# COMMISSION DECISION

## of 14 July 2004

## on the State aid implemented by Germany for MobilCom AG

*(notified under document number C(2004) 2641)*

**(Only the German text is authentic)**

**(Text with EEA relevance)**

(2005/346/EG)

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 establishing the European Economic Area, and in particular Article 62(1)(a) thereof,

Having regard to Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the Treaty establishing the European Community [1], and in particular Article 7(3) and (4) thereof,

Having called on the Member State and other interested parties to submit their comments pursuant to the provisions cited above [2], and having regard to their comments,

Whereas:

### I. PROCEDURE

(1) By letter dated 18 October 2002, Germany informed the Commission of 'rescue aid' in the form of a State guarantee for a loan of EUR 50 million granted to MobilCom AG (hereinafter referred to as MobilCom) by the State-owned Kreditanstalt für Wiederaufbau (KfW). The loan had been paid out on 19 September 2002.

(2) By letters dated 21 and 30 October 2002, the Commission asked for additional information, which Germany duly supplied by letters dated 23 October, registered as received on 23 and 24 October, and by letter dated 5 November, registered as received on the same day.

(3) By letter dated 27 November 2002, registered as received on 28 November, Germany informed the Commission of a further 80 % deficiency guarantee for a new loan of EUR 112 million. Representatives of the Commission and Germany met on 10 December 2002.

(4) By letter dated 21 January 2003, the Commission informed Germany of its decision to approve the guarantee for the loan of EUR 50 million as rescue aid pursuant to Article 87(3)(c) of the EC Treaty and to the Community guidelines on State aid for rescuing and restructuring firms in difficulty [3].

(5) By the same letter, the Commission informed Germany of its decision to initiate formal proceedings under Article 88(2) of the EC Treaty in respect of the 80 % deficiency guarantee for the EUR 112 million loan.

(6) The Commission's decision to initiate proceedings was published in the *Official Journal of the European Union* [4]. The Commission called on interested parties to submit comments.

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[1] OJ L 83, 27.3.1999, p. 1. Regulation as amended by the 2003 Act of Accession.

[2] OJ C 80, 3.4.2003, p. 5.

[3] OJ C 288, 9.10.1999, p. 2.

[4] See footnote 2.

(7) By letters dated 24 February 2003, registered as received on 25 and 26 February, Germany submitted comments on the Commission's decision to initiate proceedings.

(8) By letter dated 14 March 2003, registered as received on the same day, Germany supplied the Commission with further information, while at the same time announcing its intention of extending up to the end of 2007 the State guarantees for the EUR 50 million and EUR 112 million loans granted to MobilCom. Germany also pointed out that only EUR 88,3 million of the second loan had been paid out to the company.

(9) By letter dated 10 April 2003, the Commission asked for additional information on the planned extension of the State guarantees, which Germany supplied by letter dated 9 May, registered as received on 12 May. Germany then submitted further information by letter dated 21 May, registered as received on 21 May.

(10) By letter dated 3 June 2003, registered as received on 4 June, MobilCom submitted its comments on the Commission's decision to initiate proceedings.

(11) By letter dated 9 July 2003, the Commission informed Germany that it was extending the Article 88(2) proceedings already under way to take in the planned extension of the loan guarantees up to the end of 2007.

(12) The Commission's decision to extend proceedings was published in the *Official Journal of the European Union* ([5]). The Commission called on interested parties to submit comments.

(13) By letter dated 1 September 2003, registered as received on 2 September, Germany submitted its comments on the extension of proceedings. By letter dated 9 September 2003 the Commission asked for additional information. Germany replied by letter dated 23 September, registered as received on 25 September, in which it also informed the Commission that MobilCom had, on 22 September 2003, fully repaid the outstanding loans for which State guarantees had been granted and that the guarantee bonds were being returned to the Federal Government and the *Land* of Schleswig-Holstein by KfW (the consortium leader).

([5]) OJ C 210, 5.9.2003, p. 4.

(14) By letter dated 5 November 2003, registered as received on 6 November, Germany stated that the question of the application to the Commission for an extension of the loan guarantees up to 2007 had been dealt with since the loans had been paid back.

(15) By letter dated 25 September 2003, registered as received on 25 September, and by letter dated 2 October, registered as received on 6 October, two of MobilCom's competitors sent the Commission comments on the extension of proceedings, which were forwarded to Germany for its opinion. Germany's reply was received by letter dated 5 November, registered as received on 6 November.

(16) Talks were held on 9 and 21 January 2004 between representatives of the Commission, the Federal Government, the *Land* of Schleswig-Holstein and the company on the matter of whether additional measures were required to prevent undue distortions of competition. By letter of 13 February 2004, registered as received on 13 February, Germany informed the Commission that MobilCom AG was, in principle, prepared to discontinue direct online distribution of MobilCom mobile telephony contracts for a period of seven months. By letter of 16 February 2004, the Commission requested clarification of a number of points. It sent a further letter on 26 March, to which Germany replied by letters of 2 April, registered as received on the same day, and of 28 April, registered as received on the same day, stating that it could not make a definite commitment to close MobilCom's online shops. By letter dated 23 June 2004, registered as received on 24 June, Germany provided the Commission with additional information on current trends in MobilCom's customer numbers.

## II. DETAILED DESCRIPTION OF THE AID MEASURES

### 1. MobilCom AG

(17) MobilCom AG was founded in 1991 by Gerhard Schmid as MobilCom Communicationstechnik GmbH. It is registered in Büdelsdorf, Rendsburg-Eckernförde, Schleswig-Holstein, an area eligible for aid under Article 87(3)(c) of the EC Treaty. Besides its headquarters in Büdelsdorf, MobilCom has a number of sites in Germany (Kiel, Karlstein, Erfurt and Hallbergmoos).

(18) France Télécom is currently the largest shareholder in MobilCom (28,3 %), and the remaining shares are in the hands of small shareholders.

(19) MobilCom started its business as a reseller of 'second-generation' (2G) mobile telephony services for T-Mobile, Vodafone and E-Plus, among others. In 1996, it was floated on the stock exchange and in 1997 it was one of the first firms to be listed on the Neuer Markt segment of the Frankfurt stock exchange. In 1998 MobilCom expanded into other areas of business, entering the German landline and Internet market. Expansion during the boom years of mobile telephony allowed MobilCom to grow quickly.

(20) Between 1997 and 2000, MobilCom bought up other companies, including the network service provider Topnet, the mobile telephony service provider Cellway and the largest German Internet search engine at the time, DINO-Online. It also added to its portfolio the telecommunications firm TelePassport, the service provider D Plus and a majority holding in the Comtech computer chain. In 1999 MobilCom listed its Internet subsidiary freenet.de AG, Germany's second-largest online service, on the Neuer Markt in Frankfurt.

(21) In 2000, MobilCom, together with France Télécom, founded the joint venture MobilCom Multimedia GmbH, with the aim of bidding for a UMTS licence and breaking into the UMTS market. France Télécom exchanged its share of the joint venture for a 28,3 % stake in MobilCom AG, so that MobilCom AG came to hold all shares in MobilCom Multimedia GmbH. For the shares in MobilCom AG France Télécom paid a purchase price of EUR 7,3 billion. The external funding needed for the UMTS licence was to be provided by an international banking consortium. The basis for the strategic partnership in the UMTS field was a cooperation Framework Agreement signed by the parties in March 2000.

(22) In August 2000, MobilCom Multimedia GmbH made a successful bid of EUR 8,4 billion and obtained a UMTS licence from the Federal Government. In 2001 D Plus was merged with Cellway in order to gear up the distribution structure for the UMTS business. In the same year work began on building up the UMTS network.

(23) In the mobile telephony/service provider sector, MobilCom's aim in entering the UMTS business was to develop from a simple service provider into a network-based mobile telephony provider ([6]).

([6]) After concluding a national roaming agreement with E-Plus in April 2001, MobilCom was able to route voice and data messages through E-Plus's GSM/GPRS network and already offer special nationwide voice and data services via GPRS under its own brand before its own UMTS start-up.

(24) The landline/Internet business consisted, on the one hand, of voice telephony and, on the other, of the Internet access business operated by the Internet subsidiary freenet.de AG, in which MobilCom held a 76,1 % stake. In the landline business MobilCom served nearly 8 million customers before the crisis, of whom around 3,2 million were Internet customers.

(25) The MobilCom group's turnover for the 2001 financial year was EUR 2,59 billion, an increase of around 10 % on the previous year. Of that figure, EUR 1,919 billion was accounted for by the mobile telephony/service provider business, EUR 0,583 billion by the landline/Internet business and EUR 88 million by other areas. Turnover in the UMTS field was zero as it was still under construction.

(26) By the end of the year 5,01 million customers were making calls on a MobilCom mobile phone, an increase of 25 % on the 4 million customers the year before. This meant that in mobile telephony MobilCom was growing at a faster rate than the market (17 % in 2001). Two thirds of the customer base consisted of subscribers, compared with a market average of 44 %.

(27) On 31 July 2002 MobilCom employed 5 175 people, including staff on fixed-term contracts. This was equivalent to 4 463 full-time employees.

## 2. **The mobile telephony market**

(28) After the restructuring, MobilCom will concentrate on the mobile telephony/service provider business. Before the crisis, it also had UMTS and landline/Internet operations.

(29) According to Germany and to the market survey attached to the restructuring plan that was submitted, the market for mobile telephony services is part of the market for telecommunication services, which also includes landline connections, cable television, rented lines, carrier business and other sectors. The market for mobile telecommunications services (market for mobile telephony services) must be regarded as a separate relevant market that is distinct from the market for other telecommunications services since its products differ significantly from those on the market for such services.

(30) Among the firms active in the mobile telephony market a distinction can be drawn between network operators and pure service providers. Network operators own and operate the infrastructure needed to set up mobile services. They sell these services direct, as well as indirectly via service providers. The activities of service providers are confined to operating mobile telephony services based on their own pricing structure.

(31) According to the telecommunications and post regulator (RegTP), total turnover in telecommunications services in Germany in 2002 was around EUR 61 billion. At present, landline services and mobile services are the two segments that account for the largest turnover in the telecommunications services market as a whole, each enjoying around one third of total turnover.

(32) The combined total earnings of mobile telephony firms came to EUR 23,7 billion in 2002, according to figures from RegTP. Between 1998 and 2002, annual growth in mobile telephony services averaged 25,7 %, well above the annual average growth rate for the total German market for telecommunications services (8,3 %). However, the average annual growth in turnover in mobile telephony services was much lower than the average annual growth in the number of participants in that sector on account of the steady drop in the average monthly turnover per participant. In 2001 and 2002, growth in mobile telephony markets slowed markedly (2,8 % in 2002).

(33) All the predictions and studies on trends in the mobile telephony market in Germany available to the Commission ([7]) are based on the expectation that in the next three or four years the number of mobile telephone customers will approach a natural saturation point of 80 to 90 % of the German population. At the end of 2002 market penetration was 72,4 % of the population (68 % in 2001). It is therefore likely that, in future, the main focus will be not on achieving higher customer numbers, but on keeping existing profitable customers and pushing up average monthly turnover. Competition will concentrate increasingly on customers who are prepared to change operator. Following the boom years of 1999 and 2000, the need to exchange terminal equipment (and hence also mobile telephony contracts) will grow further in Germany in the years ahead.

(34) In 2002 the participants in the German mobile telephony market were as follows (market shares based on numbers of mobile telephone customers) ([8]):

| | |
|---|---|
| T-Mobile D1 | 27,20 % |
| Vodafone D2 | 25,60 % |
| E-Plus E1 | 9,30 % |
| O2 | 6,50 % |
| Quam ([9]) | 0,05 % |
| **Subtotal (network operators)** | **68,65 %** |
| Debitel | 13,60 % |
| MobilCom | 8,00 % |
| Talkline | 3,20 % |
| Hutchison | 1,40 % |
| Victor Vox | 1,60 % |
| Drillisch | 1,10 % |
| **Subtotal (service providers)** | **31,35 %** |
| **Total (digital mobile telephony)** | **100,00 %** |

(35) The market leaders in second-generation mobile telephony are T-Mobile and Vodafone, which also have their own mobile telephony networks.

(36) In terms of the number of customers and employees, three mobile telephone operators can be compared to MobilCom.

(37) *O2 Deutschland*, a 100 %-owned subsidiary of mmO2 plc, a former mobile telephony subsidiary of British Telecommunications plc, operates mobile telephony networks and offers mobile telephony services in Germany. It employs a staff of 3 500.

(38) *Debitel* is a telecommunications company without its own network infrastructure; it operates as a reseller of telephone minutes and second-generation mobile-telephony network functions. It employs a staff of 3 544. In 2002 its turnover was EUR 2,8 billion.

(39) *Talkline* resells second-generation mobile telephony services. In 2001 its turnover was EUR 1,26 billion. Talkline states that it employs 1 000 people.

([7]) Xonio Mobilfunkreport 2002; annual report by the German telecommunications and post regulator (RegTP) 2002; market study of 10 March 2003 conducted by Deloitte & Touche on behalf of MobilCom.

([8]) Xonio Mobilfunkreport 2002; market study of 10 March 2003 conducted by Deloitte & Touche on behalf of MobilCom.

([9]) Quam has since withdrawn from the German mobile telephony market.

### 3. Financial difficulties and restructuring

(40) Although it considerably expanded its turnover in the mobile telephony/service provider sector between 1997 and 2000 as a result of a steep net increase in customers, MobilCom's operating results in that business line steadily declined. This was primarily because the costs of acquiring new customers rose at the same time as margins in its existing business fell. Added to this was a rise in bad debts, for which significant provision had to be made, particularly in 2001.

(41) Moreover, the external situation in the UMTS field, in particular the development of the market, content products and terminal equipment, was worse than planned and clearly behind schedule.

(42) On 13 September 2002, France Télécom announced the end of its partnership with MobilCom AG since it felt that its German partner's independent UMTS activities were no longer profitable. The complete withdrawal of France Télécom from joint UMTS activities brought an immediate end to all payments for the purpose of financing the UMTS business.

(43) At this point, MobilCom had, according to its business report, debts of EUR 7,1 billion plus large current financing requirements to cover further network investments, ordinary organisational expenditure and interest. Since France Télécom had for months been MobilCom's sole remaining source of financing and since there were no alternative financing options, MobilCom was directly threatened with insolvency.

(44) Against this background the Federal Government granted rescue aid in the form of a deficiency guarantee for a loan of EUR 50 million. The loan was provided by the State-owned KfW and paid out on 21 September 2002. It enabled the firm to maintain its operations for an initial period. This aid is not covered by the present proceedings, having been approved by the Commission by decision of 21 January 2003.

(45) At the same time, MobilCom sought to enforce a compensation claim on the basis of the cooperation agreement with France Télécom.

(46) On 22 November 2003 MobilCom AG, MobilCom Holding GmbH, MobilCom Multimedia, France Télécom and Wirefree Services Belgium SA signed the MC Settlement Agreement, which cleared a considerable amount of MobilCom's debts.

(47) The central plank of the Settlement Agreement was France Télécom's assumption of the MobilCom group's UMTS liabilities. In return, MobilCom waived, in France Télécom's favour, any possible earnings from the sale or use of all UMTS assets, except for a 10 % share.

(48) More specifically, France Télécom took over bank liabilities (EUR 4,692 billion) and supplier credit (around EUR 1,25 billion). At the same time, it waived repayment of its shareholder's loans totalling around EUR 1,009 billion. The claims waived and liabilities assumed came to a total of EUR 6,9 billion, plus the interest that had accrued up to the time of the transfer.

(49) France Télécom also undertook to provide funds for the withdrawal from the UMTS business, albeit only up to 31 December 2003 and for a total amount of EUR 370 million. The parties also waived all reciprocal claims arising from their business relationship ([10]).

(50) However, France Télécom's withdrawal from cooperation in the UMTS business not only had an impact on MobilCom's UMTS operations but also made restructuring necessary in other business areas, in particular the loss-making core business of mobile telephony/service provision.

(51) France Télécom had expressly refused, during the negotiations on the settlement, to provide funds for reorganising the mobile telephony/service provider business as well. On 20 September 2002, in order to ensure the additional funding needed to finance the requisite reorganisation measures in this sector, Germany and the *Land* of Schleswig-Holstein granted a further 80 % deficiency guarantee for a loan amounting to EUR 112 million.

### 4. Description of the restructuring plan

(52) Germany submitted a comprehensive restructuring plan for the MobilCom group which examined the causes of the crisis and set out how long-term profitability might be restored.

([10]) The MC Settlement Agreement has since been approved at the general meetings of MobilCom AG and France Télécom.

(53) According to the plan, the fundamental causes of the continuing economic difficulties of the MobilCom group were to be found in the core business segment of mobile telephony/service provision and the former UMTS business segment.

(54) According to the restructuring plan, the external situation in the UMTS sector was worse than planned. The original profits expected from the UMTS business had to be corrected. In the end, the trigger for the crisis was France Télécom's withdrawal (which the MobilCom group had not expected) from the expansion of the UMTS business; in view of the considerable finance required to develop the UMTS business, this had threatened the liquidity of the MobilCom group.

(55) In the mobile telephony/service provider business segment, the chief cause of the crisis according to the restructuring plan was the exclusive concentration on growth at the expense of profitability. In the desire to win customers for the future UMTS business, too much emphasis had been placed in the past on increasing market share. Since, in the past, new customers could frequently be gained only at disproportionately high acquisition costs and primarily in cheap price-ranges and since, at the same time, only small turnovers were generated, gross yield margins were small.

(56) In addition, the unsatisfactory payment behaviour of many customers and the consequent provisions for bad debt resulted in significantly high charges. The mobile telephony/service provider business segment recorded continual losses at that time.

(57) Concentration on the UMTS business also meant that necessary adjustments in the other business segments were neglected.

(58) The basis of the strategy for restoring the firm's profitability set out in the restructuring plan was to concentrate strictly on the original core business as a service provider in the mobile telephony sector.

(59) The unprofitable UMTS business was to be completely discontinued. The cost of withdrawing from the UMTS business, i.e. selling or cutting back all UMTS assets and shedding 1 000 UMTS full-time jobs, was estimated in the restructuring plan at a maximum of EUR 370 million. According to the plan, no further funds were needed in the UMTS sector besides the EUR 370 million promised by France Télécom as part of the MC Settlement Agreement.

(60) It was also planned that MobilCom would withdraw from the Internet/landline sector. To this end, the landline division was to be integrated into freenet.de AG and the stake in freenet.de AG subsequently sold (in part).

(61) The key components of the reorganisation strategy for the loss-making mobile telephony/service provider business were to cut 850 full-time jobs, to concentrate sales and customer-services activities, which had previously been scattered over several sites, at the Büdelsdorf group headquarters and the Erfurt site, to reduce customer acquisition costs (among other things, by closing MobilCom shops) and to streamline customer portfolios. Overall, the emphasis would be on consolidation at lower but more profitable customer and turnover levels.

(62) The measures were to be financed by the loan with an 80 % State guarantee. It was originally estimated that EUR 112 million would be needed. In the end, the amount required was only EUR 88,3 million, which in the restructuring plan is broken down as follows:

— customer/loyalty measures to optimise price structure: EUR […]* (*) million,

— closure of unprofitable MobilCom shops: EUR […]* million,

— job cuts in service provider sector: EUR […]* million,

— external consultancy, to March 2003: EUR […]* million,

— closure of Karlstein and Hallbergmoos and relocation of infrastructure: EUR […]* million,

— impending financial obligations, in particular from leasing commitments for business assets no longer used on account of change in strategy: EUR […]* million,

— cash deposits […]*: EUR […]* million.

(*) Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets and marked with an asterisk.

(63) According to a business plan attached to the restructuring plan and to a profit and loss account for the period up to 2007, MobilCom would return to profit in the service provider sector in 2005. As regards repayment of the loans guaranteed by the State, a liquidity analysis concluded on the basis of the three scenarios put forward, favourable outcome, medium or 'realistic' outcome and unfavourable outcome, that, even if turnover was as posited in the worst-case scenario, the loans could be repaid by the end of 2007. According to the restructuring plan, earlier repayment would be possible, though, if the shares in freenet.de AG were successfully sold.

5. **Implementation of the restructuring plan**

(64) MobilCom began implementing the measures set out in the restructuring plan back in November 2002. The UMTS sector was frozen in accordance with the plan and prepared for sale. The planned shedding of a total of 1 850 full-time jobs in the UMTS and service provider sectors was already concluded in March 2003. The additional measures relating to the reorganisation of the service provider core business, such as the shutdown of the Karlstein and Hallbergmoos sites, the closure of unprofitable shops and the introduction of a new organisational structure, were also fully implemented in the fourth quarter of 2002 and the first quarter of 2003.

(65) In addition, all MobilCom's landline activities were grouped together in mobilcom CityLine GmbH (MCL) and transferred on 10 April 2003 by way of a purchase contract from MobilCom to freenet.de AG. The first two instalments, EUR 10 million and EUR 8,5 million, of the total purchase price of EUR 35 million to be paid to MobilCom, which were due in May and August 2003, were used in accordance with the plan to repay the second loan guaranteed by the State.

(66) The UMTS network was sold to E-Plus in May 2003 and the UMTS licence returned to RegTP in December 2003. This left MobilCom free as a service provider to offer UMTS services as well and to take part in the emerging market ([11]).

([11]) If the licence had been retained, this would not have been possible since licence holders may not be service providers at the same time.

(67) On 17 September 2003 the management board and the supervisory board decided to sell up to 20 % of the shares in freenet.de AG. Under an accelerated bookbuilding procedure, 20 % of the shares (3,75 million) were sold to various domestic and foreign investors. The gross yield from the sale was EUR 176,1 million (EUR 47 per share). This left MobilCom with 52,89 % of the shares in freenet.de AG.

(68) With the proceeds, MobilCom repaid the outstanding credit lines from the two State-guaranteed loans on 22 September 2003 and was thus free from debt. The guarantee bonds were returned to the Federal Government and the *Land* of Schleswig-Holstein.

(69) After repaying the loans, MobilCom was left with proceeds of nearly EUR 60 million from the sale of the freenet shares.

(70) According to Germany, the sale of further shares in freenet.de AG is not planned. MobilCom's stake in freenet.de AG had, it said, in the meantime been transformed from a strategic into a purely financial holding, even though MobilCom retained 52,89 % of the shares. Germany described the surviving operational links between the freenet subgroup and the MobilCom subgroup as insignificant. There was no control- and profit-transfer agreement between MobilCom and freenet.de AG.

(71) In October 2003 further extraordinary receipts flowed to MobilCom from the successful sale by the trustee Prof. Helmut Thoma of the shares held by the founder and former head of MobilCom ([12]).

(72) The MobilCom group returned to profit in both the mobile telephony/service provider and landline/Internet businesses. In the service provider sector, MobilCom achieved a positive result in the second and third quarters of 2003, recording a profit for the first time in eleven quarters. Its EBITDA (earnings before interest, taxes, depreciation and amortisation) rose to EUR 103,6 million in the financial year 2003 in both the mobile telephony/service provider and landline/Internet sectors combined on a turnover of EUR 1,837 billion. EBIT (earnings before interest and taxes) rose to EUR 22,3 million (compared with EUR - 372,9 million in 2002).

([12]) […]*.

(73) The trend of the service provider segment during the restructuring phase was as follows ([13]):

| Results | Q1 2004 | Q4 2003 | Q3 2003 | Q2 2003 | Q1 2003 |
|---|---|---|---|---|---|
| Turnover (EUR million) | 349 | 371 | 336 | 329 | 321 |
| EBITDA (EUR million) | 15,2 | - 11,2 | 17,4 | 13,5 | - 5,2 |
| EBITDA to turnover | 4,4 % | - 3,0 % | 5,2 % | 4,1 % | - 1,6 % |
| EBIT (EUR million) | 8,7 | - 20,2 | 10,3 | 4,8 | - 14,2 |
| EBIT to turnover | 2,5 % | - 5,4 % | 3,1 % | 1,5 % | - 4,4 % |
| Mobile telephony customers (million) | 4,2 | 4,2 | 4,1 | 4,2 | 4,5 |
| of which subscribers (million) | 2,4 | 2,6 | 2,6 | 2,7 | 3,0 |
| of which pre-paid customers (million) | 1,8 | 1,6 | 1,5 | 1,5 | 1,5 |
| Gross new customers (million) | 0,42 | 0,43 | 0,19 | 0,13 | 0,16 |

(74) If the capital gain from the placing of 3,75 million freenet shares is taken into account, group earnings in 2003 rose to EUR 160,4 million. According to the firm itself, MobilCom now has a solid basis.

### 6. **Details of State guarantees granted**

(75) The loan of EUR 50 million granted by KfW on 19 September 2002, which was fully secured by a Federal Government guarantee, was due to expire on 15 March 2003 but could be extended until 15 September 2003. It was initially extended until 21 July 2003. In July 2003 KfW again extended the term of the loan, pending a decision by the Commission on the restructuring plan submitted, to 20 May 2004 at the latest. The interest rate for the loan was 6,814 %. It consisted of the Euro Interbank Offered Rate (Euribor) for the interest period in question plus 3,50 % per annum.

(76) The second guarantee, for the EUR 112 million loan granted to MobilCom AG and MobilCom Holding GmbH by the consortium of banks consisting of Deutsche Bank AG, Dresdner Bank AG, KfW and Landesbank Schleswig-Holstein, with KfW as lead bank, was assumed by the Federal Government and the *Land* of Schleswig-Holstein together. The loan, which was granted on 20 November 2002, had a term of 18 months until 20 May 2004. It was to be paid in several instalments. The interest rate consisted of the Euro Interbank Offered Rate (Euribor) for the relevant interest period for each instalment plus 2,50 % per annum. The guarantee provided by the Federal Government and the *Land* of Schleswig-Holstein covered 80 % of the loan. The Federal Government underwrote 48 % of the amount, and the *Land* 32 %. Under the guarantee agreement of 20 November 2002, the guarantee was due to expire on 15 March 2003. However, if a restructuring plan was submitted to the Commission before the expiry date, this period was to be extended automatically until such time as the Commission adopted a decision on the aid on the basis of the restructuring plan in question. With the submission of the restructuring plan in March 2003, the second guarantee was extended to cover the entire duration of the loan up to the time of the Commission's decision on the basis of the plan.

(77) Germany informed the Commission that the premium which MobilCom had to pay the Federal Government for the guarantees on the loans of EUR 50 million and EUR 112 million was 0,8 % per annum in each case. An application fee of EUR 25 000 was also due. The *Land* of Schleswig-Holstein was entitled to a guarantee premium of 1 % per annum and a processing fee of EUR 25 564.

(78) Germany stated that, because only EUR 88,3 million was needed and called in for the restructuring, MobilCom wrote on 1 April 2003 to KfW as consortium leader to waive the outstanding loan amount of EUR 23,7 million.

([13]) Interim report, 1st quarter 2004, MobilCom AG.

### 7. Reasons for initiating/extending the proceedings

(79) The Commission approved the guarantee for the loan of EUR 50 million as rescue aid pursuant to Article 87 (3)(c) of the EC Treaty and the Community guidelines.

(80) In its decision to initiate the formal investigation procedure, the Commission also classified the guarantee from the Federal Government and the *Land* of Schleswig-Holstein on the second loan as State aid within the meaning of Article 87(1) of the EC Treaty. On the basis of its provisional assessment, it concluded that the notified aid should be assessed on the basis of the Community guidelines and doubted whether it was compatible with the common market.

(81) In particular, it was not clear for the Commission whether the loan granted at a later stage (EUR 112 million) was being used exclusively to keep the business running in the declared rescue period or was already being used for restructuring the firm. Because it is particularly distortive of competition, restructuring aid may be authorised only on the basis of a restructuring plan; however, this was not available to the Commission when the proceedings under Article 88(2) of the EC Treaty were initiated.

(82) By decision of 9 July 2003, the Commission included the originally planned extension of the loan guarantees until 2007 within the scope of its ongoing investigation.

(83) The Commission doubted in particular whether MobilCom needed an extension of the State-guaranteed loans. It could not at the time rule out the possibility of MobilCom's being able to secure sufficient funds for paying off the credit from a quick sale of its stake in the Internet subsidiary freenet.de AG.

## III. COMMENTS FROM GERMANY

(84) As the loans were repaid on 22 September 2003, with the guarantee bonds subsequently being returned to the guarantors, Germany considers that the question of the application to extend the loan guarantees until 2007, which had in any event been submitted only as a precautionary measure, is now closed.

(85) The second aid measure is the guarantee on the loan of EUR 112 million: Germany maintains its view that this too constituted rescue aid within the meaning of the Community guidelines.

(86) Germany states that the loans were used exclusively to finance measures taken in the service provider sector and aimed at such things as optimising the customer tariff structure, adjusting sales expenditure and cutting current staff costs, the dual purpose being simply to keep the firm's ordinary business running and to reduce the need for liquidity during the rescue phase. Without these measures, the liquidity requirement would have been EUR 110 million higher by March 2003.

(87) Furthermore, a comprehensive restructuring plan had not yet been submitted at the time the aid was granted and indeed could not have been drawn up in the short time available.

(88) In the event of the Commission's not accepting this assessment, Germany asks that the second loan guarantee be approved as restructuring aid on the basis of the restructuring plan that was submitted to the Commission subsequently. It takes the view that, in particular, MobilCom's withdrawal from the UMTS business and from the landline and Internet segment, as provided for in the restructuring plan, offset any distortions of competition on the mobile telephony market caused by the State-guaranteed loan.

## IV. COMMENTS FROM THIRD PARTIES

### 1. Comments from MobilCom

(89) In its comments on the initiation and extension of the formal investigation procedure, MobilCom rejected the doubts about the aid's compatibility with the common market.

(90) It argued that competition on the market for mobile telephony services would have come to a standstill if MobilCom had ceased to exist. The mobile telephony market, it claimed, is dominated by the network operators, which have a total market share of almost 70 %, with some 52 % being accounted for by the two dominant suppliers, T-Mobile and Vodafone. The disappearance of MobilCom would have given Debitel a virtual monopoly among service providers without their own network, thereby removing the pressure on that company to bundle the most favourable rates and offer them to its customers. The role of service providers as catalysts of price competition between the network operators would thus have been decisively weakened and the oligopolistic structure of the German mobile telephony market would have been further strengthened.

(91) MobilCom also claimed that the State guarantee would not have led to a distortion of competition and was limited to the absolute minimum. The guarantee

covered altogether only 80 % of the loan amount. The available funds were entirely earmarked for the implementation of the restructuring plan and were strictly limited to the costs of restructuring in the service provider sector. Each of the measures described in the restructuring plan had been essential to restoring long-term viability, and MobilCom again explained in detail, and gave a further breakdown of, the individual costs provided for in the restructuring plan.

(92) MobilCom also pointed out that the remaining competitors benefited from the restructuring plan because, under it, MobilCom was divesting all activities that did not belong directly to the core business sector but would be of use to it, such as the UMTS network operation in particular.

(93) No negative effects on competitors were to be expected, moreover, since under the restructuring considerable capacity reductions would be made in the service provider sector as well. In particular, the substantial reduction of staff and the closure of sites had considerably reduced MobilCom's ability to acquire customers.

(94) At the talks held between Germany and the Commission on 9 and 21 January 2004, in which representatives of MobilCom also took part, the company clarified its written comments, stating that it maintained the legal view also adopted by Germany, namely that the second aid measure was rescue and not restructuring aid. The question of appropriate compensatory measures therefore did not arise.

### 2. Comments from Talkline GmbH & Co KG

(95) As a mobile telephony service provider, Talkline GmbH & Co KG (Talkline) is a direct competitor of MobilCom. It pointed out that, like other direct competitors, it had had to adapt to market conditions in the last two years and change direction at its own expense and without State aid.

(96) Talkline argued, first of all, that the second State-guaranteed loan was restructuring aid for MobilCom and not rescue aid. The restructuring of the firm had already begun before the second loan was granted in November.

(97) The firm also took the view that the distortion of competition caused by the aid to MobilCom was particularly severe. The aid granted was not compatible with the common market without sufficient compensation.

(98) Talkline gave as a reason for the particular severity of the distortion of competition, first, the fact that the guarantee enabled MobilCom to continue in business without restriction, while carrying out a full and rapid restructuring. True, MobilCom did lose market shares during the restructuring, but its market presence was still appreciable for competitors.

(99) Second, the State-guaranteed loans enabled MobilCom to make its customer base profitable. After streamlining its customer base, MobilCom had grown about as strongly as the market but had a disproportionately high-yield customer base.

(100) In addition, because of the loans, MobilCom was able to delay the proposed sale of the fixed network to freenet.de AG and the ensuing partial sale of its stake in the latter, so that it could use the expected related rise in the market price not only to repay the loan but also to invest in the mobile telephony business since the sale of 20 % of the block of shares in September 2003 left it with liquid resources of almost EUR 60 million after paying off the loans in full.

(101) Talkline also doubts whether it was necessary to grant the second guarantee. MobilCom already had considerable fixed assets at the time, the stake in freenet.de AG in particular being emphasised by Talkline. The sale of 20 % of the freenet shares (3,75 million shares), which took place only in September 2003, would have already brought the firm an income of at least EUR 18,75 million in November 2002 at the then price of some EUR 5 per share. The sale of the whole stake (13,65 million shares) would have provided the firm with liquid resources of EUR 68 million and hence made borrowing largely, and a State guarantee definitely, unnecessary. This calculation was based only on the stock market price and not the net asset value of freenet.de AG, which had been put significantly higher by the supervisory board of MobilCom and the management board of freenet.de AG.

(102) If the Commission concludes that the State guarantee for the second loan is admissible restructuring aid, it can authorise it, in Talkline's view, only if Germany offers further compensatory measures in accordance with point 35 *et seq.* of the Community guidelines.

(103) The measures taken by Germany were not sufficient, in Talkline's opinion, to offset the aid's adverse effects. The reduction of capacities in the mobile telephony sector and the associated reduction of the customer base were largely attributable to the fact that MobilCom had dropped unprofitable customer relationships. This reduction was necessary from an

economic point of view and cannot therefore be accepted as a *quid pro quo*.

(104) There had been no complete withdrawal from the landline and Internet business. What is more, the sale of the stake in freenet, given its effect on competition in the mobile telephony sector, constituted a capital restructuring. As a *quid pro quo* for possible distortions of competition, it was thus not only worthless but considerably aggravated the distortion since MobilCom was now investing the proceeds from the sale of the freenet stake directly in the service provider business.

(105) The freezing of the UMTS business was an economic necessity and was therefore not suitable either as a compensatory measure to offset distortions of competition in the mobile telephony sector. The withdrawal benefited only the remaining UMTS licence holders, who had one direct competitor less.

(106) Lastly, Talkline proposed a catalogue of possible measures for offsetting the distortions of competition it felt had occurred. The measures included a pro rata 'sale' of customers to competitors, a closure of online shops and other direct channels for a limited period, and withdrawal from the UMTS business as a service provider (enhanced service providing) for a limited period.

### 3. Comments from a third party which wished to keep its identity secret

(107) The Commission also received comments from a further competitor, likewise a pure service provider without its own network structure.

(108) This competitor also thinks that the *quid pro quo* offered is not sufficient to achieve the reduction of capacities in MobilCom's core business necessary for offsetting distortions of competition. MobilCom wanted to concentrate on high-yield customers in the middle and upper segments. Consequently, despite a decline in customers, it would be able to maintain its market presence since, by concentrating on high-yield customers, costs could be reduced and turnovers increased.

(109) Under current market conditions, viz. saturation, lower average turnovers per customer and falling margins, the repositioning that MobilCom was trying to achieve was what all service providers were striving for. The aid, which was not available to direct competitors, was being used by MobilCom to secure a competitive advantage in the valuable, and fiercely contested, customer stratum. Germany had therefore supported the restructuring of MobilCom at the direct expense of competitors, which was not acceptable without further compensatory measures.

## V. GERMANY'S RESPONSE TO THE COMMENTS SUBMITTED BY THIRD PARTIES

(110) In response to the comments submitted by third parties, Germany argues that the second aid measure was necessary because in mid-November 2002 the liquidity needed to maintain MobilCom's current business had run out. Without the loan from the KfW consortium, MobilCom would have had to apply for insolvency immediately. In the event of an application for insolvency, MobilCom's management board estimated that a substantial proportion of customers would very rapidly be lost; a restructuring of MobilCom on the basis of an insolvency would thus have been impossible.

(111) Germany further states that, in the settlement negotiations in the second half of September 2002, France Télécom always made it clear that it could undertake to release MobilCom from its UMTS commitments only if it could be certain that MobilCom would not need to seek insolvency within the periods in which challenges might be possible under insolvency law. From the outset of the negotiations, therefore, France Télécom had wanted an outside expert's report giving a positive forecast for the continued existence of the business areas remaining to MobilCom and had demanded undertakings from third parties ensuring that the financing necessary for a successful reorganisation would be available. The loan of EUR 112 million granted for this purpose by the KfW consortium was accordingly made a condition of the MC Settlement Agreement. France Télécom also demanded that the necessary loan facilities be open for at least 18 months. The fact that the loan and guarantee ran until 20 May 2004 meant, in Germany's view, that this demand had been met.

(112) Germany also submits that the State guarantee was necessary for the granting of the loan. The loan contract with the KfW consortium required MobilCom to provide all the collateral it had at its disposal. But this was not enough to convince the consortium to grant the necessary funding. Despite intensive efforts on the part of the Federal Government to induce the banks in the consortium to assume a higher proportion of the risk, the banks insisted that there had to be a deficiency guarantee from the Federal Government and the *Land* of Schleswig-Holstein covering 80 % of the loan. Without this official cover for the loan (risk shield), none of the banks would have been prepared to provide funding for MobilCom, and MobilCom would have become insolvent.

(113) On the question of whether the aid was limited to the minimum necessary, Germany argued that in the loan contract with the KfW consortium MobilCom undertook to use all net revenue from the sale of major physical or financial assets to redeem the loans, and thus also the State guarantee. It also undertook to begin the sale of the landline network and the Internet business very soon. It began at once efforts to sell these assets and the UMTS assets. It disposed of them so quickly and so successfully that it was able to redeem the loan financing advanced and the State guarantees ahead of schedule.

(114) The sale of the landline business and the UMTS assets, and later the transfer of the Millenium shares, meant that the loan was gradually reduced, and the sale on 17 September 2003 of a stake in freenet.de AG ultimately brought it to zero. The State guarantee was thus in operation only for about half of the lifetime of the KfW loan.

(115) It was not possible to realise the assets and thus to repay the State-guaranteed loans more quickly. This was true of the sale of the landline business, which was agreed in March 2003, the sale of the UMTS assets, which was agreed in May 2003, and the sale of MobilCom shares by the trustee, Dr Dieter Thoma, which was permissible only from April 2003 onwards (MobilCom had no power to instruct Dr Thoma; under his trustee contract with Gerhard Schmid and Millenium, he was obliged to obtain as high a price as possible).

(116) Germany contends that the same applied to the sale of the freenet shares. Under the German law governing limited companies, the management board had an obligation, in the interest of the company and its shareholders, to prevent any sale of its assets below their value. Germany states in particular that, at that time, the stake could have been sold quickly only through the stock market. The market price of a freenet share was low, at about EUR 5, which gave a market value of EUR 68 million for the entire holding; if 76,1 % of freenet shares were to be disposed of rapidly, the price would probably have collapsed. And the company supervisory bodies would not have agreed to a sale in November 2002 because at that time France Télécom's general meeting had not yet approved the MC Settlement Agreement.

(117) Germany submits that there were no alternative courses that would have enabled MobilCom to continue operating in the market. Insolvency would, at best, have served the interests of competitors because MobilCom's clientele would readily have moved over to them. But Germany contends that there was no justification for breaking up MobilCom through an insolvency. Instead, considerations of competition, infrastructure and the labour market argued in favour of the granting of a State guarantee.

(118) Germany initially maintained its view that substantial compensatory measures had already been taken, the main ones being the sale of the UMTS business, the sale of the landline business, the reduction in MobilCom's stake in freenet.de AG from a qualified majority to a financial holding only, and the closure of the Hallbergmoos and Karlstein sites. In direct talks held with Germany in January 2004, the Commission raised other possible compensatory measures, and in particular closure of MobilCom's online shops for a limited period of seven months, to which Germany initially agreed. However, in April 2004 Germany informed the Commission that it could not make a definite commitment to close the online shops.

## VI. ASSESSMENT OF THE MEASURES

(119) Article 87(1) of the EC Treaty states that, save as otherwise provided in the Treaty, any aid granted by a Member State or through State resources which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is incompatible with the common market, insofar as trade between Member States is affected.

(120) The Commission notes that the question of Germany's application to the Commission for authorisation to extend the loan guarantees until 2007 is now closed because the loans were repaid on 22 September 2003, with the guarantee bonds subsequently being returned to the guarantors. Thus the Commission no longer has to consider this application.

(121) The Commission approved the State guarantee on the EUR 50 million loan as rescue aid within the meaning of the Community guidelines on 21 January 2003. This aid need not, therefore, be considered afresh.

### 1. The State guarantee on the EUR 112 million loan as aid

(122) The Commission considers that it has been shown that the 80 % State guarantee on the EUR 112 million loan granted on 20 November constitutes aid within the meaning of Article 87(1) of the EC Treaty.

(123) The guarantee was granted by the Federal Ministry of Finance and by the Ministry of Economic Affairs, Technology and Communications of the *Land* of Schleswig-Holstein, both of which are State authorities. The aid must therefore be considered as having been granted by the State.

(124) State guarantees generally fall within the scope of Article 87(1) if no market premium is paid and trade between Member States is affected ([14]).

(125) The Commission takes the view that the premium paid for the State guarantee was not a market premium. Germany stated that the premium which MobilCom had to pay to the Federal Government for the guarantee was 0,8 % per annum plus an application fee of EUR 25 000 in each case. The *Land* of Schleswig-Holstein was entitled to a guarantee premium of 1 % per annum and a processing fee of EUR 25 564. But Germany did not supply any further data that might show that that the premiums were appropriate to the risk or in line with market conditions. Rather, Germany itself always refers to the guarantee on the second loan too as 'aid'. Against this background, and given MobilCom's difficult economic situation and the fact that it was on the brink of insolvency, the Commission concludes that the premium did not reflect the risk that the Federal Government and the *Land* were running by giving the guarantee; no private investor would have granted a guarantee on those terms.

(126) The guarantee thus conferred a selective advantage on MobilCom which it would not have received under normal market conditions. In particular, its access to borrowing was improved. MobilCom was in financial distress and the guarantee enabled it to obtain loans on terms that did not correspond to its real financial position or to the risk accepted by a lender lending to a firm in a comparable position without a State guarantee. Under normal market conditions, few banks will refuse to grant a loan to a firm if reimbursement is guaranteed by the State.

(127) Moreover, the guarantee may affect competition and trade between Member States. MobilCom provides second-generation GSM mobile telephony services throughout Germany. The loan guarantee granted by Germany improved MobilCom's competitive position and is such as to have an adverse effect on the ability of other second-generation mobile telephony providers to compete. The guarantee also helped to reinforce MobilCom's position at Community level because it made it less likely that providers from other Member States might set up or expand operations in Germany. On the Community telecommunications market there is intense competition between providers from different Member States. Many of MobilCom's current or potential competitors in the provision of second-generation mobile telephony services are firms with their head offices in other Member States (e.g. O2, E-Plus, Vodafone D2, Talkline and Debitel).

(128) The State guarantee accordingly constitutes State aid caught by Article 87(1) of the EC Treaty.

(129) The Commission takes the view that the loan on which the guarantee was granted does not itself contain any aid element. The guarantee meant that the loan was secured in line with market requirements. The interest rate charged to MobilCom on the EUR 112 million loan (2,5 % per annum above Euribor) was comparable to interest rates charged in the case of healthy firms and was not below the Commission's reference rates ([15]).

### 2. **Compatibility with the common market**

(130) Article 87 of the EC Treaty lays down exceptions to the principle that State aid is incompatible with the common market. It has to be considered first of all whether the aid at issue here is compatible with the common market under Article 87(2). But the aid is not (a) aid having a social character and granted to individual consumers; (b) aid to make good the damage caused by natural disasters or exceptional occurrences; or (c) aid granted to the economy of certain areas of the Federal Republic of Germany. Turning to Article 87(3) of the EC Treaty, the exemptions provided for in subparagraphs (a) and (c) (regional aspect) are not applicable since the aid to MobilCom is not intended to facilitate the development of a specific economic area. The exemptions provided for in Article 87(3)(b) and (d) do not apply either. They refer to aid to promote the execution of an important project of common European interest and to aid to promote culture and heritage conservation.

(131) There remains the exception laid down in Article 87 (3)(c) of the EC Treaty and in the Community guidelines based on it. The Commission takes the view that other Community guidelines, e.g. on aid for research and development, small and medium-sized enterprises or employment and training, are not

([14]) Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees, point 2.1.1 (OJ C 71, 11.3.2000, p. 14).

([15]) When the aid was granted, the relevant reference rate was 5,06 %; see the reference and discount rates for State aid in Commission letter SG(97) D/7120 of 18 August 1997.

applicable. If the conditions set out in the Community guidelines on State aid for rescuing and restructuring firms in difficulty are met, the aid may contribute to the development of economic activities without adversely affecting trade (point 20 of the guidelines) and may therefore be considered compatible with the common market.

(a) *Assessment of the second aid measure as restructuring aid*

(132) After thorough consideration the Commission has concluded that, contrary to the stance taken by Germany and the beneficiary company, the second aid measure constitutes restructuring aid, and not rescue aid.

(133) Rescue aid within the meaning of the Community guidelines is, by nature, temporary. It serves to keep an ailing firm afloat for the time needed to work out a restructuring or liquidation plan. It must be restricted to the amount needed to keep the firm in business until the restructuring plan has been drawn up (e.g. covering wage and salary costs or routine supplies).

(134) Restructuring, on the other hand, is based on a feasible, coherent and far-reaching plan to restore a firm's long-term viability. It usually involves the reorganisation and rationalisation of the firm's activities, typically involving a withdrawal from loss-making activities and the restructuring of those existing activities that can be made competitive again. Financial restructuring usually has to accompany the operational restructuring.

(135) The Commission takes the view that the second guarantee does not qualify as rescue aid. The loan it covered was not intended exclusively to finance current costs, including ordinary improvements, with a view to keeping the firm afloat for a limited period until a restructuring plan had been drawn up.

(136) Germany states rather that the purpose of the State-guaranteed loan of EUR 112 million (or EUR 88,3 million) was to enable MobilCom to take a series of reorganisation measures in the loss-making service provider division. The package was thus clearly aimed at the long-term resolution of the causes of the continuing losses in this area of the business.

(137) In particular, the State-guaranteed loan financed the rapid shedding of 850 full-time jobs in the service provider sector, which was intended to reduce the high staff intensity in the segment, a factor identified in the restructuring plan as a major source of loss.

(138) Another category of costs arose out of the termination or cancellation of unprofitable contracts and the migration to tariffs appropriate to a service provider for customers who had been acquired for the firm's own UMTS network. This reorganisation of the customer base and tariffs was intended to establish profitable long-term relations with customers and put a stop to the fall in gross trading profit margins.

(139) By furthermore closing the Karlstein site, which had been brought into the MobilCom group with the takeover of D-Plus Telecommunications GmbH, and the Hallbergmoos site, which had been brought in with the takeover of Cellway Kommunikationsdienste, and by concentrating all its distribution and customer care structure at the Büdelsdorf headquarters and the Erfurt site, MobilCom says that it made up a backlog of adjustments that had been neglected while it had been focusing on building up its UMTS business.

(140) The Commission is accordingly satisfied that the package of measures financed by the State-guaranteed loan had effects that were primarily structural, being aimed at ensuring the long-term profitability of the service provider division and of the company, and not merely at keeping the firm in operation until a restructuring plan was drawn up. Structural measures cannot be financed with rescue aid. The Commission therefore finds that the second guarantee constitutes restructuring aid within the meaning of the Community guidelines.

(141) The Commission also assumes that the measures relating to the service provider business were based on a solid plan for the restoration of the firm's long-term profitability. The Commission expressly rejects Germany's objection that, at the time the State-guaranteed loan was granted in November 2002, no restructuring plan had yet been presented.

(142) The management board, in close consultation with the supervisory board, decided the main points of the reorganisation strategy back in September 2002 ([16]). MobilCom was in no doubt that, without the participation of France Télécom, the UMTS project could not be realised and would have to be abandoned.

(143) The management board also submitted a comprehensive reorganisation programme for the mobile service provider division the main features of which even at that time were a shedding of 850 full-time jobs in the

([16]) See press releases issued by MobilCom on 27 September 2002.

core business, a concentration of the distribution and customer care activities, hitherto spread over five sites, at the permanent headquarters at Büdelsdorf and the Erfurt site, and a reduction in the cost of acquiring customers, in particular by closing unprofitable MobilCom shops.

(144) This reorganisation plan, which was fundamentally identical to the subsequent restructuring plan submitted to the Commission in March 2003, was examined by the auditors Deloitte & Touche. In its report, delivered on 25 October 2002, Deloitte & Touche came to the conclusion that, given the lack of time and the terms of reference of the contract, no final opinion could be reached on the question of whether the MobilCom group's restructuring plan had dealt fully with all points of weakness. But the essential points of weakness had indeed been taken into account and described in the report. The measures set out in the restructuring plan, taken together, could be expected to remedy the points of weakness identified so far and to put the MobilCom group in a position to achieve positive results within one to two years.

(145) The Commission considers, therefore, that it has been adequately shown that by November 2002 at the latest, there was a coherent plan for the reorganisation of the firm which formed the basis not only of the KfW consortium's decision to grant a loan but also of the measures to reorganise the service provider business undertaken in November. This conclusion is in no way invalidated by the fact that, at that time, France Télécom had not yet given its final assent to the MC Settlement Agreement. If the Settlement Agreement had not become effective, MobilCom would have had to apply for insolvency anyway. The assessment of its prospects consequently rested from the outset on the premise that a far-reaching discharge of debts would be possible and thus assumed that an effective agreement could be concluded. MobilCom itself, logically enough, began implementing the measures without delay and did not wait for final approval from France Télécom's general meeting.

(146) The Commission also considers that a decisive indication that the second aid measure constituted restructuring aid is the fact that, when the State-guaranteed loan was granted, it had a lifetime of 18 months, up to 20 May 2004. The guarantee was to run initially until 15 March 2003, but that deadline was to be extended automatically if a restructuring plan had been submitted to the Commission before it expired. Point 23 of the Community guidelines states that rescue aid in the form of loan guarantees must be linked to loans that are to be reimbursed over a period of not more than twelve months after disbursement of the last instalment to the firm. That was not the case here.

(147) To sum up, the second aid measure thus constitutes restructuring aid which the Commission can authorise only if the conditions laid down in the Community guidelines are met.

(b) *Compatibility with the restructuring guidelines*

Eligibility of the firm

(148) For the purposes of the Community guidelines, a firm is regarded as being 'in difficulty' where it is unable, whether through its own resources or with the funds it is able to obtain from its owner/shareholders or creditors, to stem losses which, without outside intervention by the public authorities, will almost certainly condemn it to go out of business in the short or medium term (point 4 of the guidelines). The usual signs of a firm being in difficulty include increasing losses, declining cash flow and falling or nil net asset value as well as situations where the firm cannot recover through its own resources or with the funds it obtains from its owners/shareholders or creditors (point 6 of the guidelines).

(149) The withdrawal of France Télécom from the financing of the UMTS business meant the liquidation of all of MobilCom's corporate funds.

(150) In the third quarter of 2002 MobilCom suffered a loss before interest and taxes (EBIT) of EUR 2,9 billion, while its capital resources amounted to EUR 606,7 million (2001: EUR 3 769 million); the insolvency looming in September 2002 could be averted only through the State-guaranteed liquidity aid loan of EUR 50 million provided by KfW.

(151) Despite the successful conclusion of the MC Settlement Agreement, under which France Télécom took over UMTS liabilities totalling EUR 6,9 billion plus interest, the group's loss in the fourth quarter of 2002 amounted to EUR 289 million, still well in excess of the losses before the crisis (second quarter of 2002: a loss of EUR 172,8 million; first quarter of 2002: a loss of EUR 116,4 million; fourth quarter of 2001: a loss of EUR 91,9 million).

(152) The Commission further deduces from the liquidity figures available to it that the negative cash flow developments in the MobilCom group could not be halted in November 2002 either. The available liquidity reserves were already exhausted in September 2002. The rescue aid merely allowed the short-term current liquidity requirement to be covered and the immediate threat of insolvency to be averted.

(153) Germany moreover showed that, without the reorganisation measures provided for in the restructuring plan, the current loss would probably have been EUR 110 million higher in March 2003. In Germany's view, it would not have been possible to finance such a loss through bank loans.

(154) The Commission likewise concludes that MobilCom would also not have been able to cover the financing requirement in November 2002 from its own available capital resources.

(155) As already explained, liquidity reserves were no longer available at that time. The Commission is also obliged to conclude on the basis of the available information that the (partial) sale of the Freenet stake, as envisaged in the restructuring plan, in order to redeem the State-guaranteed loan, which eventually happened in September 2003, would not have been possible in the short term.

(156) Germany has convincingly shown that, prior to the conclusion of the MC Settlement Agreement in November 2002, it was not possible to sell the freenet holding because of the existing credit liabilities to the creditor banks in the context of the UMTS project. Any such sale would not have been possible without the agreement of the creditor banks, to which the freenet holding was still pledged at the time. In view of the large debts in the UMTS sector, the creditor banks would not have agreed to a sale. Furthermore, the proceeds would have had to be used exclusively for the repayment of the credit liabilities resulting from the UMTS project for the banks.

(157) Nor does the Commission have any evidence to suggest that, during the acute crisis in the third and fourth quarters of 2002, investors would have shown any interest in acquiring shares in MobilCom AG. This means of procuring funds was therefore also not available to MobilCom.

(158) Germany has also demonstrated sufficiently that the consortium banks would not have granted the EUR 112 million loan without the State guarantee, since the default risk was considered to be too high and in particular since the usual banking collateral was not provided in sufficient measure.

(159) Germany submitted among other things an opinion drawn up by the consortium lead bank, KfW, on 1 June 2003 in which the latter assessed the value of the collateral additionally provided for the EUR 112 million loan. In the EUR 112 million loan contract, MobilCom undertook among other things to pledge all the shares in all the subsidiaries and associated companies of MobilCom AG and MobilCom Holding GmbH, including the freenet.de AG holding, and to transfer all claims against Millenium GmbH and against the former manager Gerhard Schmid amounting to EUR 71 million. All the usual banking collateral that was available in the company was also to be transferred.

(160) The value of the freenet holding, which had already been pledged in December 2002, could not be assessed according to KfW because of the marked volatility of the shares.

(161) The claims against Gerhard Schmid and Millenium GmbH made over to the bank consortium were to be met through the sale of the MobilCom AG holding by the trustee Prof. Dieter Thoma by 31 December 2003. The valuation of this collateral was based on the stock exchange price of MobilCom's stock. Since that price is dependent on MobilCom's creditworthiness, KfW, according to Germany, was not able to attribute any collateral value, based on customary banking principles, to the collateral.

(162) Other collateral, such as the subsequently transferred purchase money claim against freenet.de AG arising from the sale of the landline division amounting to EUR 35 million, was not yet available at the time the loan was granted.

(163) The Commission must therefore conclude that the granting of the 80 % Federal and *Land* guarantee was necessary in order for the banks to be able to justify the granting of the EUR 112 million loan.

(164) The Commission thus finds that, at the time when the second loan was granted, the firm was unable to restructure itself through its own resources or with the funds it was able to obtain from its owner/shareholders or creditors, without the State contribution. In its view, therefore, there is sufficient evidence that, in November 2002, MobilCom was still a firm in difficulty within the meaning of the Community guidelines.

Restoration of long-term viability

(165) Pursuant to point 31 *et seq.* of the Community guidelines, the grant of restructuring aid is conditional on implementation of a restructuring plan which must be endorsed by the Commission in the case of all individual aid measures and checked to see whether it is likely to restore the long-term viability of the firm.

(166) The Commission did not have any doubt that the MobilCom group could be stabilised following the successful conclusion of the MC Settlement Agreement with France Télécom. The detailed restructuring plan submitted to the Commission in March 2003 contained a comprehensive analysis of the structural deficits responsible for the problems and a comprehensive list of measures to overcome the weaknesses

identified. On the basis of a forecast profit and loss account up to the end of 2007 and a scenario and risk analysis, the Commission was able to establish that the proposed restructuring measures were reasonable, cogent and, in principle, appropriate to allow MobilCom to restore its long-term viability.

(167) Furthermore, Deloitte & Touche carried out an assessment of the restructuring plan on behalf of MobilCom and came to the conclusion that the plan was in line with the auditing firm's assessments in the 25 October 2002 report and in its monthly reporting on the restructuring process.

(168) This *ex ante* assessment is also borne out by actual developments. MobilCom was back in profit in the service provider sector in the second quarter of 2003 (for the first time after eleven quarters) and was able to pay off its debts in full through the sale of freenet shares in September 2003.

Aid limited to the minimum

(169) Under point 40 of the Community guidelines, the amount and intensity of the aid must be limited to the strict minimum needed to enable restructuring to be undertaken. Aid beneficiaries must make a significant contribution to the restructuring plan from their own resources, including through the sale of assets that are not essential to the firm's survival, or from external financing at market conditions.

(170) The Commission considers that Germany has demonstrated sufficiently that the restructuring aid in the form of a State guarantee for the loan of EUR 112 million is limited to the minimum needed for the restructuring in the light of the existing financial resources of the company, its shareholders or the business group to which it belongs. During the restructuring phase, MobilCom did not carry out any additional acquisitions or new investment not strictly necessary for the restoration of long-term viability. Nevertheless, the Commission thinks it necessary to attach conditions to its approval of the aid in order to avoid undue distortions of competition (see paragraphs 176 to 189).

(171) As far as the period covered by the State-guaranteed loan is concerned, the Commission notes that, according to the information provided by Germany, France Télécom pressed for a term of at least 18 months for the State-guaranteed restructuring loan as a precondition for its taking over the liabilities stemming from the UMTS business, as MobilCom needed it to do, and that, consequently, a shorter term would not have been practicable without endangering the conclusion of the MC Settlement Agreement. The Commission therefore regards the requirement that aid be limited to the minimum as also having been met in this respect.

(172) As regards the beneficiary's own contribution to the restructuring, the Commission notes that the State guarantee covered only 80 % of the guaranteed loan. The risk in relation to the remaining 20 % was thus borne by the firm and the lending banks. In addition, MobilCom helped to finance the restructuring through the sale of assets as set out in the restructuring plan. The first instalments made possible by the EUR 35 million sale of the landline division to freenet in March 2003 were used to pay back the loans. The remainder of the loan was repaid in full in less than one year out of the proceeds from the sale of 20 % of the shares in freenet.

(173) Against this background and bearing in mind that the aid took the form of a loan guarantee and not a non-repayable grant, the Commission concludes that MobilCom made a sufficient contribution to the restructuring from its own resources within the meaning of point 40 of the guidelines and that the aid was reduced to the minimum.

Avoidance of undue distortions of competition

(174) Under point 35 *et seq.* of the Community guidelines, measures must be taken to mitigate as far as possible any adverse effects of the aid on competition. This condition usually takes the form of a limitation or reduction of the presence which the company can enjoy on its market or markets, such limitation or restriction being in proportion to the distortive effects of the aid and, in particular, to the relative importance of the firm on its market or markets.

(175) The Commission finds that MobilCom used the aid as specified in the restructuring plan only for the stabilisation of the mobile telephony/service provider business area. The aid therefore had an impact primarily on the mobile telephony market. In the Commission's view, the markets for landline services, voice telephony and Internet services, on which MobilCom will continue to operate in the future through its holding in freenet.de AG, are not appreciably affected.

(176) In what follows the Commission will therefore examine first whether the aid has had a negative impact on MobilCom's competitors in the mobile telephony market and whether it has led to distortions which make compensatory measures necessary.

(177) Taking the market for mobile telephony services as a whole, MobilCom is one of the smaller suppliers, with

a total market share of 8 % prior to the restructuring of the group and an estimated share of around 6 % after restructuring. Moreover, the aid granted to MobilCom took the form of a loan guarantee, and not a grant. The guaranteed loan was repaid in full on 20 September 2003, only 10 months after the loan had been granted in November 2002.

(178) On the other hand, in the years prior to the crisis in 2002, MobilCom pursued an aggressive expansion strategy geared exclusively to growth in the mobile telephony/service provider sector at the expense of profitability. MobilCom's focus purely on expanding its market share also had to be viewed in the context of the planned expansion of its UMTS network since network operators earn higher margins on their customers than pure service providers.

(179) By focusing its activities on the UMTS field and attempting to establish itself as a UMTS operator, MobilCom was taking a major risk. Ultimately, this business strategy failed, as demonstrated by the difficulties MobilCom experienced in the second half of 2002. MobilCom therefore withdrew as a network operator from the UMTS sector and geared its marketing strategy towards keeping existing profitable customers and pushing up average monthly turnover.

(180) However, because of the aid, MobilCom did not have to bear the negative consequences of its high-risk strategy alone, while it continued to benefit from the positive effects such as the possibility of drawing on a wider clientele when streamlining its customer base. This gave MobilCom a clear advantage over its competitors.

(181) MobilCom also conceded that, without the State aid, it would have had to declare insolvency, which would probably have lost it a large proportion of its existing customers. The aid enabled MobilCom not only to stay in business but also to carry out a physical reorganisation, to reorient its marketing strategy, to drop customers with lower profit margins from its clientele and to focus on profitable customers. In the end, although customer numbers dropped during the restructuring, gross yield per customer rose ([17]).

(182) The Commission also takes account of the fact that the granting of the aid gave MobilCom time to prepare the planned sale of the freenet holding carefully in order to achieve the maximum proceeds from the sale for redeeming the loans and to generate further liquidity. In point of fact, MobilCom managed to achieve proceeds of EUR 176 million on the sale of only 20 % of the shares. After redemption of the outstanding credit lines from the State-guaranteed loans, the remaining proceeds gave MobilCom EUR 60 million in additional liquidity for its service provider operations.

(183) In changing its business strategy, MobilCom thus benefited from the guaranteed loan directly, as well as indirectly in that the guarantee allowed it to obtain a bridging loan in order to enable it to sell shares in freenet.de AG at an appropriate later date. An earlier sale would probably have resulted in lower proceeds.

(184) The aid therefore has a particularly negative effect on competitors, who, as the expected natural saturation point is reached in the next few years, will also have to gear their business strategy to more profitable customer segments, but without the support of any State aid. Despite the fact that MobilCom's share in the German mobile telephony market is less than 10 % and although the State-guaranteed loans were repaid rapidly, the Commission has therefore concluded that the aid led to undue distortions of competition in that market.

(185) In the Commission's view, the measures cited by Germany for reducing the firm's market presence, in particular its withdrawal from the UMTS business, have not sufficiently mitigated these distortions.

(186) MobilCom's withdrawal from the UMTS business cannot fully offset the adverse effects of the aid on competitors as the remaining UMTS licence holders were the main beneficiaries of the withdrawal and are only some of the competitors on the mobile telephony market. Nor can the withdrawal from the landline/Internet business by way of the transfer of landline activities to freenet and the changing of the freenet stake from a strategic into a financial holding, as claimed by Germany, be regarded as adequate compensatory measures for the undue distortions of competition caused by the aid since they primarily benefited landline operators and Internet service providers, not mobile telephony operators.

(187) Germany cited as further compensatory measures the shedding of 1 850 full-time jobs, including 850 in the service provider sector, and the closure of sites. It also indicated that MobilCom had lost customers and therefore market shares. At the end of 2003 the firm had only 4,2 million customers compared with some 4,9 million at the beginning of the crisis, a drop which was reflected in a 7,2 % decline in turnover in the

([17]) 2003: EUR 30 per subscriber (2002: EUR 28,60) and EUR 6,80 per pre-paid customer (2002: EUR 5,20).

service provider sector (EUR 1,356 billion in 2003 compared with EUR 1,487 billion in 2002).

(188) However, the Commission would point out that shedding jobs and closing sites were, in any event, necessary efficiency-boosting measures under the restructuring plan. The company has meanwhile succeeded in ending the negative trend in turnover recorded during the restructuring phase. Turnover in the service provider sector already stood at EUR 349 million in the first quarter of 2004, compared with EUR 321 million in the first quarter of 2003. The number of MobilCom customers has also stabilised meanwhile at around 4,2 million. In the fourth quarter of 2003 the number of new customers (426 000) exceeded customer departures in the same period (338 000) ([18]). It is true that, according to the company's figures, subscribers still show a marked readiness to switch operator, which again led to a slight decline in customer numbers in the first two quarters of 2004. Overall, however, MobilCom gained far more new subscribers in the first two quarters of 2004 than in the same period in 2003. According to its own data, MobilCom had a market share of 10 % in the new customer business in the first quarter of 2004 ([19]).

(189) In view of the undue distortions of competition described in paragraphs 175 to 184, the Commission thus concludes that the adverse effects of the aid on MobilCom's competitors have not yet been sufficiently mitigated by the measures referred to by Germany, although, when determining further compensatory measures, account should be taken of the customer losses which have already occurred, the turnover losses during the restructuring phase and the withdrawal from the UMTS business.

(190) The Commission has made it clear to Germany that the second aid measure cannot be approved as restructuring aid and deemed compatible with the common market without further compensatory measures. However, in view of MobilCom's above--mentioned customer and turnover losses during the restructuring phase and its withdrawal from the UMTS business as a network operator, these compensatory measures should not be too detrimental to its activities.

([18]) Company data.

([19]) Press release of 13 May 2004.

(191) Following negotiations on 9 and 21 January 2004 between Commission representatives and representatives of the Federal Government, the *Land* of Schleswig-Holstein and the company, further compensatory measures were discussed, including, at the Commission's instigation, a possible temporary cessation of direct online sales of MobilCom mobile telephony contracts. In these discussions, while maintaining its legal stance, Germany expressed a willingness in principle to commit itself to suspending online direct sales of MobilCom mobile telephony contracts for seven months with a view to enabling the aid to be approved. In a communication of 13 February 2004, Germany then informed the Commission that, generally speaking, MobilCom was also prepared to close its online shops for direct sales of its mobile telephony contracts for a maximum of seven months. The communication also contained further details as to how the measure might be organised, with additional clarification provided in an e-mail from Germany on 18 February 2004 in response to a request from the Commission.

(192) However, in April 2004 Germany informed the Commission that it could not make a definite commitment to close the online shops, in the light of the legal stance taken in the end by MobilCom. The firm still doubted that the measure constituted restructuring aid. However, were the Commission none the less to conclude that restructuring aid was involved, the planned seven-month suspension of online direct sales of mobile telephony contracts imposed a disproportionate burden on the company.

(193) As set out in detail in paragraphs 132 to 147, it takes the view that the second aid measure constitutes restructuring aid. Likewise as stated above, it considers that further compensatory measures are necessary to offset the undue distortions of competition caused by the granting of the aid.

(194) Since agreement could not be reached with Germany and the company on potential compensatory measures, the Commission is making approval of the second aid measure, pursuant to Article 7(4) of Regulation (EC) No 659/1999, conditional on the cessation of online direct sales of MobilCom mobile telephony contracts (pre-paid and/or post-paid) for a period of seven months.

(195) Specifically, this condition requires Germany to ensure that MobilCom AG and all the companies in the group close their online shops for direct sales of MobilCom mobile telephony contracts for seven months so that no new mobile telephony contracts (pre-paid or post-paid) may be concluded directly with MobilCom AG or the companies in the group. The

distribution of mobile telephony contracts of other suppliers via freenet.de AG is not affected.

(196) Germany must also ensure that, as long as the online shops are closed, MobilCom also suspends direct sales of its mobile telephony contracts via the websites of the MobilCom shops and that MobilCom AG and the other companies in the group do not take any other measures to circumvent this condition.

(197) During the period of closure, customers may not conclude online any new mobile telephony contracts (pre-paid and/or post-paid) directly with MobilCom AG or the companies in the group. The Commission would make it clear that all other services not aimed at concluding new mobile telephony contracts with final customers may continue to be provided online. This includes all services that are provided for existing customers (e.g. servicing, contract extensions, ring tones and games).

(198) During the period of closure, customers may be informed on the websites concerned that they cannot conclude a new mobile telephony contract online for the time being. However, MobilCom may specify on its website the addresses of distribution partners from which customers may obtain the desired service. However, customers may not be passed on directly to another distribution partner by means of an automatic link.

(199) The Commission also requires Germany to start implementing the measure within two months of the adoption of this Decision. A longer preparatory period prior to implementation seems unnecessary and would undermine the effectiveness of the measure since it would no longer be close in time to the restructuring of the firm.

(200) In formulating this condition, the Commission has been guided by Germany's original proposals.

(201) After carefully weighing up all the circumstances, the Commission has come to the conclusion that discontinuing online direct sales of MobilCom mobile telephony contracts will help to offset sufficiently the distortions of competition which have occurred. In 2003, according to its own data, MobilCom gained [...]* new customers (gross), of which [...]* subscribers, through its direct online sales. Overall, the gross number of new customers in 2003 was […]*, of which […]* were subscribers. This means that in 2003 MobilCom gained some 1 to 1,5 % of its total customers and some 2 % of its subscribers via its online shops. For 2004 it can be assumed that MobilCom will gain as many as 2 to 5 % of its customers through its direct sales online. The fact that, during the closure period, customers cannot conclude online any new mobile telephony contracts (pre-paid and/or post-paid) directly with MobilCom AG or the other companies in the group means that MobilCom is barred access to an increasingly important direct distribution channel. The consequence of the measure for competitors will be that they temporarily have the benefit of customers visiting their websites instead and concluding contracts there.

(202) The seven-month period during which the measure is to be implemented likewise appears appropriate. The State-guaranteed loan was granted to MobilCom in November 2002 and repaid by the company in September 2003. If account is also taken of the fact that the guaranteed loan was paid out in several instalments, the last being in March 2003, the period of seven months corresponds to the period during which MobilCom actually benefited in full from the State-guaranteed loan during its restructuring. It therefore seems appropriate when it comes to compensating for the distortions of competition caused to fix the duration for the closure of the online shops for the direct distribution of MobilCom mobile telephony contracts at seven months too.

(203) Furthermore, the Commission sees no reason to suppose that the cessation of online direct sales of mobile telephony contracts for a period of seven months would impose a disproportionate burden on the company. On the contrary, it takes the view that the measure interferes, as is necessary in this case, only to a limited extent with the business activities of the company. The company still acquires most of its customers via its MobilCom shops as well as via independent distribution partners. MobilCom's main distribution channels are therefore not affected by the shutdown of direct online distribution.

(204) Nor can it be assumed that all customers who would actually have concluded a direct contract online with MobilCom during the shutdown period will turn to another (online) provider. Rather, it can be expected that some of these customers will conclude a contract with MobilCom via other distribution channels. Even if, during the closure period, all customers who would have liked to conclude a direct online contract with MobilCom turn to a competitor, the resulting loss of customers appears reasonable considering the distortions of competition which have occurred.

(205) Moreover, existing customers will still be able to renew their contracts online on expiry. MobilCom will also be able to provide customer services and other services not aimed at concluding new mobile telephony contracts online. Furthermore, even during the closure period, MobilCom can advertise its mobile telephony products intensively in its online shops, highlighting particularly favourable post-paid and pre-paid products which customers can acquire from MobilCom shops and other remaining distribution channels.

(206) The Commission notes that discontinuing direct online sales of MobilCom mobile telephony contracts is not likely to cause a manifest deterioration in the structure of the market within the meaning of point 38 of the Community guidelines. The closing of the online shops is a relatively limited compensatory measure that in no way threatens MobilCom's continued existence. There is therefore no danger of a major competitor's being eliminated or severely weakened, thereby indirectly strengthening the two market leaders T-Mobile and Vodaphone.

(207) The Commission does not consider it necessary to impose other measures such as a pro rata 'sale' of customers to competitors or the withdrawal of MobilCom from the UMTS business as a service provider for a limited period. It does not regard these two measures as suitable compensatory measures. A 'sale' of MobilCom customers is neither legally nor practically possible. As for prohibiting MobilCom from acting as a service provider in the UMTS business for a limited period, the Commission takes the view that this would obstruct innovation in the mobile telephony market and would thus not be in the interest of competition as it would restrict its dynamic.

## VII. **CONCLUSION**

(208) The Commission finds that the State guarantee granted on the EUR 112 million loan for MobilCom AG is restructuring aid which, on the basis of the Community guidelines on State aid for rescuing and restructuring firms in difficulty, is compatible with the common market pursuant to Article 87(3)(c) of the EC Treaty provided that Germany meets the condition described in detail in recitals 195 to 199, namely to discontinue direct online sales of MobilCom mobile telephony contracts. Should this condition not be met, the Commission reserves the right to make use of the powers conferred on it by Articles 16 and 23 of Regulation (EC) No 659/1999,

HAS ADOPTED THIS DECISION:

*Article 1*

The State aid which Germany granted to MobilCom AG and MobilCom Holding GmbH in the form of the 80 % deficiency guarantee that was assumed by the Federal Government and the *Land* of Schleswig-Holstein on 20 November 2002 for the EUR 112 million loan granted to the company by the consortium of banks with the Kreditanstalt für Wiederaufbau as lead bank is compatible with the common market pursuant to Article 87(3)(c) of the EC Treaty provided that Germany complies with the condition set out in Article 2 of this Decision.

*Article 2*

1. Germany shall ensure that MobilCom AG and all the companies in the MobilCom group close their online shops for direct online sales of MobilCom mobile telephony contracts for a period of seven months so that no new mobile telephony contracts (pre-paid and/or post-paid) can be concluded directly with MobilCom AG or the companies in the group via this distribution channel. The distribution of other suppliers' mobile telephony contracts via freenet.de AG shall not be affected.

2. Germany shall ensure that, as long as the online shops are closed, MobilCom also suspends direct sales of its mobile telephony contracts via the websites of the MobilCom shops and that MobilCom AG and the other companies in the group do not take any other measures to circumvent this condition.

3. During the period of closure pursuant to paragraph 1, customers may be informed on the websites concerned that it is not possible to conclude a new mobile telephony contract online. However, MobilCom AG may specify on its websites the addresses of distribution partners from which customers may obtain the desired service. Customers may not be passed on directly to another distribution partner by means of an automatic link.

4. Germany shall ensure that the closure of the online shops commences within two months of the adoption of this Decision.

*Article 3*

Germany shall inform the Commission when the closure of the online shops commences. Within the first month of the closure of the online shops, it shall submit a report detailing all the steps taken to implement the measure. Furthermore, it shall inform the Commission immediately when the measure is terminated.

*Article 4*

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 14 July 2004.

*For the Commission*
Mario MONTI
*Member of the Commission*