COMMISSION DECISION

of 17 September 2003

on the State aid implemented by Germany for Space Park Development GmbH & Co., KG

(notified under document number C(2003) 3241)

(Only the German text is authentic)

(Text with EEA relevance)

(2004/167/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 the provision cited above [1],

Whereas:

I. PROCEDURE

(1) Between 14 June 1999 and 19 September 2001, the Commission received several letters from several complainants concerning the construction of a leisure park in Bremen which was allegedly receiving considerable State aid, in particular from the Bremen regional administration, contrary to the provisions of the EC Treaty. By letter of 26 October 2001, the Commission sent the German authorities a request for information, seeking clarification on the complainants' allegations, to which the German authorities replied by letters of 31 January and 1 February 2002, in a meeting on 6 June 2002 and by letter of 20 June 2002. The case was registered under NN 78/2002.

(2) By letter dated 2 August 2002, 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 part of the measures. As of then the case was registered as C 53/2002.

(3) In its decision to initiate the formal investigation procedure (the opening), the Commission could not exclude that the capital injection of Bremen to Köllmann AG and the partly interest-free loan granted by SWG Grundstücks GmbH & Co. KG to Space Park Development GmbH & Co. KG involve elements of incompatible State aid within the meaning of Article 87(1) of the EC Treaty. As regards the complainants' remaining allegations, the Commission concluded that there was no State aid or no reason to investigate further at that stage.

(4) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* [2]. The Commission invited interested parties to submit comments in that respect.

(5) The Commission has received no comments from interested parties.

(6) Comments presented by Germany were received on 12 September 2002, 27 January 2003 and 16 April 2003. On 8 May 2003, the Commission decided to enjoin Germany pursuant to Article 10(3) 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 [3] to supply all such documentation, information and data as are necessary to assess the compatibility of the measure in question. Additional information presented by Germany by letter of 16 June 2003 was received on 17 June 2003.

II. DESCRIPTION OF THE PROJECT AND THE MEASURES AT STAKE

(a) *The Space Park Bremen Project*

(7) Space Park Bremen is an investment project of about EUR 500 million on an area of 26 ha, including several activities in the leisure and entertainment sector, in

[1] OJ C 246, 12.10.2002, p. 14.

[2] See footnote 1.

[3] OJ L 83, 27.3.1999, p. 1.

particular a leisure-park-type 'Space Centre', restaurants, a multiplex-cinema and a discotheque, a hotel and a shopping centre (retail). The park is under construction since end 2000. The opening of the park was envisaged for spring 2003, but the date was postponed because of unexpected delays. The park area is situated on a derelict shipyard in the Gröpelingen district of Bremen, where also two other industrial areas are being developed.

(8) The Space Park project was initiated by Köllmann AG, a company active in international real estate development. Bremen, DEGI Deutsche Gesellschaft für Immobilienfonds mbH, a subsidiary of the Dresdner Bank Group, and KanAM Euro Malls GmbH are the investors of the project. DEGI and KanAM are both active in international real estate development and invest in shopping and urban entertainment centres.

(b) *The measures at stake*

(9) Bremen intended to purchase 2,96 million shares of Köllmann AG at a price of EUR 2,55 plus a premium of EUR 1,75/share. This represented a proportion of 7,98 % of the increased capital of Köllmann AG. The total price would have been EUR 12,782 million. In exchange, Bremen would have sent one of the six members of the board and participated at the distribution of 50 % of the profit of Köllmann AG. Germany claimed that KanAm would participate at the same conditions as Bremen in this operation. In exchange, Köllmann AG would have invested in the Space Park project.

(10) The complainants claimed that Bremen had granted an interest-free loan to finance the Space Park project. According to the information provided by the German authorities before the opening, SWG Grundstücks GmbH & Co. KG (hereafter referred to as SWG) granted by contract of 18 January 1999 to a precursor company of Space Park KG a loan of DEM 26 million (EUR 13 million), which was disbursed on 23 February 1999. On 15 April 1999, an unrelated company, Space Park Development GmbH & Co. KG replaced the former debtor. This loan was at least a partly interest-free loan.

III. **COMMENTS PRESENTED BY GERMANY**

(11) During the formal investigation procedure Germany supplied additional information on the measure as regards the participation of Bremen in Köllmann AG and the grant of the partly interest-free loan by SWG to Space Park Development GmbH & Co., KG.

(a) *The intended participation of Bremen in Köllmann AG*

(12) With respect to the intended participation of Bremen in Köllmann AG, the German authorities informed the Commission that the former investor Köllmann would be replaced and that therefore no participation of Bremen in Köllmann AG will take place. They further informed the Commission that, for the time being, no measure had been adopted by Germany — that is, regardless of whether or not the envisaged measure would or would not involve State aid, no grant has yet taken place.

(b) *The partly interest-free loan*

(13) Following the information submitted by the German authorities, Space Park Development GmbH & Co., KG, a private project company that was owned and established by Köllmann AG for the purpose of the Space Park project, replaced, as from 15 April 1999, Space Park KG as borrower of the loan of DEM 26 million (EUR 13 million) granted by SWG. The former borrower Space Park KG was dispensed from all rights and obligations of the loan agreement. The loan was split into two tranches (hereafter: loan I and loan II) and had, besides a handling fee of DEM 25 000 and after some modifications on 5 July 1999 and 20 September 1999, the following conditions:

(1) conditions for loan I	
Amount:	million DEM 1,47
Interests:	3,8 % p.a. from 15.4.1999 to 30.6.1999 4,73 % p.a. from 1.7.1999 to 31.12.1999
Duration:	Until 31.12.1999
Securities:	(1) Group guarantee from Köllmann AG (2) Directly enforceable guarantee from Space Park KG (3) Land charge given by Köllmann AG

(2) conditions for loan II	
Amount:	million DEM 24,53
Interests:	no interests from 15.4.1999 to 31.12.1999 4,73 % p.a. from 1.1.2000 to 31.3.2000
Duration:	Until 31.3.2000
Securities:	See above

(14) However, according to the information available, there is no indication for neither the payment of interests nor

the repayment of the loans on due date. On the contrary, according to the information available the Commission has to conclude that no interests had been paid and that the loans have still not yet been reimbursed. The Commission therefore considers that the loans have been prolonged for an open-ended period of time as from 1 January 2000 and as from 1 April 2000 and not yet been repaid.

(15) In their letter of 16 April 2003, the German authorities argued that the loan did not involve State aid in the meaning of Article 87(1) EC as its granting was not imputable to the State since it had been granted by SWG and not directly by the State. SWG was claimed to be an independently acting public undertaking without being under constant State control. In this context the German authorities referred to the so-called Stardust ruling ([4]) and stated that following the case-law of the ECJ, Article 87(1) EC presupposes that when the granted sums 'constantly remain under public control, and [are] therefore available to the competent national authorities, [it] is sufficient for them to be categorised as State resources' ([5]). The German authorities continue to refer to the Stardust ruling, in particular to points 55 and 57, and argued that even if SWG would be under constant public control, the mere fact that a public undertaking is under State control is not sufficient for measures taken by that undertaking to be imputed to the State and that a specific analysis has to be made by the Commission in each particular case.

(16) Despite this argument, Germany offered in previous letters to demand retroactively the borrower to pay the applicable reference rate as interest. This was finally accepted by the borrower, Space Park Development GmbH & Co., KG, by letter dated 13 June 2003 and confirmed by the German authorities by letter of 16 June 2003. The German authorities claimed therefore that since the loan was backed by guarantees and further securities, the loan would not have to be regarded as State aid in the meaning of Article 87(1) of the EC Treaty.

(17) Finally, the German authorities argued that in any case, although the loan was granted to Space Park Development GmbH & Co., KG, it should be taken into account that the enterprise belonged to the Köllmann-Group and therefore its situation should be seen in the context of the financial situation of Köllmann AG, which was one of the leading German project development companies at the time the loan was granted. The current financial difficulties of Köllmann AG could not be relevant to the issue since they were not predictable neither at the time the loan was granted nor at the time it was prolonged.

([4]) Case C-482/99, France v. Commission (Stardust Marine), [2002] ECR I-04397.

([5]) Case C-482/99 (Stardust Marine), referred to above, point 37.

IV. ASSESSMENT OF THE MEASURES

1. Measures under scrutiny

(a) *The intended participation of Bremen in Köllmann AG*

(18) As regards the participation of Bremen in Köllmann AG the Commission notes that no participation has to-date taken place. Therefore, the participation of Bremen in Köllmann AG has not to be assessed in this decision. The measure is without object. Any future participation in that or any other company will need to be examined on its own merits.

(b) *The loan granted to Space Park KG*

(19) On 18 January 1999, SWG granted a loan of DEM 26 million (EUR 13 million) to Space Park KG at an interest rate of 3,8 %. The duration of the loan was limited to 15 April 1999. Any potential aid arising from the loan to Space Park KG would not exceed the *de minimis* — threshold of EUR 100 000 over a period of three years. This is why the opening did not have to involve a potential aid given to Space Park KG.

(c) *The loan granted to Space Park Development GmbH & Co. KG*

(20) On 15 April 1999, Space Park Development GmbH & Co. KG replaced the former debtor Space Park KG and thus became borrower of the loan of DEM 26 million (EUR 13 million) granted by SWG. As a result of the above, only this measure has to be assessed into detail.

2. Presence of State aid in the meaning of Article 87(1) of the EC Treaty

(21) In order to appraise the measure under the State aid rules of the EC Treaty it has to be assessed whether it constitutes State aid within the meaning of Article 87(1) of the EC Treaty.

(22) By virtue of Article 87(1) of the EC Treaty, any aid granted by a Member State or through State resources in any form whatsoever, which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, shall, in so far as it affects trade between Member States, be incompatible with the common market. The concept of State aid applies to any advantage granted directly or indirectly, financed out of State resources, granted by the State itself or by an intermediary body acting by virtue of

powers conferred on it. A measure is thus deemed to be State aid if it meets four criteria: (a) it confers an advantage; (b) this advantage is conferred by means of State funding; (c) the measure distorts or threatens to distort competition, thereby affecting trade between Member States; and (d) the measure concerned is selective, favouring particular companies.

(23) The Commission must therefore analyse the loan, in respect of which it initiated the procedure provided for in Article 88(2) of the EC Treaty, in the light of the four criteria referred to in the foregoing recital.

(24) The measure confers an advantage to the borrower as the interest of the loan is clearly lower than the reference rate used by the Commission ([6]).

(25) The Commission considers that any State aid granted for the development of a leisure park would be liable to distort or threaten to distort competition and thereby affect trade between Member States since:

(a) large amusement parks, such as the one in question, constitute destination parks which, at least potentially, affect tourist flows;

(b) such parks increase tourism facilities in the regions where they are set up;

(c) the Commission has adopted several decisions on State aid for amusement parks (Eurodisney ([7]), Parco Navi ([8]), Terra Mítica Park (Benidorm, Alicante) ([9])), etc.,) as well as investments in tourism (hotels ([10]), marinas ([11]), etc.).

Irrespective of the other activities of Space Park Bremen (cinema, shopping centre, etc.,) the measure is therefore liable to distort or threaten to distort competition and thereby affect trade between Member States. In addition, the measure also indirectly benefit to Köllmann AG which is an international real estate development company. For this reason, it therefore also affects trade between Member States.

([6]) See Commission notice on the method for setting the reference and discount rates (OJ C 273, 9.9.1997, p. 3) and the reference rates applicable for Germany as from 1 August 1997 (see http://europa.eu.int/comm/competition/state_aid/others/reference_rates.html).
([7]) State aid N 640/99 France (OJ C 284, 7.10.2000, p. 4).
([8]) State aid N 132/99 Italy (OJ C 162, 10.6.2000, p. 23).
([9]) State aid C 42/2001 (ex NN 14/01) Spain (OJ C 300, 26.10.2001, p. 2).
([10]) State aid N 785/99 Italy (OJ C 328, 18.11.2000, p. 32).
([11]) State aid N 582/99 Italy (OJ C 40, 12.2.2000, p. 2).

(26) The measure concerns the company Space Park Development GmbH & Co. KG, at the time the loan was granted a wholly-owned subsidiary of Köllmann AG. The measure is therefore selective.

(27) The question is whether this advantage is conferred by means of State resources and if so imputable to the State.

(a) *Presence of State resources and imputability to the State*

(28) The German authorities have argued against the presence of State resources and the imputability of the granting of the loan to the State since the loan was granted by SWG, a public undertaking, and not directly by the Bremen authorities. The Commission doubts whether the rules developed by the Court in the so-called Stardust ruling ([12]) can be applied in this case rather than the rules developed in the so-called Air France ruling ([13]), which seems to be much closer to the situation at stake. But even if the principles developed in the Stardust ruling would apply, the Commission assumes the presence of State resources and the imputability of the measure at stake to the State. Following the Stardust ruling, the imputability of a measure to the State although taken by a public undertaking may be inferred from a set of indicators arising from the circumstances of the case and the context in which that measure was taken ([14]). In this context, Advocate General Jacobs stated that because of the difficulties of proof and the obvious danger of circumvention, a restrictive view should not be taken of the type of evidence to be adduced. Circumstantial evidence (perhaps even press reports) might be relied upon ([15]). Since the German authorities did not supply all such documentation, information and data as necessary to assess this question although requested in the information injunction, the Commission has to assess this issue based on the information in its possession.

(29) As regards the ownership of SWG, the information submitted by the German authorities seems to be contradictory. By letter of 20 June 2002, during the Commission's preliminary assessment of the case, the German authorities stated with respect to potential aid elements in the context of the sale of land by the Land of Bremen that SWG is a company owned by the City of Bremen. This statement was taken for granted in the opening, where the Commission concluded that the sale

([12]) Case C-482/99 (Stardust Marine), referred to above.
([13]) See case T-358/94 (Compagnie nationale Air France v. Commission), [1996] ECR II-2109, in particular points 55 to 61.
([14]) Case C-482/99 (Stardust Marine), referred to above, point 55.
([15]) See Opinion of Advocate General Jacobs in case C-482/1999 (Stardust Marine), referred to above, point 67.

of land by SWG did not involve State aid. By letter of 16 April 2003, the German authorities stated that SWG is a real estate company pursuant to private law which is owned by Bremer Investitions-Gesellschaft mbH and not integrated into the public administration of the City of Bremen, which is alleged not to be a shareholder of SWG. However, following the information available ([16]), the Bremer Investitions-Gesellschaft mbH is the central service provider for regional and business development in the Land Bremen and concentrates, in particular in conjunction with its subsidiaries, namely the WfG Bremer Wirtschaftsförderung GmbH, Bremer Aufbau-Bank GmbH and the BIA Bremer Innovations-Agentur GmbH, the responsibility for all kind of economic incentive activities in Bremen, i.e. in particular the administration of aid schemes. The responsibility for the administration of these aid schemes was transferred in a contract governed by public law (öffentlich-rechtlicher Vertrag) by the Land Bremen to Bremer Investitions-Gesellschaft mbH on the basis of the so-called Beleihungsgesetz (Gesetz zur Übertragung von Aufgaben staatlicher Förderung auf juristische Personen des privaten Rechts vom 26. Mai 1998) ([17]). Following its business reports 2000 and 2001 ([18]), the company capital (Eigenkapital) of Bremer Investitions-Gesellschaft mbH, which amounts to EUR 92 million, is held by the Land Bremen (EUR 86,2 million), by the City of Bremen (EUR 4,464 million) and by the City of Bremerhaven (EUR 0,736 million). The Bremen Senator for Economic Affairs is the chairman of the supervisory board. In view of the above, the Commission concludes that SWG, the subsidiary of Bremer-Investitions-Gesellschaft mbH, is indirectly owned by Bremen and therefore considers that SWG is a public undertaking. Funds belonging to SWG are therefore State resources.

(30) Although requested explicitly in the information injunction, the German authorities did not submit any decision, contract, agreement, law or other document demonstrating that Bremer Investitions-Gesellschaft mbH and/or SWG did not act — openly or covertly, regularly or on an ad hoc basis in the present case — as a relay or vehicle which the Bremen authorities used to intervene in support of Space Park Development GmbH & Co. KG. However, following the Commission's own investigations, an answer given by the Bremen authorities on 10 September 2002 to a parliamentary question asked in the regional parliament Bremische Bürgerschaft (Landtag) assumes the presence of State resources and the involvement of the Bremen authorities in the granting of the loan. The Bremen authorities answered the parliamentary question as follows ([19]):

'(…) SWG had refinanced DEM 24,53 million of the loan with the purchase money paid for the so-called AG-Weser-area, which economically was entitled to the Free Hansa City of Bremen (FHB), and DEM 1,47 million of the loan with funds of the Bremer-Investitions-Gesellschaft mbH (BIG). When appraising the circumstances, in particular the securities, representatives from the Bremen Senator for Economic Affairs, the Bremen Senator for Finance, the Bremen Chancellery and BIG decided on 13 January 1999 to find the granting of the loan compatible with the board decision of November 1998 in terms of an efficient project realisation. A consultation of the board of BIG for its own part of the loan was not necessary, pursuant to the company agreement.

SWG initially granted the loan to Space-Park KG. On behalf of Köllmann AG's request, the loan was transferred by contracts of 15 June 1999 and 5 July 1999 to Space-Park Development GmbH (now: Space Park Development GmbH & Co. KG). Space Park KG is still jointly and severally liable vis-à-vis SWG. In this context the SWG-loan was split into two parts amounting to DEM 1,47 million and DEM 24,53 million and the following interests were agreed: As regards the part amounting to DEM 1,47 million, interests of 3,8 % p.a. until 30 June 1999 and 4,73 % p.a. afterwards were calculated. The part amounting to DEM 24,53 million was granted interest-free until 31 December 1999. As from 1 January 2000 the interests amounted to 4,73 % p.a. (…).'

The Commission therefore notes that at least DEM 24,53 million of the funds that refinanced the loan were economically entitled to the Free Hansa City of Bremen and therefore have to be regarded as State resources. In addition to that it is noted that the granting of the whole loan was depending on the approval of the Bremen authorities. Thus the loan has to be regarded as imputable to the State. Even if a part of the loan was financed through SWG using its own or BIG's funds, such fact is irrelevant in that regard. Following the case-law for those funds to be categorized as State resources, it is sufficient that, as in the present case, they constantly remain under public control and are therefore available to the competent national authorities ([20]).

(31) In this context the Commission also notes that the German authorities offered even before and also during the opening to modify the conditions of the loan retroactively. An appropriate letter by SWG addressed to the recipient was presented by letter of 27 January 2003. The agreement by the recipient, dated 13 June 2003, was presented by letter of 16 June 2003. The implementation of the commitment of the Bremen

([16]) See http://www.big-bremen.de/.

([17]) Brem.GBl. 1998, p. 134 (corrigendum Brem.GB. 1998, p. 171). The constitutionality of the law in its wording of 17 October 2000 (Brem.GBl. 2000, p. 399) was confirmed by the Bremen Constitutional Court in 2002 (see ruling of 15 January 2002 in case ST 1/01).

([18]) The business reports are published under http://www.big-bremen.de/.

([19]) See Drucksache 15/1238 of the regional parliament Bremische Bürgerschaft (Landtag), available under http://www.bremische-buergerschaft.de/.

([20]) See case C-328/99 and C-399/00, Italy and SIM 2 Multimedia SpA vs. Commission, not yet published, point 33; see also case C-482/99 (Stardust), referred to above, point 37.

authorities by SWG can only be explained by the influence of the Bremen authorities on SWG in the context of the loan agreement at stake. The fact that the Bremen authorities succeeded to agree to modify the loan agreement retroactively therefore seems to be contradictory to the argumentation put forward by the German authorities as regards the non-imputability of the measure to the State.

(32) Accordingly, the Commission concludes the involvement of State resources and the imputability of the granting of the loan to the Bremen authorities.

(b) *Conditions of the loan and its aid element*

(33) In order to further decide whether the grant of a loan by a public authority contains elements of State aid, it has to be examined in particular whether the company could get the loan on the market at the same conditions ([21]). The aid element corresponds to the residual balance between the interest rate corresponding to real market conditions and the actually paid rate ([22]). For the determination of the market consideration within the framework of the granting of a loan and for the calculation of the aid equivalent, the Commission notice on the method for setting the reference and discount rates ([23]) is applicable. In this communication the Commission states the abstract parameters, which it uses for the calculation of the aid element of an aid that is disbursed in several instalments and to calculate the aid element resulting from interest subsidy schemes for loans.

(34) For the evaluation of the aid equivalent, the Commission uses a reference rate, which is supposed to reflect the average level of interest rates charged, in the various Member States, on medium and long-term loans (five or ten years) backed by normal securities. The reference rate thus determinated is a floor rate, which may be increased in situations involving a particular risk (e.g. undertaking in difficulty, or where the security normally required by banks is provided). In such cases, the premium may amount to 400 basis points or more if no private bank would have agreed to grant the relevant loan.

(35) In any case, the situation would have to be viewed from the point of view of the lender at the moment the loan is approved. If he chooses to lend on conditions which could not be considered as normal in banking terms, then there is an element of aid involved which has to be quantified. Therefore, according to the case-law, it is necessary to place oneself in the context of the period during which the financial support measures were taken in order to assess the economic rationality of the State's conduct, and thus refrain from any assessment based on a later situation ([24]). This is why the Commission has to assess the conditions of the loan from the standpoint of 1999, when the loan was granted to Space Park Development GmbH & Co., KG, and of 2000, when the loan was prolonged for an open-ended period of time.

(aa) The application of the reference rates

(36) In this context the Commission notes that the German authorities committed themselves to demand the applicable reference rates retroactively. It is also noted that the Commission's reference rate for Germany amounted to 4,73 % as from 1 January 1999, to 4,76 % as from 1 August 1999, to 5,61 % as from 1 November 1999, to 5,70 % as from 1 January 2000, to 6,33 % as from 1 January 2001, to 5,23 % as from 1 December 2001, to 5,06 % as from 1 January 2002 and to 4,80 % as from 1 January 2003.

(bb) No indication to assume a particular risk when the loan was granted

(37) In addition to that, the Commission notes that according to the information available, the reference rate has not been increased in the present case since no situation involving a particular risk could be assumed at the times the loan (i.e. loan I and loan II) was granted, i.e. based on the data available to the Bremen authorities and SWG in 1999 and 2000:

(38) The German authorities submitted information according to which the beneficiariy did not have to be regarded as an enterprise in difficulties at the time the loan was granted and prolonged. Space Park Development GmbH & Co., KG itself was founded in 1997 by Köllmann AG in order to develop the Space Park project. Following the information available, Space Park Development GmbH & Co., KG was clearly not an undertaking in difficulties at the time the loan was granted.

(39) However, it has to be taken into account that Space Park Development GmbH & Co., KG belonged to the Köllmann-Group, which has given an express written guarantee in relation to the loan, and therefore its situation has to be seen in the context of the financial

([21]) Case 40/85, Belgium/Commission (Boch), [1986] ECR 2321 (2345) point 13.
([22]) See Case T-16/96, Cityflyer Express, [1988] ECR I-757 (777) point 52.
([23]) OJ C 273, 9.9.1997, p. 9.
([24]) See for instance case C-482/99 (Stardust), referred to above, point 71.

situation of Köllmann AG. Köllmann AG seems to be in financial difficulties since 2002. Nevertheless, at the time the loan was granted, Köllmann AG was one of the leading German project development companies and had realised numerous large projects in- and outside Germany in 1997. At the time the loan was granted, Köllmann AG had a very high equity capital of DEM 150 million (EUR 75 million), which was far above the amount of the loan. At the end of 1997, the profit and loss account showed sales of almost DEM 308 million (EUR 154 million) and a balance sheet profit of about DEM 45 million (EUR 22,5 million). In addition to the financial situation of Köllmann AG, the granting of the loan was also based on appropriate financial forecasts. Köllmann AG made a financial plan according to which all obligations in the context of the Space Park Bremen project would be met by the cash flow originated from the operation of Space Park Development GmbH & Co. KG. It resulted in expected expenditures of about DEM 862 million (EUR 431 million) and expected financial revenues of about DEM 960 million (EUR 480 million) for the years 1999 to 2002. Thus a cash flow of DEM 100 million (EUR 50 million) was expected, far above the amount of the loan. In addition, a profit of DEM 200 million (EUR 100 million) was also expected.

(40) These forecasts were carefully verified by SWG. In this context SWG relied on an expertise from FIDES Treuhandgesellschaft, which is an independent auditing company. FIDES had confirmed the plausibility of the financial forecasts.

(41) The Commission therefore concludes that before granting the loan, SWG had verified the financial situation of both Space Park Development GmbH & Co. KG and its parent enterprise Köllmann AG and the financial plan of the Space Park Bremen project by itself as well as through the expertise of FIDES. Accordingly, following the information available, in 1999 and even in 2000, there was no indication for a borrower in the position of SWG to doubt the solvency of Space Park Development GmbH & Co., KG or its parent company Köllmann AG. The granting and the prolongation of the loan in the years 1999 and 2000 do not show an unjustified risk.

(42) In addition, following the information available, the loan was backed by securities normally required by private banks. The loan was backed by the following securities: a group guarantee (Konzernbürgschaft) given by Köllmann AG, amounting to DEM 26 million (EUR 13 million), a land charge given by Köllmann AG with a value of DEM 11 million (EUR 5,5 million) and a directly enforceable guarantee given by Space Park KG, amounting to DEM 26 million (EUR 13 million). The Commission notes that Space Park KG was owned by the following share holders in 1999 and 2000: DEGI owned 90 %, KanAm EuroMalls GmbH owned 5 % and Köllmann AG owned 5 % of the shares of Space Park KG. As already mentioned, DEGI is a subsidiary of the Dresdner Bank AG. The company Space Park KG had and still has original capital of DEM 290 million (about EUR 145 million) and was and still is the owner of the Space Park — properties.

(43) It is therefore concluded that the loan given by SWG to Space Park Development GmbH & Co. KG was backed by securities which, following the information available, were valuable and which more than doubled the amount of the loan.

(44) Eventually, it has to be mentioned that a loan amounting to DEM 26 million (EUR 13 million) in the context of an investment project of about EUR 500 million appears to be rather limited and does not seem to involve a particular risk.

(45) Finally, as regards the prospects of the leisure park market from the standpoint of 1999 and 2000, the Commission reminds on several similar leisure park projects launched or realised during this period, like for instance Parco Navi ([25]), Pompei Tech World ([26]) or Terra Mítica ([27]). The Commission acknowledged for instance in the Pompei Tech World case that there is a large scope for an expansion of this particular market segment. Accordingly, the Commission cannot find a particular risk only because of the nature of the project.

(46) The Commission concludes that, based on the information available, no particular risk can be assumed at the time the loan was granted in 1999 and even at the time of its prolongation in 2000. The reference rate as a floor rate has not to be increased.

(cc) Risk assumed by SWG as regards the prolongation of the loan

(47) According to the information at the disposal of the Commission, the loan was prolonged under the same conditions for an open-ended period of time. In principle, a private bank in a market economy does not prolong a loan for an open-ended period of time (without any schedule of reimbursement). In this sense also, such a prolongation bears an element of State aid within the meaning of Article 87(1) EC.

([25]) State aid N 132/99 — Italy (OJ C 162, 10.6.2000, p. 33).
([26]) State aid N 229/01 — Italy (OJ C 330, 24.11.2000, p. 2).
([27]) State aid C 42/2001 (ex NN 14/01) — Spain (OJ L 91, 8.4.2003, p. 23).

(48) Up to March 2002, i.e. up to the time the Bremen authorities and therefore SWG, according to the information available ([28]), were definitely informed that the financial situation of Köllmann had worsened the Commission has no reason to believe that such a prolongation involved additional risks for SWG. It is common that huge projects such as the Space Park project are delayed and that prolongation of the financing is necessary. The financial forecasts had no reason to be changed and the loan was still backed by the same securities. Therefore, for this period also the reference rate as a floor rate has not to be increased.

(49) On the opposite, as from April 2002, the Bremen authorities and therefore SWG were definitely informed that the financial situation of Köllmann had worsened. From this time, it is very disputable that a private bank would have prolonged such a loan at the same conditions. This is all the more so since from that time, the presence of Köllmann as a lead investor in the Space Park project started to be questioned. According to the sixth subparagraph first indent of the above-mentioned Commission notice, the premium (in addition to the floor reference rate) in case of an undertaking in difficulties may amount to 400 basis points or more if no private bank would have agreed to prolong the loan. Despite the information injunction, the German authorities did not provide the Commission with clear reasons for this prolongation. In the present circumstances therefore, given that the loan is still secured, the Commission assumes that an increase of the floor reference rate by 400 basis points is appropriate in order to reflect the risk increase of SWG.

(50) The Commission also takes note of the commitment of Germany that the loan will be paid back at short notice. Should it not be the case, even considering the increase of the floor reference rate as mentioned above, the loan would entirely amount as operating aid to Space Park Development GmbH & Co. KG and its parent company Köllmann AG.

([28]) The Commission did not receive any precise information from the German authorities as of when SWG definitely knew that the financial situation of Köllmann AG had worsened. However, the Bremen Senator for Economic Affairs explained in a debate on request in the local parliament Bremische Bürgerschaft (Stadtbürgerschaft) that Köllmann had informed the Bremen authorities in March 2002 that it was in financial difficulties (see record of the 38th session of the 15th Bremische Bürgerschaft (Stadtbürgerschaft) on 17 September 2002, Plenarprotokollnr.: PlPr 15/38, S. 1761, available under http://bremische-buergerschaft.de/). Since no exact date was mentioned, the Commission therefore considers that both the Bremen authorities and SWG, acting on behalf of the Bremen authorities as described above, were informed in March 2002 and had to take this information into account as from April 2002.

(dd) The use of compound interest

(51) However, in order to remove all potential distortion of competition deriving from the potential aid, the Commission wishes to remind the German authorities on the Commission communication on the interest rates to be applied when aid granted unlawfully is being recovered ([29]). By modifying the loan agreement retroactively, the beneficiary forfeited the unfair advantage which it enjoyed over its competitors on the market and the conditions of competition which existed prior to the payment of the loan were restored. The retroactive adjustment of the loan agreement is therefore comparable with the recovery of illegal aid and the principles as stipulated in the above-mentioned Communication have to be applied for the medium term non-interest bearing loan granted to Space Park Development GmbH & Co., KG ([30]). In addition, it has to be mentioned that abuse could not be excluded in similar cases if the Commission would accept the application of the reference rate retroactively in the present case without the use of compound interest. Otherwise Member States could try to circumvent an expected negative decision that would order the use of the reference rate on the basis of compound interest by modifying the measure retroactively by using the applicable reference rate, but on the basis of simple interest. Accordingly, the use of compound interest appears necessary to ensure that the financial advantages of the loan are fully neutralised. These compound interests have to be calculated on the interests to be paid, themselves calculated using the reference rate (as adjusted) as follows from the above.

3. **Legality of the measure**

(52) The Commission regrets that Germany granted and prolonged the loan without prior notification under Article 88(3) of the EC Treaty or did not design the loan as non-aid from the beginning.

4. **Compatibility of the measure with the EC Treaty**

(53) The Commission would not have to adopt a partly negative decision if the measure were compatible with

([29]) OJ C 110, 8.5.2003, p. 21 (Corrigendum OJ C 150, 27.6.2003, p. 3).

([30]) See in particular subparagraph 6 of the Commission communication on the interest rates to be applied when aid granted unlawfully is being recovered (OJ C 110, 8.5.2003, p. 21 and OJ C 150, 27.6.2003, p. 3), where the following is stated: '(…) it appears that the effects of an unlawful aid are to provide funding to the beneficiary on similar conditions to a medium term non-interest bearing loan. Accordingly, the use of compound interest appears necessary to ensure that the financial advantages resulting from this situation are fully neutralised. (…).'.

the EC Treaty. On this basis, an assessment must be made as to whether that measure can be considered compatible with the common market. It should be pointed out that the German authorities did not invoke any exemption clause of the Treaty with regard to possible State aid elements in connection wit the loan at stake.

(54) None of the exemption clauses of Article 87(2) of the EC Treaty are applicable. The aid is not of a social character, is not granted to individual consumers, does not make good the damage caused by natural disasters or exceptional occurrences, and does not compensate for economic disadvantages caused by the division of Germany.

(55) Given that the aid has no regional objective — it is designed neither to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment nor to facilitate the development of certain economic areas — neither Article 87(3)(a) nor (c) of the EC Treaty for regional aid is applicable. On the basis of the information provided by the German authorities, the granting of the aid was not linked to any conditions. A regional derogation is therefore not possible.

(56) There is no justification applicable for the aid at stake as regards a serious disturbance in the German economy nor the promotion of the execution of an important project of common European interest in the meaning of Article 87(3)(b) of the EC Treaty.

(57) Under Article 87(3)(c) of the EC Treaty, aid may be found compatible with the common market if it facilitates the development of certain economic activities. This might in principle also apply to the loan at stake. However, in the case at hand, no condition for the application of this exemption clause is met since the granting of the aid was not linked to any condition.

(58) The aid is not aimed either at promoting culture or heritage conservation in the meaning of Article 87(3)(d) of the EC Treaty.

(59) Accordingly, no exemption from the principle of the ban on State aid pursuant to Article 87(1) of the EC Treaty applies.

V. **CONCLUSION**

(60) In view of the above, as regards the period of time after execution of this decision, the incompatible State aid in the loan must be abolished by terminating the loan or modifying it in an appropriate way. One means for Germany to eliminate the aid by modifying the loan would be to increase the interest rate by 400 basis points, and modify the loan so that it will be paid back at short notice.

(61) As regards the period of time up to execution of this decision, the Commission finds that the loan involves State aid, to be calculated on the basis of the difference between the interest rate actually charged and the relevant reference rate, where appropriate increased by 400 basis points. This illegal and incompatible State aid must be recovered by Germany from the beneficiary. The amount to be recovered must be subject to interest at the reference rate in force when the loan was granted, annually compounded.

(62) For the purpose of calculating the amount of aid involved in the loan, the relevant interest rate ([31]) will apply from the date of grant to the date of prolongation. Then the relevant interest rates will apply from the day the loans were prolonged, i.e. 1 January 2000 for loan I and 1 April 2000 for loan II, up to 31 March 2002 ([32]). Finally, the relevant interest rates, increased by 400 basis points, will apply as from 1 April 2002 up to the date the illegal and incompatible aid is reimbursed ([33]).

(63) These determinations are also essentially consistent with the conclusions accepted by Germany during the course of the administration procedure, and the undertakings given by it to that effect.

(64) As regards the participation of Bremen in Köllmann AG, the Commission concludes that the measure has become without object since the participation has not taken place.

([31]) The applicable interest rate was 4,73 % for Germany on 15 April 1999.

([32]) As the loan is open-ended the relevant reference rate has to be used for each period it is applicable:
For loan I: 5,70 % from 1 January 2000 to 31 December 2000; 6,33 % from 1 January 2001 to 30 November 2001; 5,23 % from 1 December 2001 to 31 December 2001; 5,06 % from 1 January 2002 to 31 March 2002.
For loan II: 5,70 % from 1 April 2000 to 31 December 2000; 6,33 % from 1 January 2001 to 30 November 2001; 5,23 % from 1 December 2001 to 31 December 2001; 5,06 % from 1 January 2002 to 31 March 2002.

([33]) As the loan is open-ended the increased reference rate has to be used for each period it is applicable, i.e. for loan I and II: 9,06 % from 1 April 2002 to 31 December 2002; 8,80 % as from 1 January 2003. Any potential future modification of the relevant reference rate up to the date the loan is reimbursed has to be taken into account.

HAS ADOPTED THIS DECISION:

Article 1

The loan granted on 15 April 1999 by Germany, through SWG Grundstücks GmbH & Co. KG, to the beneficiary, Space Park Development GmbH & Co. KG, involves illegal and incompatible State aid, to be calculated on the basis of the difference between the interest rate actually charged, and the relevant applicable reference rate, increased from 1 April 2002 by 400 basis points.

Article 2

Germany shall immediately take all necessary steps to abolish forthwith the illegal and incompatible State aid contained in the loan. If the loan is to continue, Germany shall forthwith alter the measure, imposing an interest rate at the reference rate plus 400 basis points, and inserting a provision pursuant to which the loan is to be paid back at short notice.

Article 3

Germany shall immediately take all necessary steps to recover from the beneficiary the illegal and incompatible State aid. The aid to be recovered shall be subject to interest at the reference rate in force when the loan was granted, annually compounded.

Article 4

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

Article 5

This Decision is addressed to Germany.

Done at Brussels, 17 September 2003.

For the Commission

Mario MONTI

Member of the Commission