COMMISSION

COMMISSION DECISION

of 24 January 2007

on the State aid C 38/2005 (ex NN 52/2004) implemented by Germany for the Biria Group

(notified under document number C(2007) 130)

(Only the German text is authentic)

(Text with EEA relevance)

(2007/492/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

Having called on interested parties to submit their comments pursuant to the provisions cited above [1] and having regard to their comments,

Whereas:

I. PROCEDURE

(1) On 23 January and 20 August 2002 the Commission received a complaint with regard to state aid in form of a public guarantee for the Biria Group.

(2) Following an exchange of correspondence between them, Germany informed the Commission by letter of 24 January 2003, registered as received on 28 January, that the plan to provide a guarantee, which had been made conditional on approval being given by the Commission, had been withdrawn. The complainant was informed of this by letter of 17 February 2003.

(3) By letters of 1 July 2003, registered as received on 9 July, and of 8 August 2003, registered as received on 5 September, the complainant submitted further information concerning another public guarantee for the Biria Group and public participations in group companies.

(4) The Commission requested information from Germany by letter of 9 September 2003, to which Germany replied by letter of 14 October 2003, registered as received on 16 October. It requested on 9 December 2003 further information which Germany submitted by letter of 19 March 2004, registered as received on the same day.

(5) On 18 October 2004 the Commission issued an information injunction as it had doubts as to whether the aid measures granted to the Biria Group complied with the schemes under which they had allegedly been granted. In response to the information injunction, Germany submitted further information by letter of 31 January 2005, registered as received on the same day.

(6) On 20 October 2005 the Commission initiated the formal investigation procedure with respect to three alleged state aid measures. In the same decision it took the view that several other aid measures that were alleged to have been granted unlawfully either did not constitute aid or had been granted on the basis of and in line with approved aid schemes. The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* [2]. The Commission invited interested parties to submit comments on the possible aid measures. Comments were received by letter of 27 January 2006, registered as received on 30 January, from a third party that wished to remain anonymous, by letter of 6 February 2006, registered as received on the same day, from Prophete GmbH & Co. KG, Rheda-Wiedenbrück, and Pantherwerke AG, Löhne, and by letters of 6 February, registered as received on the same day, and of 27 February 2006, registered as received on the same day, from Vaterland-Werke GmbH & Co. KG, Neuenrade.

[1] OJ C 2, 5.1.2006, p. 14.

[2] See footnote 1.

(7) The comments were transmitted to Germany by letters of 6 February and 2 March 2006. Germany replied by letters of 5 April, registered as received on 7 April, and of 12 May 2006, registered as received on the same day, respectively.

(8) Germany's response to the initiation of the formal investigation procedure was submitted by letter of 23 January 2006, registered as received on the same day.

(9) The Commission requested on 6 February 2006 further information which Germany submitted by letter of 5 April 2006, registered as received on 7 April. The Commission sent another request for information on 19 July 2006, to which Germany replied by letter of 25 September, registered as received on 26 September.

II. **DESCRIPTION**

2.1. **The beneficiary**

(10) The Biria Group is active in the production and marketing of bicycles. The parent company, Biria AG, is located in Neukirch, Saxony, an assisted area under Article 87(3)(a) of the EC Treaty.

(11) In 2003 the group had a turnover of EUR 93.2m (2002: EUR 83.8m) and recorded profits of EUR 3.7m (2002: losses of EUR 5.8m). With 415 employees in 2003 (2002: 490 employees), it thus ranks as a large undertaking.

(12) The parent company, Biria AG, was founded in 2003 as a result of a merger between Biria AG as was and one of its subsidiaries, Sachsen Zweirad GmbH. At the same time, the name of the latter was changed from Sachsen Zweirad GmbH into Biria GmbH. In April 2005 Biria GmbH was transformed into Biria AG. In 2003 Biria GmbH (now Biria AG) had an annual turnover of EUR 55.7m and recorded profits of EUR 3.6m. The sole owner of Biria AG is Mr Mehdi Biria.

(13) Apart from the parent company, the most important companies in the group are Bike Systems GmbH & Co. Thüringer Zweiradwerk KG (hereinafter 'Bike Systems'), which is owned by Biria via Biria's subsidiary Bike Systems Betriebs- und Beteiligungsgesellschaft mbH ('BSBG') and by Checker Pig GmbH.

(14) Bike Systems is located in Nordhausen, Thuringia, an assisted area under Article 87(3)(a) of the EC Treaty. In 2003 it had a turnover of EU-6.1m and recorded losses of EUR 0.6m. It had 157 employees. It produces bicycles exclusively for its parent company BSBG ('Lohnherstellungsvertrag'). BSBG is responsible for the distribution of the bicycles.

(15) Checker Pig GmbH is located in Dresden, Saxony, an assisted area under Article 87(3)(a) of the EC Treaty. In 2003 it had a turnover of EU-6.9m and recorded losses of EUR 0.4m. It had 43 employees.

(16) On 7 November 2005 Biria AG sold the majority of its assets to two companies in the Lone Star Group, a private equity fund. The real estate remains with Biria AG, which rents it to Lone Star Group. The assets were sold for EUR 11.5m. An external expert had put the market price of the assets at EU-10.7m. The company(companies) owned by Lone Star Group now seems(seem) to operate under the name Biria GmbH.

(17) According to the information submitted by Germany, the sale was carried out through an open, transparent and unconditional tender. The tender was published on the Internet and in several print media. The involvement of a new investor could take the form of an asset deal, an asset deal 'en bloc' or a share deal. The Lone Star Group ultimately took over the assets by way of an asset deal.

(18) According to Germany, the efforts to sell the company got under way before the Commission decision to initiate the formal investigation procedure on 20 October 2005. The first bids were to be submitted by 4 October 2005.

2.2. **The financial measures**

(19) Measure 1: In March 2001 gbb Beteiligungs-AG ('gbb'), a subsidiary of Deutsche Ausgleichsbank, a public-law development bank, provided until end-2010 a silent participation ('stille Einlage') to Bike Systems amounting to EUR 2 070 732. According to Germany, the participation was provided on market conditions and so did not constitute state aid.

(20) Measure 2: On 20 March 2003 the Land of Saxony provided — originally until end-2008 — an 80 % guarantee for an operating credit of EUR 5.6m in favour of Sachsen Zweirad GmbH. The guarantee was given back in January 2004 and replaced by a guarantee to Biria GmbH (see Measure 3). The guarantee was provided under the guarantee scheme for Saxony ([3]), an aid scheme approved by the Commission.

(21) Measure 3: On 9 December 2003 the Land of Saxony provided an 80 % guarantee for an operating credit amounting to EUR 24 875m in favour of Biria GmbH (now Biria AG) to finance the planned increase in turnover and the restructuring of the group's financing plan. The credit consists of EUR 8m to repay working capital loans, EUR 7.45m as an advance on current account ('Kontokorrentkredit') and EU-9 425m for seasonal financing needs ('Saisonfinanzierungslinie'). The guarantee was provided under the guarantee scheme for Saxony, an aid scheme approved by the Commission. It was provided on condition that the guarantee for Sachsen Zweirad GmbH (Measure 2) would be given back. It thus entered into force only on 5 January 2004 after the guarantee to Sachsen Zweirad had been given back.

III. REASONS FOR INITIATING THE FORMAL INVESTIGATON PROCEDURE

(22) The Commission initiated the formal investigation procedure since it had doubts as to whether the silent participation was provided on market conditions as claimed by Germany. In its view, Bike Systems had just come out of insolvency through the adoption of an insolvency plan and so its future prospects were uncertain. It should thus have been considered as a company in difficulty at that time. The Commission doubted that the remuneration was appropriate taking into account the risk and that the silent participation was provided on market conditions. As regards possible exemptions under Article 87(2) and (3) of the EC Treaty, the Commission had no information as to whether the conditions laid down in the Community Guidelines on state aid for rescuing and restructuring firms in difficulty ([4]) ('Community Guidelines') had been met.

(23) Another reason for initiating the formal investigation procedure was that the Commission came to the provisional conclusion that the conditions of the approved aid scheme under which the guarantees to Sachsen Zweirad GmbH and Biria GmbH had allegedly been provided were not met and that the guarantees were thus not covered by the aid scheme. The Commission considered that Sachsen Zweirad GmbH and Biria GmbH were companies in difficulty at the time the guarantees were provided. Moreover, since Sachsen Zweirad GmbH and Biria GmbH were large undertakings, the guarantees would have been notifiable individually to the Commission under the aid scheme. As regards possible exemptions under Article 87(2) and (3) of the EC Treaty, the Commission had doubts that the conditions of the Community Guidelines were met.

([3]) N 73/1993 Guarantee scheme of the Land of Saxony (SEC(93) D/9273) of 7 June 1993.

([4]) OJ C 288, 9.10.1999, p. 2.

IV. COMMENTS FROM INTERESTED PARTIES

(24) The Commission received comments from a third party that wished to remain anonymous, from Prophete GmbH & Co. KG and Pantherwerke AG, and from Vaterland-Werke GmbH & Co. KG.

4.1. Comments from a competitor that wished to remain anonymous

(25) In its comments on the initiation of the formal investigation procedure, the competitor that wished to remain anonymous argues that, because of the state guarantee of EUR 24.5m, Biria AG could sell bicycles to the competitor's customers at below production costs even though the competitor has the most cost-efficient production site in Germany.

(26) The competitor points out that in 2003 Biria AG could only show profits because of a waiver of bank claims amounting to EUR 8.567m. In 2004 and 2005 Biria AG again recorded losses.

(27) The competitor also notes that Biria was sold to the Lone Star Group by way of an asset deal. According to the competitor, Sachsen-LB and the Mittelständische Beteiligungsgesellschaft probably waived large amounts of their claims. The new Biria GmbH, which is owned by the Lone Star Group, took over all the assets from Biria AG as was.

4.2. Comments from Prophete GmbH & Co. KG and Pantherwerke AG

(28) In its comments on the initiation of the formal investigation procedure, Prophete GmbH & Co. KG and Pantherwerke AG ('Prophete and Pantherwerke') allege that, because of the state aid, Biria can offer its products at prices that it could not maintain under normal market conditions. The two companies are competitors of Biria and are thus directly affected by the aid.

(29) The Biria Group is the largest producer of bicycles in Germany with an annual production of around 700 000 bicycles. The companies in the group are active in two segments of the bicycle market, i.e. non-specialised trade and specialised trade.

(30) The non-specialised trade segment concerns all retail sales by the larger retail chains and catalogue sales. Bicycles in this segment are priced at between EUR 100 and EUR 199. Prophete and Pantherwerke estimate that the size of the market is around 1.5m bicycles and that, with sales of 650 000 bicycles, the Biria Group has a market share of around 50 % in this segment.

(31) According to Prophete and Pantherwerke, the Biria Group also has a dominant position in the specialised trade segment. The size of the market is between 150 000 and 200 000 bicycles priced at up to EUR 400. Pantherwerke is a direct competitor of Biria in this segment.

(32) Prophete and Pantherwerke have stated for several years that the prices offered by the Biria Group are invariably lower than those offered by other producers. This difference cannot be explained by economic factors since, although the Biria Group has a higher purchase volume because of its dominant market position, this is not reflected in more advantageous conditions. Prophete and Pantherwerke estimate that, on account of its low prices, the Biria Group has suffered significant losses in recent years.

(33) As regards the silent participation, Prophete and Pantherwerke have doubts that, given the economic situation of Bike Systems in March 2001, a private investor would have acquired such a silent participation.

(34) As regards the two guarantees for Sachsen Zweirad GmbH and Biria in 2003 and 2004, Prophete and Pantherwerke regard them as not being compatible with the Community rules on state aid. They take the view that the companies were in difficulty at the time the guarantees were provided. They argue that the new company Biria has to be viewed as the legal successor to the two former companies from which it emerged. In their opinion, the opening balance of the newly created company is not meaningful.

(35) It is claimed that the two guarantees violated the 'one time–last time' principle as the economic activities of the companies forming the Biria Group could be sustained only with repeated state support.

(36) No compensatory measures were taken to offset adverse effects on competitors. No restriction was placed on the market presence of the Biria Group. Instead, the plan of the Biria Group is to expand its activities further through an aggressive pricing policy. On its homepage Biria announced planned sales of 850 000 bicycles in 2005, which would have implied a further increase in sales compared with 2004. Prophete and Pantherwerke also point out that, according to a press release, the owner of Biria AG has sold the business to the Lone Star Group, a private equity fund.

4.3. **Comments from Vaterland-Werke GmbH & Co. KG**

(37) In its comments on the initiation of the formal investigation procedure, Vaterland-Werke GmbH & Co. KG (Vaterland-Werke) points out that, with a total production of between 700 000 and 800 000 bicycles, the Biria Group is the largest bicycle manufacturer in Germany. The only comparable company is MIFA Mitteldeutsche Fahrradwerke with an annual production of around 700 000 bicycles. Other competitors produce only between 250 000 and 400 000 bicycles a year.

(38) Vaterland-Werke and Biria are both active in the non-specialised trade, which includes sales by the larger retail chains and catalogue sales by large mail order companies. There is fierce competition in the market and Biria is known as an aggressive competitor selling at below production costs. Such behaviour is possible only because of external financing sources, i.e. in the case of Biria because of state aid. This situation threatens the existence of all small competitors that do not receive state aid. Vaterland-Werke is particularly affected and free capacities cannot be filled with alternative work orders. It concludes that, in a market with surplus capacities, any capacity extension undertaken by a producer with the help of state aid imposes a burden on other competitors.

(39) As regards the silent participation, Vaterland-Werke has doubts that, in view of the economic situation of Bike Systems in March 2001, a private investor would have acquired such a participation.

(40) As regards the two guarantees for Sachsen Zweirad GmbH and Biria in 2003 and 2004, Vaterland-Werke regards them as not being compatible with the Community rules on state aid. It takes the view that the companies were in difficulty at the time the guarantees were provided. It argues that the new company Biria has to be viewed as the legal successor to the two former companies from which it emerged. In its opinion, the opening balance of the newly created company is not meaningful.

(41) It is claimed that the two guarantees violated the 'one time–last time' principle as the economic activities of the companies forming the Biria Group could be sustained only with repeated state support.

(42) No compensatory measures were taken to offset adverse effects on competitors. No restriction was placed on the market presence of the Biria Group. Instead, the plan of the Biria Group is to expand its activities further through an aggressive pricing policy. On its homepage Biria announced planned sales of 850 000 bicycles in 2005, which would have implied a further increase in sales compared with 2004. Vaterland-Werke also points out that, according to a press release, the owner of Biria AG has sold the business to the Lone Star Group, a private equity fund.

V. **COMMENTS FROM GERMANY**

(43) In its comments on the initiation of the formal investigation procedure, Germany argues that the silent participation by gbb was provided on market conditions. It agrees with the Commission that the risk attaching to a silent participation is higher than that attaching to a traditional bank loan. Nevertheless, it argues that the conditions of the silent participation are such that the provisions of the Commission notice on the method for setting the reference and discount rates ([5]) were complied with. According to the notice, the reference rate is a floor rate which may be increased in situations involving a particular risk. In such cases, the premium may amount to 400 basis points or more.

(44) Germany points out that the remuneration for the silent participation amounts to 12.25 % (8.75 % fixed and 3.5 % depending on the realisation of profits). The remuneration is thus 600 basis points above the Commission's reference rate of 6.33 %. gbb thus took into account the fact that the company was going through a period of restructuring and that the risk attaching to the silent participation was therefore higher as a result of the company's reorganisation and the lack of collateral. This increased risk is reflected in the additional premium of 200 basis points.

(45) In addition, Germany argues that the decision to provide the silent participation was taken on the basis of a forecast indicating an increase in company turnover from EUR 0.89m in 2001 to EUR 3.38m in 2003. It therefore concludes that the agreed remuneration for the silent participation of 12.25 % was an appropriate reflection of the associated risk. In its view, the fact that part of the remuneration is variable is irrelevant as this is common in the case of silent participations and corresponds to the behaviour of a market economy investor.

(46) As regards the guarantee for Sachsen Zweirad GmbH, Germany argues that the company was not in difficulty at the time it was provided and that the company did not show any of the typical signs of a company in difficulty as defined by the Community Guidelines. Among other things, the company had positive own capital of EUR 404m for 2003 (until the merger with Biria in October 2003) and generated a profit of EUR 2.1m. Its economic situation had improved in 2003 compared with 2001/2002 thanks to consolidation efforts launched at the end of 2002 and to an improved market situation.

(47) Germany points out that, although the company's liquidity situation was difficult, it was not 'serious'. There had been no danger that the private banks would not extend their credit lines. Moreover, high interest payments would not have led to liquidity problems as claimed by the Commission.

(48) As regards the guarantee for Biria GmbH (now Biria AG), Germany points out that the basis for it was the new plan of the Biria Group for streamlining its organisation and concentrating procurement, production responsibilities and distribution at Biria GmbH. Apart from the financing needed to increase turnover, the plan also included a reorganisation of group financing.

(49) Germany claims that Biria GmbH (now Biria AG) was not in difficulty at the time the guarantee was provided. In its view, a distinction has to be made between Biria AG as was and the new Biria AG. The latter can be considered in difficulty only if it had inherited the difficulties of the old company (in the event of there being any). This is, however, not the case with the new Biria AG, which resulted from a merger of Sachsen Zweirad GmbH and Biria as was. Sachsen Zweirad AG, which was not in difficulty, dominated the merger economically. It cannot therefore be automatically assumed that the new Biria AG would be in difficulty. Even if Biria AG as was had been in difficulty, the merger with Sachsen Zweirad GmbH would have meant that the new Biria AG would not automatically have found itself in difficulty.

(50) Germany also explained that the withdrawal by one of the private banks from the financing operation was due to a revamping of the bank's strategy following a merger. The other two banks ended their involvement at the same time at this private bank. This cannot however, be seen as a sign of a lack of confidence as one of the banks still provided financing for two separate projects.

([5]) OJ C 273, 9.9.1997, p. 3.

(51) Germany points out that the merger of Sachsen Zweirad GmbH and Biria AG was not designed to circumvent the state aid rules and classification of the company as a company in difficulty but was the consequence of a new plan for the group.

(52) In reply to the comments by a competitor who wished to remain anonymous, Germany argues that the figures on the cost structure of the competitor and Biria are not comparable. The turnover of the competitor has increased while the sales of the Biria Group have decreased. At the same time, the EBITDA of the competitor fell while that of Biria Group remained constant. This shows that Biria does not sell at dumping prices and that the competitor has engaged in more aggressive price behaviour than the Biria Group.

(53) Germany argues that the economic disadvantages apparently suffered by the competitor because of the Biria Group's behaviour are not borne out by facts or presented in a coherent manner. It also points out that it is normal in a competitive market for a company to be undercut by a competitor.

(54) As regards the sale of the assets of the Biria Group to the Lone Star Group, which was mentioned by the competitor, Germany provided details on the sale as well as on the repayment of private and public claims.

(55) In reply to the comments by Prophete and Pantherwerke and by Vaterland-Werke, Germany points out that the market for bicycles is divided into three segments, and not two as claimed by these companies. The three segments are specialised trade, mail order/catalogue sales and self-service premises. Biria has a strong position in the mail order segment due less to aggressive pricing than to just-in-time deliveries, while in the self-service segment MIF AG is the leading supplier, with Biria having less than 10 % of the market.

(56) Germany rejects the assertion by Vaterland-Werke that the Biria Group planned to expand its activities further through an aggressive pricing policy and makes references to information already submitted in the context of the investigation procedure. It points out that Biria AG produced 670 000 bicycles in 2003 and that production has been falling since.

VI. **ASSESSMENT**

6.1. **The relevant undertaking**

(57) The aid was granted to Sachsen Zweirad GmbH and Biria GmbH (now Biria AG) as well as to Bike Systems, a subsidiary of Biria GmbH. On 7 November 2005 Biria AG sold the majority of its assets to two companies in the Lone Star Group, a private equity fund. The Commission notes that, judging by the information provided, the assets were sold following an open, transparent and unconditional tender. According to Germany, an expert opinion put the sales price of the assets at EU-10.7m. The price paid by the Lone Star Group (EUR 11.5m) was thus above the estimated price.

(58) On the basis of the information at its disposal, the Commission therefore comes to the conclusion that there is no evidence to suggest that any advantage accrued to the Lone Star Group as a result of the aid or that the Lone Star Group would thus be a direct or indirect beneficiary of the state aid granted to Biria GmbH (now Biria AG) and Bike Systems.

6.2. **Measure purportedly provided on market conditions**

(59) According to Germany, ggb's silent participation in Bike Systems (Measure 1) was provided on market conditions. A silent participation is comparable in terms of risk to a subordinated loan and should thus be treated as a high-risk loan. In the case of bankruptcy or liquidation, it is paid back only after all other liabilities have been honoured. The risk associated with the participation thus exceeds that associated with a traditional bank investment loan, which is normally secured on the conditions required by the bank and reflected in the Commission's reference rate. The remuneration to be paid for such a participation should thus significantly exceed the reference rate.

(60) The Commission's reference rate at the time was 6.33 %. The participation was provided with a fixed remuneration of 8.75 % plus a variable remuneration of 3.5 %, depending on the profits made. The agreed remuneration is thus higher than the Commission's reference rate.

(61) However, Bike Systems had just came out of insolvency through the adoption of an insolvency plan. Its future prospects were uncertain as only a limited operational restructuring had been carried out. According to the company's annual report for 2001, the company still recorded losses that year. Its own capital was still negative although, thanks to hidden reserves, this did not trigger insolvency. Bike Systems must, therefore, be regarded as a company in difficulty at that time.

(62) Accordingly, the Commission considers that the remuneration was not proportional to the risk and that the silent participation was not provided on market conditions. The silent participation thus conferred on Bike Systems an advantage that the company would not have obtained on the market.

6.3. **Aid purportedly covered by approved aid schemes**

(63) The guarantee in favour of Sachsen Zweirad GmbH for an operating credit of EUR 5.6m (Measure 2) and the guarantee in favour of Biria GmbH (now Biria AG) for an operating credit of EUR 24.875m (Measure 3) were granted under the loan guarantee scheme of the Land of Saxony. This approved scheme allows guarantees for loans of more than DEM 5m (EUR 2.6m) to healthy companies for the financing of new investments and, in special cases, for supplementary financing of investment and working capital. In exceptional cases, the scheme also allows for the financing of consolidation and restructuring measures. The provision of guarantees for the restructuring of a large undertaking must, however, be notified to the Commission in each individual case.

(64) According to Germany, the conditions of the scheme were met and the guarantees therefore comply with the scheme. Germany considers that Sachsen Zweirad GmbH and Biria GmbH (now Biria AG) were not in difficulty at the time the guarantees were provided to secure working capital loans, something which is admissible under the aid scheme.

(65) The Commission does not agree that the guarantees are compatible with the aid scheme under which they were allegedly provided. As will be explained in more detail below, the Commission, unlike Germany, considers that Sachsen Zweirad GmbH was a company in difficulty at the time a guarantee was provided in March 2003 and that, in its turn, Biria GmbH was also a company in difficulty at the time a guarantee was provided in December 2003. The provision of guarantees for the restructuring of a company in difficulty must, however, be notified to the Commission in each individual case.

Guarantee for Sachsen Zweirad GmbH (Measure 2)

(66) Germany argues that Sachsen Zweirad GmbH did not show any of the typical signs of a company in difficulty within the meaning of the Community Guidelines ([6]). The Commission points out that the typical signs of a firm being in difficulty, which are mentioned in point 6 of the Community Guidelines, give merely an indication of when a company can be considered to be in difficulty and do not have to be met cumulatively. Sachsen Zweirad GmbH recorded operating losses of EUR 1.274m in 2001 and EUR 0.733m in 2002. The losses were taken over by the parent company Biria under the profits and loss transfer agreement. Turnover decreased in 2002 compared with 2001.

(67) According to the annual report for 2002, Sachsen Zweirad GmbH also faced liquidity problems. It is explicitly stated in the annual report that its liquidity situation was tight because of high expenditures for the pre-financing of the group's inventory and because of its growth and that its survival could be ensured only if the banks were prepared to keep open or to restructure the existing credit lines.

(68) Germany argues that there never had been any danger of the banks not extending their credit lines. However, this does not invalidate the fact that the liquidity situation of the company was tight. According to the annual report, a large majority of the credits had a remaining period to maturity of less than five years, which is by no means optimal for financing business activities and increases the risks facing the company. The short-term nature of the credits also led to high interest payments (albeit slightly lower in 2002 compared with 2001), placing a further burden on the company's liquidity.

(69) The Commission thus comes to the conclusion that Sachsen Zweirad GmbH has to be viewed as a company in difficulty at the time the guarantee was provided and that the guarantee has accordingly to be viewed as a restructuring guarantee. Since the provision of such a guarantee to a large undertaking has to be notified individually to the Commission, the conditions of the approved aid scheme under which the guarantee had allegedly been provided were not met and the guarantee was not covered by the aid scheme.

Guarantee for Biria GmbH (Measure 3)

(70) Biria GmbH (now Biria AG) was created with effect from 1 October 2003 through a merger of Biria AG as was with its subsidiary Sachsen Zweirad GmbH.

([6]) See footnote 4.

(71) According to Germany, Biria GmbH (now Biria AG) has to be clearly distinguished from its predecessors Biria AG as was and Sachsen Zweirad GmbH since, as a result of the merger, a new company was created. The assessment whether this company was in difficulty when the guarantee was provided on 9 December 2004 should therefore be based on the opening balance sheet of the newly merged company, which, according to Germany, demonstrates that Biria GmbH does not qualify as a company in difficulty.

(72) The Commission does not agree. The newly merged company Biria GmbH cannot be viewed separately from Biria AG as was and Sachsen Zweirad GmbH since it was created through a merger of the two companies. Otherwise, it would be easy to circumvent the classification as a company in difficulty by merging economic entities or creating new companies. Biria AG as was recorded losses and faced liquidity problems in 2002 as did Sachsen Zweirad GmbH. Biria GmbH inherited all the debts and liabilities of Biria AG as was and Sachsen Zweirad GmbH. It also owns the same assets and carries out the same activities as Biria AG as was and Sachsen Zweirad AG. The Commission therefore considers that Biria GmbH took over the difficulties of Biria AG as was and Sachsen Zweirad AG.

(73) Germany claims that Sachsen Zweirad GmbH dominated the merger economically and was not in difficulty, from which it cannot automatically be assumed that the new Biria GmbH had found itself in difficulty. Contrary to what Germany claims, the Commission is most certainly of the view that Sachsen Zweirad GmbH was a company in difficulty. Consequently, the new Biria GmbH also 'inherited' the difficulties of Sachsen Zweirad GmbH.

(74) Moreover, according to its annual report for 2003, the Biria Group continued its restructuring and reorganisation, which had started in 2002 and included a reordering of its financing. On the basis of the guarantee provided by the Land of Saxony for the EUR 24.875m loan, the Biria Group drew up a new plan for financing its activities in the medium term that included a significant adjustment of interest rates and thus a reduction in the high interest burden.

(75) At the same time, the pool of banks was reorganised: three banks agreed to waive claims amounting to EUR 8.567m, which seems to have represented significantly more than 50 % of their claims, in return for an immediate redemption of remaining claims. Consequently, the loan covered by the 80 % guarantee under Measure 3 consists of EUR 8m to pay off working capital loans, EUR 7.450m in the form of an advance on current account and EU-9.425m for seasonal financing needs.

(76) Biria GmbH (now Biria AG) thus faced serious liquidity problems at the time the guarantee was provided and so was a company in difficulty. This assessment is borne out by the fact that three banks withdrew from the financing of Biria's activities and even agreed to waive a large part of their claims in return for the immediate redemption of remaining claims. This shows that the banks had serious doubts as to whether Biria would be able to service its debts and was to be regarded as a viable company.

(77) Germany argues that the banks withdrew from the financing only because of a refocusing of their business strategy. The Commission notes that the banks agreed to waive probably around 50 % of their claims, which, even if the banks withdrew because of a refocusing of their business strategy, is a sign that the banks considered it unlikely that they would be able to recover the full amount of the loans.

(78) The Commission thus comes to the conclusion that Biria GmbH has to be viewed as a company in difficulty at the time the guarantee was provided and that the guarantee has accordingly to be viewed as a restructuring guarantee. Since the provision of such a guarantee to a large undertaking has to be notified individually to the Commission, the conditions of the approved aid scheme under which the guarantee had allegedly been provided were not met and the guarantee was not covered by the aid scheme.

6.4. **State aid within the meaning of Article 87(1) of the EC Treaty**

(79) According to Article 87 of the EC Treaty, any aid granted by a Member State or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between Member States, incompatible with the common market. Pursuant to the established case law of the European Courts, the criterion of trade being affected is met if the recipient firm carries out an economic activity involving trade between Member States.

(80) The silent participation (Measure 1) was provided by gbb. Germany claims that this took place under the 'Eigenprogramm' of the gbb so that no state support was involved. The Commission notes nevertheless that, at the time the participation was provided, gbb was fully controlled by the Deutsche Ausgleichsbank, a public-law development bank with the task of supporting the German economy in the public interest. In addition, gbb is also tasked with promotional tasks. For example, it was responsible for the Consolidation and Growth Fund for Eastern Germany ('Konsolidierungs- und Wachstumsfonds Ostdeutschland'), which is entrusted with providing equity capital to medium-sized companies in eastern Germany to strengthen their equity capital base. The Commission therefore considers that the measure is imputable to the State. As pointed out in paragraphs 59 to 62, the measure also conferred on Bike Systems an advantage that the company would not have obtained on the market.

(81) The guarantees under Measures 2 and 3 were provided by the Land of Saxony. They thus stem from state resources and are imputable to the State. The guarantees confer an advantage on Sachsen Zweirad GmbH and Biria GmbH (now Biria AG) as the two companies would not have been able to obtain the guarantees on the market on the same conditions.

(82) Bike Systems as well as Sachsen Zweirad GmbH and Biria GmbH manufacture bicycles. As this product is traded across borders, the measures threaten to distort competition and affect trade between Member States. The Commission concludes therefore that the silent participation and the two guarantees constitute state aid within the meaning of Article 87(1) of the EC Treaty and that the two guarantees were not provided under an approved aid scheme. Measures 1, 2 and 3 thus constitute new aid which has to be assessed accordingly.

Aid element of Measure 1

(83) The Commission considers that the aid element of the silent participation should be calculated as the difference between the remuneration that Bike Systems would have paid on the market for the silent participation and the remuneration actually paid. As Bike Systems was in difficulty when the silent participation was provided and as the associated risk was high, the aid element could amount to as much as 100 % of the silent participation as no market economy investor would have provided the participation (see point 3.2 of the Commission notice on the application of Articles 87 and 88 of the EC Treaty to state aid in the form of guarantees ([7])).

(84) According to the Commission notice on the method for setting the reference and discount rates ([8]), reference rates are supposed to reflect the average level of interest rates charged on medium- and long-term loans backed by normal security. The notice also points out that this reference rate is a floor rate which may be increased in situations involving a particular risk (for example, an undertaking in difficulty or where the security normally required by banks is not provided). In such cases, the premium may amount to 400 basis points or more. The silent participation is not a loan but can nevertheless be compared to a high-risk loan since, in case of bankruptcy, it is subordinated to all other claims including subordinated loans.

(85) As explained in paragraph 61, the situation of Bike Systems after it had come out of insolvency should be considered as insecure. Its future prospects were uncertain as only limited operational restructuring had been carried out. As pointed out in the same paragraph, the company is therefore to be regarded as a company in difficulty. Moreover, no collateral was provided for the silent participation, increasing the risk of default. In addition to the missing collateral, the silent participation is also subordinated to all other loans in the event of insolvency, further increasing the risk of default.

(86) In the present case, therefore, the Commission considers that Bike Systems would have had to pay an interest rate at least equal to the reference rate plus a premium of 400 basis points because it was in difficulty and a premium of a further 400 basis points because of the lack of any collateral. It also considers an additional 200 basis points appropriate because of the low ranking of the silent participation in the event of insolvency. This is in line with the indications given in the Commission notice on the method for setting the reference and discount rates, which states that in situations involving a particular risk (for example, an undertaking in difficulty or where the security normally required by banks is not provided) the premium may amount to 400 basis points or more. The aid element of the silent participation thus consists in the difference between the reference interest rate plus 1 000 basis points and the actual remuneration against which the silent participation was provided.

([7]) OJ C 71, 11.3.2000, p. 14.
([8]) See footnote 5.

(87) In calculating the aid element, the variable remuneration of 3.5 % can be taken only partly into account as it depends on the company realising profits. The company's situation was, however, weak and the profit outlook was unclear. The Commission therefore considers that only 50 % of the variable remuneration should be taken into account, i.e. 1.75 %. In calculating the aid element, the actual remuneration should, therefore, be the fixed rate of 8.75 % plus 50 % of the variable remuneration of 3.5 %, giving a total rate of 10.5 %. The aid element consequently consists in the difference between the reference rate plus 1 000 basis points and the remuneration of 10.5 %.

Aid element of Measures 2 and 3

(88) The guarantees in the case of Measures 2 and 3 enabled Sachsen Zweirad GmbH and Biria GmbH to obtain better financial terms for loans than otherwise normally available on the financial markets. The aid element of these guarantees is the difference between the interest rate that Sachsen Zweirad GmbH and Biria GmbH would have had to pay on a loan on market conditions, i.e. without a guarantee, and the interest rate at which the guaranteed loan was actually provided. This should correspond to the premium that a market economy guarantor would have required for these guarantees. As Sachsen Zweirad GmbH and Biria GmbH were in difficulty at the time the guarantees and the loans were provided, the aid element can amount to as much as 100 % of the guarantees as no lender would have provided the loans without a guarantee ([9]).

(89) According to the Commission notice on the method for setting the reference and discount rates ([10]), the Commission establishes reference rates which are supposed to reflect the average level of interest rates charged on medium- and long-term loans backed by normal security. The notice also points out that this reference rate is a floor rate which may be increased in situations involving a particular risk (for example, an undertaking in difficulty or where the security normally required by banks is not provided). In such cases, the premium may amount to 400 basis points or more.

(90) As explained above in paragraphs 66 to 78, Sachsen Zweirad GmbH and Biria GmbH were companies in difficulty at the time the guarantees were provided. The loan and the guarantee to Sachsen Zweirad GmbH involved an additional risk as the collateral provided was particularly low. The guarantee for the loan to Sachsen Zweirad GmbH was secured only by an absolute guarantee ('selbstschuldnerische Bürgschaft') provided by the group companies. The economic value of such general guarantees is very low.

(91) Therefore, in the present case, the Commission considers that, without the guarantee, Sachsen Zweirad GmbH would have had to pay an interest rate at least equal to the reference rate plus 400 basis points because it was a company in difficulty and plus a further 400 basis points because of the very low collateral. The aid element of the guarantee thus consists in the difference between the reference rate plus 800 basis points and the actual rate at which the guaranteed loan was provided.

(92) As regards the loan and the guarantee to Biria GmbH, the collateral provided had a higher economic value than that for the guarantee to Sachsen Zweirad GmbH. Nevertheless, the collateral is still lower than that normally required. The guarantee to Biria GmbH is secured by a first-rank mortgage on property of Bike Systems amounting to EUR 15m. The mortgage is, however, subordinated to another loan of EUR 2m. This first-rank mortgage therefore covers only just over 50 % of the total sum of the loan. The other forms of collateral (mortgages, assignment of claims, assignment of materials in the possession of the group companies and absolute guarantee on the part of the owner of Biria) were of low economic value.

(93) Consequently, the Commission takes the view that, without the guarantee, Biria GmbH would have had to pay an interest rate at least equal to the reference rate plus 400 basis points because it was a company in difficulty and plus a further 300 basis points because of the low collateral (compared with the premium of 400 basis points for the guarantee to Sachsen Zweirad GmbH because of the very low collateral). The aid element of the guarantee thus consists in the difference between the reference rate plus 700 basis points and the actual rate at which the guaranteed loans were provided.

6.5. **Derogations under Article 87(2) and (3) of the EC Treaty**

(94) Article 87(2) and (3) of the EC Treaty provides for exemptions to the general prohibition of state aid as spelt out in Article 87(1).

([9]) See footnote 7.
([10]) See footnote 5.

(95) The exemptions in Article 87(2) do not apply in the present case because the aid measures neither have a social character nor are granted to individual consumers; moreover, the measures do not make good the damage caused by natural disasters or exceptional occurrences and are not granted to the economy of certain areas of the Federal Republic of Germany affected by its division.

(96) 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 aid to promote culture and heritage conservation.

(97) This leaves the exemptions provided for in Article 87(3)(a) and (c) and in the relevant Community guidelines.

Measure 1

(98) Firstly, the Commission notes that Bike Systems is located in an assisted area under Article 87(3)(a) of the EC Treaty that is eligible for regional aid. Nevertheless, despite the doubts raised by the Commission when initiating the formal investigation procedure, Germany did not provide any information to show that the conditions for the granting of regional aid as laid down in the Guidelines on national regional aid ([11]) were met.

(99) Further exemptions are laid down in the Community Guidelines. As the aid was granted in March 2001, the Community Guidelines of 9 October 1999 ([12]) apply. The Commission does not possess any information to show that the aid can be considered to be compatible with the EC Treaty on the basis of the Community Guidelines. Under the Community Guidelines, the granting of restructuring aid is conditional on the existence of a sound restructuring plan, with undue distortions of competition being avoided and the aid being limited to the minimum. Despite the doubts raised by the Commission when initiating the formal investigation procedure, Germany did not provide any information to show that these conditions had been met. The Commission concludes therefore that the conditions of the Community Guidelines have not been met.

([11]) OJ C 74, 10.3.1998, p. 9.
([12]) See footnote 4.

(100) In addition, none of the other Community guidelines and regulations governing aid for research and development, for the environment, for small and medium-sized enterprises, for employment and training, risk capital, etc. apply to the present measure. Since it does not correspond to any objective of common interest, the aid constitutes operating aid that is incompatible with the EC Treaty.

Measures 2 and 3

(101) The Commission notes that Sachsen Zweirad GmbH and Biria GmbH are located in an assisted area under Article 87(3)(a) of the Treaty. Nevertheless, the provisions of that indent and the regional provisions of indent (c) are not applicable as Sachsen Zweirad GmbH and Biria GmbH were in difficulty and the objective of the aid measures was not the economic development of a certain region.

(102) The Commission concludes that only the Community Guidelines could be applicable. As the aid was granted in March and December 2003, the Community Guidelines of 9 October 1999 ([13]) apply.

(103) The granting of aid is conditional on the implementation of a restructuring plan the duration of which must be as short as possible and which restores the long-term viability of the firm within a reasonable timescale and on the basis of realistic assumptions as to the future operating conditions. Despite the doubts raised by the Commission when initiating the formal investigation procedure, Germany did not provide any information to show that the guarantees had been based on a sound restructuring plan that would have restored the group's viability.

(104) Measures must also be taken to mitigate as far as possible any adverse effects of the aid on competitors. This usually takes the form of a limitation on the presence which the company can enjoy on its market or markets after the end of the restructuring period. The Commission was not provided with any information on the relevant market or on the share of the Biria Group on that relevant market. It was not provided either with any information on compensatory measures to limit the company's presence on the market. Instead, the Biria Group seems to have expanded with the takeover of Checker Pig and Bike Systems in 2001.

([13]) See footnote 4.

(105) The amount of aid must be limited to the strict minimum required to enable restructuring to be undertaken in the light of the existing financial resources of the company and its shareholders. In addition, the beneficiary must make a substantial contribution to the restructuring costs from its own resources or from external financing on market conditions. As the granting of the aid was not based on a restructuring plan, the Commission has no information on the contribution of the beneficiary and as to whether the aid was limited to the strict minimum.

(106) According to the Community Guidelines, restructuring aid should be granted only once. If the firm concerned has received restructuring aid in the past and if less than ten years have elapsed since the restructuring period came to an end, the Commission will normally allow further restructuring aid only in exceptional and unforeseeable circumstances.

(107) In April 1996 and March 1998 Sachsen Zweirad GmbH received restructuring aid in form of a public participation amounting to a total of EUR 1 278 200 under an approved aid scheme. Since less then ten years have elapsed since the restructuring period of Sachsen Zweirad GmbH came to an end and since the Commission is not aware of any exceptional and unforeseeable circumstances, the 'one time — last time' condition has not been met in granting the two guarantees.

(108) The Commission therefore comes to the conclusion that the conditions of the Community Guidelines are not met.

(109) In addition, none of the other Community guidelines and regulations governing aid for research and development, for the environment, for small and medium-sized enterprises, for employment and training, for risk capital, etc. apply to Measures 2 and 3. Since the measures do not correspond to any objective of common interest, the aid constitutes operating aid that is incompatible with the EC Treaty.

VII. **CONCLUSION**

(110) The Commission thus comes to the conclusion that the participation of gbb in Bike Systems of EUR 2 070 732, the 80 % guarantee for a loan of EUR 5.6m to Sachsen Zweirad GmbH and the 80 % guarantee for a loan of EUR 24.875m for Biria GmbH (now Biria AG) constitute state aid and do not meet the necessary conditions for them to be considered compatible with the common market,

HAS ADOPTED THIS DECISION:

Article 1

The state aid for Bike Systems GmbH & Co. Thüringer Zweiradwerk KG, Sachsen Zweirad GmbH and Biria GmbH (now Biria AG) is incompatible with the common market. The aid consisted of the following measures:

(a) Measure 1: a silent participation of EUR 2 070 732 provided to Bike Systems GmbH & Co. Thüringer Zweiradwerk KG. The aid element corresponds to the difference between the reference interest rate plus 1 000 basis points and the remuneration against which the silent participation was provided (fixed remuneration plus 50 % of the variable remuneration);

(b) Measure 2: a guarantee of EUR 4.480m to Sachsen Zweirad GmbH. The aid element corresponds to the difference between the reference interest rate plus 800 basis points and the interest rate at which the guaranteed loan was provided;

(c) Measure 3: a guarantee of EUR 19.9m to Biria GmbH (now Biria AG). The aid element corresponds to the difference between the reference interest rate plus 700 basis points and the interest rate at which the guaranteed loan was provided.

Article 2

1. Germany shall take all necessary measures to recover from the beneficiary the aid referred to in Article 1 and unlawfully made available to the beneficiary.

2. The silent participation and the guarantee for Biria GmbH (now Biria AG) shall be discontinued within two months following notification of this decision.

3. Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of the decision.

4. The aid to be recovered shall include interest from the date on which it was at the disposal of the beneficiary until the date of its recovery.

5. Interest shall be calculated in conformity with Chapter V of Commission Regulation (EC) No 794/2004 [14].

Article 3

Germany shall inform the Commission, within two months following notification of this decision, of the measures already taken or planned to comply with it. It shall provide this information using the questionnaire annexed to this Decision. In particular, it shall submit to the Commission all documents proving that recovery proceedings have been initiated against the beneficiary of the unlawful aid.

Article 4

This decision is addressed to the Federal Republic of Germany.

Done at Brussels, 24 January 2007.

For the Commission

Neelie KROES

Member of the Commission

[14] OJ L 140, 30.4.2004, p. 1.

ANNEX

Information regarding the implementation of the Commission Decision C(2007) 130

1. **Calculation of the amount to be recovered**

1.1. Please provide the following details regarding the amount of unlawful state aid that has been put at the disposal of the beneficiary:

Date(s) of payment (*)	Amount of aid (**)	Currency	Identity of beneficiary

(*) Date or dates on which the aid or individual instalments of aid were put at the disposal of the beneficiary; if the measure consists of several instalments and reimbursements, use separate rows.
(**) Amount of aid put at the disposal of the beneficiary, in gross aid equivalents.

Comments:

1.2. Please explain in detail how the interest payable on the amount to be recovered will be calculated.

2. **Measures planned and already taken**

2.1. Please describe in detail what measures have already been taken and what measures are planned to effect the immediate and effective recovery of the aid. Please also explain what alternative measures are available under national law to effect recovery. Where relevant, please indicate the legal basis for the measures taken or planned.

2.2. By what date will the recovery of the aid be completed?

3. **Recovery already effected**

3.1. Please provide the following details of aid that has been recovered from the beneficiary:

Date(s) (*)	Amount of aid repaid	Currency	Identify of beneficiary

(*) Date or dates on which the aid was repaid.

3.2. Please attach supporting documents for the repayments shown in the table at point 3.1.