimis* provisions might be exceeded. The rules do not offer any assurance that the *de minimis* ceiling of EUR 100 000 over a period of three years laid down in Article 2(2) of Regulation (EC) No 69/2001 or the previously applicable ceiling was complied with in every instance. There is in particular no guarantee that it was complied with where the rules were applied to firms in difficulty, involving as they do a high risk of default.

(47) In the Commission's view, the beneficiaries under the rules were exclusively or at least largely firms in difficulty.

(48) For the purpose of differentiating between firms in difficulty and other firms, the Commission included an explanation of what is meant by a firm in difficulty in point 2.1 of the 1994 Community guidelines on State aid for rescuing and restructuring firms in difficulty ([11]) (hereinafter referred to as the 1994 guidelines). This definition essentially confirmed the Commission's decision-making practice in the preceding years, as described in its Eighth Report on Competition Policy published in 1979 (recitals 227 to 229) ([12]).

(49) The definition of a firm in difficulty which the Commission will use here is given in the 1994 guidelines as a firm which is 'unable to recover through its own resources or by raising the funds it needs from shareholders or borrowing. […] The typical symptoms are deteriorating profitability or increasing size of losses, diminishing turnover, growing inventories, excess capacity, declining cash flow, increasing debt, rising interest charges and low net asset value. In acute cases the company may already have become insolvent or gone into liquidation.'

(50) According to the wording of point 1 of the rules (Objective of the aid), they are intended for firms which are experiencing liquidity and profitability problems as a result of their often difficult financial and earnings position. The Commission interprets this to mean that such firms can in any event include those in need of recovery which meet the definition of firms in difficulty.

(51) Germany argues that, in the event of a guarantee being called in, the main bank's own liability was 40 % and that there was no possibility of this risk on the part of the main bank being covered by the liability of another public source. The main bank's own risk represented an appropriate incentive for the lender to carry out proper checks concerning the borrower's creditworthiness so as to reduce the risk of default.

(52) This argument is not convincing as evidence that the consolidation programme was not applied to firms in difficulty. According to their wording, the specific purpose of the rules was to grant consolidation loans and guarantees to firms in financial difficulties. Although the likelihood of the recipient actually being a firm in difficulty was reduced by the risk which the

([10]) These guidelines entered into force on their publication in the *Official Journal of the European Communities*. By Decision 1999/183/EC, the Commission found that national aid schemes in Germany were incompatible with the common market within the meaning of Article 87(1) of the EC Treaty in so far as they did not comply with the guidelines and appropriate measures for State aid (in connection with investments in the processing and marketing of agricultural products) which were communicated to Germany by letter SG(95) D/13086 of 20 October 1995.

([11]) OJ C 368, 23.12.1994, p. 12.

([12]) As regards non-notified aid, paragraph 101(b) of the 1999 Community guidelines on state aid for rescuing and restructuring firms in difficulty (Notice to Member States including proposals for appropriate measures; OJ C 288, 9.10.1999, p. 2) lays down that the Commission will examine for its compatibility with the common market any rescue or restructuring aid granted without its authorisation and therefore in breach of Article 88(3) of the EC Treaty on the basis of the guidelines in force at the time the aid was granted. The Commission accordingly assessed the rules on the basis of the decision-making practice set out in its Eighth Report on Competition Policy (published in 1979) and on the basis of the 1994 guidelines.

main bank still ran, the granting of aid to firms in difficulty was by no means ruled out by the wording of the rules.

(53) The Commission also takes the view that it could be advantageous for the main bank, in particular in the case of firms in difficulty, to participate in granting loans under the rules since the granting of a consolidation loan improved the overall liquidity of the recipient firm and reduced the risk of default on loans previously granted by the main bank. It may in fact make economic sense for a bank to reduce a high risk of default in respect of existing loans by ensuring that new funds are made available to the firm for its restructuring. This is particularly true where the associated risk is partly assumed by the State.

(54) After all, the individual lists sent by Germany of aid granted or disbursed under the rules show that firms in difficulty were assisted. Germany also acknowledged in its comments that the Thuringia consolidation programme was directed at both viable firms and firms in difficulty.

(55) The aid element of the guarantee should have been taken into account in the calculation of the loans' aid intensity, especially bearing in mind the risk of default in the case of firms in difficulty.

(56) This assessment is not affected either by Germany's statement in its comments that the German authorities, between 1993 and early 1996, did not know that the aid element associated with the guarantee and the particular risks involved in the granting of loans to firms in difficulty should have been taken into account in calculating the aid intensity.

(57) The Commission cannot accept this argument since back in 1989 it sent a letter to Member States pointing out that, in its view, all guarantees given by the State fell within the scope of Article 87(1) of the EC Treaty ([13]). The German authorities should, in granting guarantees to firms facing liquidity difficulties, at least have had doubts as to whether the measures involved aid and they should have notified the measures contained in the scheme in good time to the Commission, in order to allow it to give its opinion on the matter.

(58) Under the Commission notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees ([14]), the cash grant equivalent of a loan guarantee in a given year can be:

(a) calculated in the same way as the grant equivalent of a soft loan, the interest subsidy representing the difference between the market rate and the rate obtained thanks to the State guarantee after any premiums paid have been deducted, or

(b) taken to be the difference between the outstanding sum guaranteed, multiplied by the risk factor (the probability of default) and any premium paid, i.e. (guaranteed sum × risk) – premium; or

(c) calculated by any other objectively justifiable and generally accepted method.

(59) This confirmed the Commission's long-held view that, if at the time of the loan decision the probability of the borrower being unable to pay is evidently very high, the intensity of the aid can be equivalent to the sum actually secured by the guarantee.

(60) Furthermore, the aid element of the guarantee can, even in the case of viable firms, result in the *de minimis* ceiling being exceeded.

(61) In the Commission's view, the rules and their application involve aid within the meaning of Article 87(1) of the EC Treaty in so far as they do not fall within the scope of Regulation (EC) No 69/2001 or do fall within the scope of the Regulation but exceed the *de minimis* ceiling. The same applies in respect of the other *de minimis* provisions in force at the time the measures were implemented.

(62) Where applied to firms in difficulty, the rules allowed recipient firms to receive from a private bank financial resources which, in view of their financial situation, they would not otherwise have received from private credit institutions on the basis of the loan terms normally applied by the latter. These financial resources made it possible for recipient firms to avoid being forced out of the market. If the firm had been forced out of the market, either existing overcapacities would

([13]) Commission letter to Member States SG(89) D/4328 of 5 April 1989.

([14]) OJ C 71, 11.3.2000, p. 15.

have been reduced or the market shares made available would have been acquired by competitors, which could in either case have improved their profitability. The consolidation loans do not preclude loans being granted to firms which produce goods or provide services that may be the subject of intra-Community trade. It must therefore be assumed that the financial measures concerned by the proceedings are liable to affect trade between Member States.

(63) Even viable firms would not have obtained such finance from private banks on the terms offered and were therefore able to improve their market position vis-à-vis competitors within the common market as a result of the working capital loans provided. This applies in particular to viable firms operating in sensitive sectors. Community markets in sensitive sectors are faced with overcapacity. The financial advantage conferred on the specific firms by the consolidation loans led to their position being strengthened vis-à-vis other competitors, with the result that trade between Member States could be affected.

(64) The rules thus might have distorted or threatened to distort competition.

(65) The Commission accordingly concludes that the rules and their application constitute state aid within the meaning of Article 87(1) of the EC Treaty for firms involved in intra-Community trade.

(66) On the basis of the arguments presented by Germany, the Commission takes the view that the private bank, as a lender, did not profit from the grant of the consolidation loan in a manner which distorts competition.

(67) In the Commission notice on the application of Articles 87 and 88 of the EC Treaty to state aid in the form of guarantees, the Commission assumes that, if a State guarantee is given *ex post* in respect of a loan or other financial obligation already entered into without the terms of this loan or financial obligation being adjusted or if one guaranteed loan is used to pay back another, non-guaranteed loan to the same credit institution, then there may also be aid to the lender, in so far as the security of the loans is increased.

(68) Although, according to the wording of point 1 of the rules, the firms' existing liquidity problems are to be resolved by means of a rescheduling of short-term indebtedness on the basis of a soft loan, Germany indicated in its comments that a rescheduling of the main bank's existing loan commitments by the Thüringer Aufbaubank was possible only without the latter's co-liability. This means that no guarantee could be given *ex post* by the Thüringer Aufbaubank in respect of a loan or other financial obligation already entered into nor could one guaranteed loan be used to pay back another, non-guaranteed loan to the same credit institution.

(69) Since the main bank's existing loan commitments could not be rescheduled with co-liability on the part of the Thüringer Aufbaubank, the rules do not appear to contain any element of aid to the lender. The mere fact that stabilisation of a firm in difficulty benefits all its creditors is an accepted consequence of aid and does not in itself represent aid within the meaning of Article 87(1) of the EC Treaty to those creditors.

4.2. **Lawfulness of the aid**

(70) The Commission regrets that, in granting the aid, Germany acted in breach of Article 88(3) of the EC Treaty.

4.3. **Compatibility of the aid with the common market in so far as the scope of application of Regulation (EC) No 69/2001 or of the other relevant *de minimis* provisions was exceeded**

(71) The Commission assessed the rules on the assumption that they were directed both at viable firms and at firms in difficulty.

(72) In as much as aid was granted to firms in difficulty, it constituted restructuring or rescue aid as defined in the Commission's Eighth Report on Competition Policy published in 1979 and in the 1994 guidelines ([15]), confirmed by the guidelines adopted in 1999 ([16]).

([15]) Under point 2.2 of the 1994 guidelines, they applied only to the extent that they were consistent with the special rules in the sensitive sectors. At the time in question, there were special aid rules in agriculture, fisheries, steel, shipbuilding, textiles and clothing, synthetic fibres, the motor industry, transport and the coal industry. In the agricultural sector, as an alternative to these guidelines, special Commission rules for rescue and restructuring aid could still be applied to individual recipients at the discretion of the Member State concerned.

([16]) See point 101 of the guidelines.

(73) In so far as the aid was granted to viable firms, it constituted operating aid within the meaning of the Commission communication of 1979 on regional aid systems ([17]) and of the Commission communication of 1988 on the method for the application of Article 92(3)(a) and (c) to regional aid ([18]). These communications were confirmed by the 1998 guidelines on national regional aid ([19]).

(74) The compatibility of the rules will be examined in the light of the relevant provisions applicable ([20]).

(75) In so far as the restructuring of firms in difficulty is involved, it should be noted that, in accordance with the Commission's practice and the 1994 guidelines, the following criteria had to be met as a precondition for compatibility of the aid with the common market:

(a) submission and implementation of a restructuring plan capable of restoring the long-term viability of the firm;

(b) a significant contribution from the recipient firm and its shareholders;

(c) limitation of the aid to the strict minimum required;

(d) compliance with the special rules governing the sensitive sectors, requiring in principle the notification of individual cases;

(e) individual notification of aid to large firms;

(f) restructuring aid to be granted only once in so far as there are no unforeseen circumstances for which the company is not responsible.

(76) Under the rules, aid was granted on condition that the firm submit a viable overall consolidation plan which, taking account of the rescheduling loan, made it likely that profitability could be restored on a long-term basis. The plan had to indicate the firm's consolidation requirements and existing liquidity and profitability problems, together with the contributions which the recipient and its main bank would make. To the extent that the plan satisfied these conditions, the rules met the first two criteria listed above.

(77) The wording of the rules does not prohibit the repeated grant of restructuring aid or limit the amount of aid to the strict minimum required to achieve the objective; Germany did not indicate whether these criteria were taken into account in the granting of aid.

(78) The rules did not provide for individual notification of aid for large firms or require compliance with the special rules for sensitive sectors.

(79) The Commission therefore finds that, to the extent that the rules provide for restructuring aid to firms in difficulty, such aid is not compatible with the common market.

(80) In so far as the rescue of firms in difficulty is involved, it must be noted that the established policy in this respect was to make it a precondition of compatibility with the common market that rescue aid be granted either in the form of public loans on market terms or in the form of a State guarantee on a private-sector loan. This condition was not met in the case in point, since the loans in question were soft loans.

(81) To the extent that the provision of rescue aid under the rules is involved, this aid is incompatible with the common market.

(82) In as much as loans were granted to economically viable firms, they constituted operating aid, which had to be assessed by the Commission in the light of the provisions on regional aid that applied to the rules.

(83) Thuringia is an assisted area under Article 87(3)(a) (formerly Article 92(3)(a)) of the EC Treaty. The Commission communications on regional aid of 1979 and 1988 ([21]) allowed the Commission exceptionally to approve certain types of operating aid in assisted areas in view of the particular difficulties they faced, on the following conditions:

([17]) OJ C 31, 3.2.1979, p. 9.
([18]) OJ C 212, 12.8.1988, p. 2.
([19]) OJ C 74, 10.3.1998, p. 9.
([20]) OJ C 119, 22.5.2002, p. 22. (For the definitions applied, the Commission refers to the provisions specified. It examined the aid to viable firms in the light of its 1988 communication on the method for the application of Article 92(3)(a) and (c) to regional aid. Its assessment is not affected by application of the 1998 guidelines on national regional aid.)

([21]) See footnotes 16 and 17.

(a) the aid had to be limited in time and designed to overcome the structural handicaps of firms located in Article 92(3)(a) regions;

(b) it had to contribute to durable and balanced economic development and not give rise to sectoral overcapacity at Community level such that the resulting Community sectoral problem was more serious than the original regional problem; in this context a sectoral approach was required whereby the Community rules and guidelines applicable to certain sectors of industry (steel, shipbuilding, synthetic fibres, textiles and clothing) and agriculture, and to industrial firms involved in processing agricultural products were to be observed; under these Community rules and guidelines, operating aid could not be granted in the sectors concerned;

(c) the aid had to be granted in accordance with the rules on aid to firms in difficulty;

(d) in addition, in the course of the 1990s, the Commission developed a practice of requiring aid to be degressive.

(84) According to the wording of the rules, they were not limited in time. On 16 January 1996 the rules were replaced by the 1996 Thuringia loan programme, which in turn came to an end on 1 June 1999 ([22]). The Commission concludes that the duration of the rules at issue in these proceedings came to an end on 31 May 1999.

(85) The objective of the rules was to make it easier for already privatised firms or firms operating for the first time under the new conditions of the market economy in a region which seriously lags behind in development terms to participate fully in the single market. However, the Commission's practice required that aid should contribute to balanced economic development and not give rise to sectoral overcapacity. Sensitive sectors were thus excluded from receiving operating aid.

(86) The rules do not provide for aid to be degressive. However, this does not mean that the measures in question are incompatible with the common market because, at the time they were applicable, this practice on the part of the Commission had not been fully developed and because, in many cases in eastern Germany in the early years following German unification, the Commission did not insist on aid being degressive because of the uncertain development situation.

(87) In so far as the rules enabled aid to be granted to viable firms in non-sensitive sectors, the operating aid was consistent with the Commission' practice at the time and is therefore compatible with the common market.

(88) However, the rules are incompatible with the common market in so far as aid to viable firms in the sensitive sectors is involved, since the Community rules and guidelines applicable to sensitive sectors prohibit the granting of operating aid to viable firms.

(89) The Commission takes the view that the exemptions under Article 87(2) of the EC Treaty do not apply in this case as the rules do not pursue any of the aims listed there. Nor did Germany claim that those exemptions applied ([23]).

(90) The Commission concludes that, apart from the guidelines for assessing aid for rescuing and restructuring firms in difficulty, no special provisions concerning aid with horizontal objectives pursuant to Article 87(3)(c) of the EC Treaty are applicable to the rules since they do not pursue one of the special objectives and Germany has not argued that this is the case.

(91) In the Commission's view, the aid is equally not intended to promote an important project of common European interest or to remedy a serious disturbance in the economy of a Member State. Nor does it promote culture or heritage conservation. The Commission therefore concludes that neither Article 87(3)(b) nor Article 87(3)(d) of the EC Treaty applies to the rules.

(92) Some of the individual cases covered by the rules may have been the subject of other formal investigation

([22]) It was replaced by a new *de minimis* loan programme which appears *prima facie* to comply with the *de minimis* provisions applicable.

([23]) As regards application of the exemption under Article 87(2)(c) of the EC Treaty, the Commission refers to the Court of Justice ruling of 19 September 2000 in Case C 156/98 Germany v Commission (not yet published) concerning Section 52(8) of the German Income Tax Law.

proceedings under Article 88(2) of the EC Treaty. This decision does not apply to them.

5. **CONCLUSION**

(93) The aid scheme is unlawful. Aid that exceeded the scope of Regulation (EC) No 69/2001 or, where it was not caught by the Regulation, exceeded the scope of the other applicable *de minimis* provisions in force at the time the scheme was implemented was granted unlawfully.

(94) The aid scheme is incompatible with the common market, in that it allows rescue aid to be granted at subsidised interest rates outside its *de minimis* scope, allows restructuring aid to be granted without restricting it to the minimum necessary and without ruling out its repetition, does not require notification of restructuring aid to large firms in difficulty or of individual cases in the sensitive sectors, and does not rule out aid to viable firms in the sensitive sectors.

(95) Accordingly, application of the rules beyond the scope of Regulation (EC) No 69/2001 or of the other relevant *de minimis* provisions to firms in difficulty and in respect of operating aid to viable firms in the sensitive sectors was incompatible with the common market.

(96) The rules are compatible with the common market in so far as they allow operating aid to viable firms outside the sensitive sectors.

(97) It is the Commission's long-established practice to require recovery from the aid recipient of aid which, under Article 87 of the EC Treaty, has been unlawfully granted and is incompatible, provided that the aid is not covered by *de minimis* provisions. This practice was confirmed by Article 14 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ([24]). Article 14 of the Regulation requires Member States to take all necessary measures to recover the aid from the beneficiary. To clarify the number of cases where recovery is required, the Commission considers that Germany should draw up a list of all firms not covered by the scope of Regulation (EC) No 69/2001,

([24]) OJ L 83, 27.3.1999, p. 1.

HAS ADOPTED THIS DECISION:

Article 1

The rules governing the Thuringia consolidation programme (hereinafter referred to as the rules) establish state aid within the meaning of Article 87(1) of the EC Treaty.

The rules do not establish state aid if the payments fall within the scope of Regulation (EC) No 69/2001 or, where this is not the case, within the scope of the *de minimis* provisions in force at the time the rules were implemented and, in combination with other *de minimis* aid, do not exceed the relevant *de minimis* ceilings of Regulation (EC) No 69/2001 or the other relevant *de minimis* provisions.

The rules do not establish aid within the meaning of Article 87(1) of the EC Treaty if the payments were for firms not involved in producing goods or providing services for intra-Community trade.

To the extent that the rules are caught by Article 87(1), they involve unlawful aid.

Article 2

In so far as the rules establish operating aid for viable firms outside the sensitive sectors, they are compatible with the common market.

Article 3

In so far as the rules establish operating aid for firms in the sensitive sectors, they are incompatible with the common market where they fall within the scope of Article 87(1) of the EC Treaty.

Article 4

In so far as the rules establish rescue and restructuring aid for firms in difficulty, they are incompatible with the common market where they fall within the scope of Article 87(1) of the EC Treaty.

Article 5

This Decision does not apply to those cases covered by the rules that have been the subject of other Commission proceedings or of a final Commission decision. Germany shall draw up a list of the cases concerned.

Article 6

Germany shall take all necessary measures to recover from the beneficiaries the aid referred to in Articles 3 and 4 and unlawfully made available to them.

Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of the Decision. The aid to be recovered shall include interest from the date on which it was at the disposal of the beneficiaries until the date of its recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant equivalent of regional aid.

Article 7

Germany shall, in implementing this Decision, draw up a list of the firms concerned which fall outside the sectoral scope of Regulation (EC) No 69/2001 or which, if the aid element contained in the guarantee and other *de minimis* aid granted during the relevant period are included, received aid exceeding the ceiling laid down in that Regulation.

In implementing this Decision, Germany shall draw up a list of all firms in difficulty which were assisted under the rules and are not caught by Regulation (EC) No 69/2001 and shall indicate the criteria on which the classification is based.

In this connection, Germany shall also devise a method to identify the aid element in the guarantee.

In implementing this Decision, it shall draw up a list of firms which were assisted under the rules and are not caught by Regulation (EC) No 69/2001 but which were not involved in producing goods or providing services for intra-Community trade and shall indicate the criteria applied.

Article 8

Germany shall inform the Commission, within two months of notification of this Decision, of the measures taken to comply with it.

Article 9

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 27 November 2002.

For the Commission

Mario MONTI

Member of the Commission