COMMISSION DECISION

of 27 January 2010

on the State aid C 27/08 (ex N 426/05) which Germany implemented for Sovello AG (formerly EverQ GmbH)

(notified under document C(2010) 172)

(Only the German text is authentic)

(Text with EEA relevance)

(2010/358/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on European Union and to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) of the latter,

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],

Whereas:

1. PROCEDURE

(1) By letter dated 29 August 2005, registered as received on 1 September 2005, Germany notified the Commission of aid to be granted in the form of a SME bonus to EverQ GmbH (hereinafter: Sovello [2]). By letters dated 28 October 2005, 24 January 2006 and 4 April 2006, registered as received on the same day, Germany provided the Commission with further information.

(2) On 7 June 2006, the Commission approved, under reference C(2006) 2092 final, the SME bonus for Sovello (State aid case N 426/05 [3]).

(3) During its examination of another notified aid measure for Sovello (State aid case C 21/08 [4] — ex N 864/06), the Commission uncovered evidence that the decision on State aid case N 426/2005 may have been based on incomplete/incorrect information submitted during the notification procedure.

(4) By letter dated 17 March 2008, the Commission gave Germany the opportunity to comment on the intention of the Commission to open the formal investigation procedure before possibly revoking its decision of 7 June 2006, in line with Article 9 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty [5]. Germany submitted its comments by letters dated 15 April 2008, registered as received on 15 and 16 April 2008 respectively.

(5) By letter dated 17 June 2008, with reference C(2008) 2669 final, the Commission informed Germany that it had decided to initiate the procedure laid down in Article 108(2) TFEU in respect of the SME bonus granted to Sovello.

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

(7) Germany submitted its comments by letter dated 10 September 2008, registered as received on the same day. Germany submitted further comments by letters dated 20 March, 13 May, and 16 November 2009, registered as received on the same day respectively. Meetings between the Commission services and the German authorities took place on 2 April and 13 October 2009.

(8) The Commission did not receive any comments from third parties.

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[1] OJ C 253, 4.10.2008, p. 23.

[2] On 24 November 2008, EverQ GmbH was transformed in an 'Aktiengesellschaft' called Sovello AG. To facilitate understanding of the decision, the current name 'Sovello AG' will be used, even for the period preceding the change of name.

[3] OJ C 270, 7.11.2006, p. 2.

[4] Commission Decision 2009/697/EC (OJ L 237, 9.9.2009, p. 15).

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

[6] See footnote 1.

2. DETAILED DESCRIPTION OF THE AID

2.1. The project

(9) The purpose of the overall aid project (regional aid granted under approved aid schemes plus the notified SME bonus) was to build a new 30 MWp plant (Sovello1) to manufacture solar modules (ProdCom code 32.10.52.37) based on the String-Ribbon technology ([7]). The new plant was Sovello's first production site. The construction started in December 2004. The factory was intended to have a nominal production capacity of 30 Megawatt peak ([8]) and to be functional by 31 December 2007. Sovello1 already started production in April 2006.

2.2. The beneficiary

(10) The beneficiary of the notified aid is Sovello. Sovello was established as a joint venture in December 2004 by Q-Cells SE ([9]) (hereinafter Q-Cells) — owning 24,9 % of the shares — and the US firm Evergreen Solar Inc. (hereinafter: Evergreen) — owning 75,1 %. This situation is reflected in the initial master joint venture agreement ([10]) dated 14 January 2005 (hereinafter: MJVA1) between Evergreen and Q-Cells. As indicated in the MJVA1, prior to the date of this agreement, Q-Cells acquired Topas 107 V.V. GmbH, a shelf-company, which Q-Cells was to cause to become Sovello (at that time EverQ). The name of the shelf-company was changed to EverQ on 11 February 2005.

(11) Evergreen is a producer of solar modules and owns a patent on the String-Ribbon technology. Q-Cells is one of the largest producers of solar cells in the world. The aim of the joint venture Sovello was to first test the economic viability of the production of solar modules — based on the String-Ribbon technology brought in by Evergreen, and the cell manufacturing know-how and experience on the German market of Q-Cells — and at a later stage to enable industrial manufacturing of String-Ribbon modules.

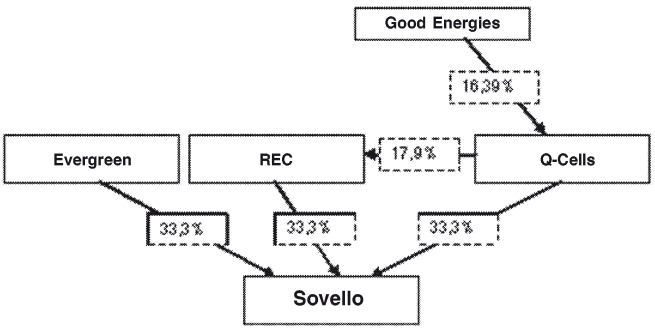
(12) In November 2005, Renewable Energy Corporation ASA (Norway) (hereinafter: REC) joined and took a participation of 15 % (based on a contract for silicon delivery to Sovello), whereas Evergreen and Q-Cells lowered their participation to respectively 64 % and 21 %. This situation is reflected in the second master joint venture agreement dated 25 November 2005 (hereinafter: MJVA2) between Evergreen, Q-Cells and REC. REC is among the world's largest producers of silicon materials for the photovoltaic industry.

(13) At the time of notification, Q-Cells and REC had a joint shareholder, the venture capital company Good Energies Investment BV (hereinafter: Good Energies). This company held 16 % of the shares of Q-Cells and 39 % of the shares of REC (situation on 7 March 2006). The German authorities informed that no further relationship between Q-Cells, REC and Evergreen existed besides having a share in Sovello.

(14) Since 19 December 2006, the partners Evergreen, Q-Cells and REC each hold a share of 33,3 % in Sovello (amendment to the MJVA2, dated 29 September 2006).

(15) On 5 February 2007, Q-Cells announced its plans to take a share of 17,9 % in REC. On the same date, Good Energies announced in a press release that it would sell its share in REC to Q-Cells and Orkla ASA (26 February 2007).

(16) The current shareholder structure of Sovello is represented in the figure below (situation Q3 2009):



([7]) The String-Ribbon technology is a continuous process whereby long wires unwind from spools, run through a silicon melt and pull a long 'ribbon' of silicon out of this melt. The ribbon is harvested periodically and cut into smaller pieces (solar wafers). The wafers are then cleaned and undergo further processing ($POCl_3$-diffusion, etching, SiN-antireflexcoating, metallisation and conditioning) into solar cells. The last stage consists in the assembly of the cells into solar modules (panels).

([8]) One Megawatt peak (MWp) corresponds to 1 000 000 Watt peak (Wp). Watt peak is a measurement unit for the capacity (nominal output) of solar cells and solar modules. Watt peak is the standard usually used in the photovoltaic industry to measure the technical capacity of solar modules; it expresses the nominal output of the module under standard test conditions.

([9]) Based in Thalheim, Sachsen-Anhalt, Germany. Formerly Q-Cells AG.

([10]) This MJVA1 is available on Internet: http://www.secinfo.com/dsvRx.z7n.d.htm

(17) Different company documents and shareholder decisions illustrate the development of Sovello. The document titled 'Project "Sovello": Heads of Agreement' (hereinafter: Heads of Agreement), signed by the CEO's of Evergreen and Q-Cells, is anterior to the MJVA1. This agreement outlines a possible transaction between the two companies regarding the establishment and conduct of a joint venture for the development, manufacture and sale of solar products based upon String-Ribbon technology. The text mentions the understanding of the parties that in order to qualify for certain German government subsidies, Q-Cells' ownership of Sovello must be less than 25 %. It also announces the will of the parties to ensure that they both have a shared voice in major company actions, and contains provisions which point to the essential role of Q-Cells for the operability of the joint venture.

(18) The Articles of Association of Sovello also confer to Q-Cells substantial decisional rights (the Supervisory Board is composed of two persons nominated by Evergreen and one by Q-Cells, but for several strategic decisions the agreement of at least one of each partners' nominees is required).

(19) The MJVA1 sets the participation of Evergreen in Sovello at 75,1 %, and that of Q-Cells at 24,9 %. It however includes the possibility for Q-Cells to — if this would not result in a decrease of investment grants — increase its ownership interest to 50 %. The MJVA1 foresees additional possible agreements between the parties (on services, technology, and marketing). In reality, the modules produced by Sovello were distributed by Evergreen under the Evergreen brand (until early 2009).

(20) The MJVA2 sets the following shareholder structure: Evergreen 64 %, Q-Cells 21 % and REC 15 %. It confirms the possibility for Q-Cells to increase its share up to the same level as Evergreen, whereas for REC, the possibility to increase its share to 21 % and to 33,3 % is subject to further silicon supply contracts.

(21) The timeline representing the development of Sovello along important company documents and decisions is summarized in table I below.

Table I

Development of Sovello

Date	Document or fact	Shareholder structure
Summer 2004	Heads of Agreement	Evergreen 75,1 %, Q-Cells 24,9 %
27.12.2004	Application for aid	
13.1.2005	Articles of Association of Sovello	
14.1.2005	Initial master joint venture agreement (MJVA1)	
21.4.2005	Granting of aid	
1.9.2005	Notification of SME bonus (N 426/05)	
25.11.2005	Second master joint venture agreement (MJVA2)	REC 15 %, Evergreen 64 %, Q-Cells 21 %
7.6.2006	Commission approval of SME bonus (N 426/05)	
29.9.2006 (effective as from 19.12.2006)	Modification of the MJVA2	Evergreen, Q-Cells and REC each 33,3 %

2.3. **Investment cost and financing of the project**

(22) The investment project involves a total investment in nominal value of EUR 65 699 302, of which EUR 60 873 300 are eligible for regional aid. Table II below gives a breakdown of the total investment cost for the notified project.

Table II

Breakdown of the project costs (in nominal values)

(in EUR)

Investment category	Amount
Land	[…] (*)
Buildings	[…]
Machinery/equipment	[…]
Total investment cost	65 699 302
Total eligible cost	60 873 300

(*) Covered by the obligation of professional secrecy.

(23) The project was financed using own resources and bank loans, in addition to the aid applied for. Table III below gives an overview of the financing of the notified project.

Table III

Financing of the project (in nominal values)

(in EUR)

Resource	Amount
Own resources	[…]
GA grant	14 142 000
IZ investment premium	14 329 100
Bank loan (not covered by public guarantee)	8 000 000
Loan from mother companies	[…]
Total	65 699 302

2.4. **Applicable regional aid intensity ceiling**

(24) The investment is located in Thalheim, Landkreis Bitterfeld, Sachsen-Anhalt, Germany, an assisted area pursuant to Article 107(3)(a) TFEU, with an aid intensity ceiling of 35 % gross grant equivalent (GGE), according to the Guidelines on national regional aid ([11]) (hereinafter: RAG 1998) and the regional aid map established for Germany and in force till the end of 2006 ([12]).

([11]) OJ C 74, 10.3.1998, p. 9.

([12]) State aid N 641/02 — Germany — Regional State aid map for Germany (2004-2006).

2.5. **Aid amount and aid intensity**

(25) The aid under scrutiny concerns a SME bonus of 15 %, notified under N 426/05 required by the approval decision pursuant to Article 4(3)(b) of Commission Regulation (EC) No 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises ([13]) (hereinafter: SME block-exemption Regulation), to be granted as a top-up to regional aid granted to Sovello on the basis of the existing regional aid schemes 'Improvement of the regional economic structure' (State aid N 642/02 ([14]) — hereinafter: the GA scheme), and the 'Investment Premium Law 2005' (State aid N 142a/04 ([15]) — hereinafter: the IZ scheme). The SME bonus corresponds to an aid amount of EUR 9 130 995.

2.6. **Assessment of SME status of Sovello in Commission decision N 426/05**

(26) For SMEs, the RAG 1998 allow to complement regional investment aid by a SME bonus ([16]). The SME bonus to Sovello was granted as a top-up to regional aid granted lawfully under the German GA scheme.

(27) To establish whether a firm constitutes a SME, the Commission applies the Commission recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises ([17]) (hereinafter: the SME Recommendation). In particular, it tests whether the firm concerned meets certain ceilings (staff headcount, turnover, size of balance sheet). In these tests, the corresponding data for linked enterprises (having dominant influence by, mainly, holding the majority of voting rights) are fully taken into account, whereas the data for partner enterprises (holding a minimum of 25 % of shares or voting rights) are taken into account proportionally to their share in the target enterprise.

(28) In its decision N 426/05 (see above recital 2), the Commission included in its calculation the relevant data for Sovello itself and for Evergreen, but not the data for Q-Cells and REC, since at the time of notification and until the Commission took its approval decision they held less than 25 % in shares or voting rights. On this basis, the Commission concluded that Sovello was an SME and approved the notified aid.

([13]) OJ L 10, 13.1.2001, p. 33.

([14]) Commission Decision of 1 October 2003 (OJ C 284, 27.11.2003, p. 5).

([15]) Commission Decision of 19 January 2005 (OJ C 235, 23.9.2005, p. 4).

([16]) A bonus of 10 % GGE for SMEs located in Art. 107(3)(c) areas, and 15 % GGE for SMEs located in Art. 107(3)(a) areas.

([17]) Commission recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36).

3. GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

3.1. The new information

(29) The new information discovered by the Commission during its assessment of another notified aid for Sovello concerns the MJVA1 between Evergreen and Q-Cells on the creation of Sovello, which was not submitted to the Commission during the preliminary investigation phase for the case N 426/05. This information led to concerns that the joint venture partners had kept the participation of Q-Cells artificially below 25 % (first at 24,9 %) in order to maximize the allowable amount of State aid (including an SME bonus), whereas Q-Cells was represented in the board of the joint venture by one out of three directors, with a veto right on important decisions. On this basis, the Commission invited Germany to comment on its intention to open the formal investigation procedure before possibly revoking its original decision of 7 June 2006, in line with Article 9 of Regulation (EC) No 659/1999.

(30) With its letter dated 15 April 2008, Germany submitted a copy of the Articles of Association of Sovello, of the Heads of Agreement, as well as notarised copies of the MJVA1, the MJVA2 and the amended MJVA2. In this letter, Germany took the view that in the case of Sovello, at the time of the notification, the formal criteria concerning the thresholds as defined in the Commission recommendation were met and that no other clearly defined and practically usable criteria are spelled out in the SME Recommendation. Therefore, Germany was of the opinion that these formal criteria for the determination of the SME status of an enterprise should be decisive, in order to ensure legal certainty and calculability of the Commission State aid control policy, and that, if the Commission is of the view that these formal criteria are not adequate anymore, it should not change its practice in the context of individual cases, but consider changing the applicable rules itself.

(31) Germany further observed that it did not deliberately conceal nor withhold information at the time of the notification, and that the initial participations of the shareholders (75,1 % for Evergreen and 24,9 % for Q-Cells) were based on economic grounds. Germany further reported that the participation of Q-Cells in the initial joint venture did not relieve Sovello from the typical handicaps of starting SMEs.

3.2. Possible consequences of the new information for the assessment

(32) The Commission however took the view that even if Sovello may have met the formal criteria of the SME definition, the Commission had strong indications that these formal criteria were only met by artificially keeping the participation of Q-Cells in Sovello below 25 %, with the essential purpose to obtain a SME bonus, while the effective influence of Q-Cells in Sovello was stronger. Consequently, the Commission considered that it must be alert to the possibility that the shareholder structure of the beneficiary had been artificially designed in order to circumvent the SME definition.

(33) The new information thus led to the fact that the Commission had doubts whether Sovello constituted a SME in the sense of the SME Recommendation. If this was not the case, the notified and approved SME bonus would be incompatible with the TFEU.

(34) Before revoking its original decision of 7 June 2006, which might have been based on incomplete/incorrect information, and taking a new decision, the Commission opened the formal investigation procedure, in accordance with Article 9 of Regulation (EC) No 659/1999. This Article 9 stipulates that 'the Commission may revoke a decision (…) after having given the Member State concerned the opportunity to submit its comments, where the decision was based on incorrect information provided during the procedure which was a determining factor for the decision. Before revoking a decision and taking a new decision, the Commission shall open the formal investigation procedure pursuant to Article 4(4). (…)'.

4. COMMENTS FROM INTERESTED PARTIES

(35) The Commission received no observations from interested parties.

5. COMMENTS FROM THE GERMAN AUTHORITIES

5.1. Legal basis

5.1.1. *Article 9 of Regulation (EC) No 659/1999 not applicable*

(36) Germany is of the opinion that the pre-conditions for the revocation of the decision N 426/05 — on the basis of alleged new information — do not exist. Germany claims that the information it provided to the Commission in the context of the notification of case N 426/05 was neither incomplete nor incorrect, and that consequently Article 9 of Regulation (EC) No 659/1999 is not applicable. Germany argues that the Commission was informed of the fact that Sovello was a newly founded technology enterprise in the solar industry, created as a joint venture between Evergreen and Q-Cells, which did not exceed the thresholds of the SME definition and which was exposed to the typical handicaps of an SME. Germany adds that neither the MJVA1 nor the Heads of Agreement contain new information which could justify a revocation of the decision N 426/05.

(37) Germany claims that at the request of the Commission (letter dated 30 December 2005, D/57570), it provided the model declaration as annexed to the Commission Communication 'Model declaration on the information relating to the qualification of an enterprise as an SME' ([18]) (hereinafter: the Commission Communication on the Model declaration) for Sovello in the context of the notification, stating that Evergreen is a linked enterprise with Sovello and that Sovello is independent from Q-Cells. Germany also submitted a declaration under oath from Q-Cells stating that it is nor a partner to nor a linked company with Sovello.

(38) Germany argues that it, nor Sovello, have seen any indication in the SME block-exemption Regulation, in the Commission Communication on the Model declaration, or in the information requests of the Commission, which invited them to provide the joint venture agreement in the course of the notification. Therefore, Germany is of the opinion that it has submitted complete information at that time.

5.1.2. *No additional criteria to be considered*

(39) Germany observes that whereas to define SMEs the former SME recommendation of 1996 ([19]) refers to thresholds as well as a so-called independency criterion, the actual SME definition solely differentiates between autonomous, partner and linked enterprises. Germany argues that the actual SME block-exemption Regulation, in conjunction with the SME definition, is binding for the Commission, and can certainly not be narrowed by adding unwritten criteria. Neither the Court of Justice nor the Court of First Instance has in its judgements considered such unwritten criteria in cases based on the new SME definition.

(40) Germany contests that the independence criteria set out by the Court of Justice in its judgment on case C 91/01 Italy v Commission ([20]) (hereinafter: the Solar Tech case), based on the former SME recommendation of 1996, remain also valid for cases to be assessed on the basis of the new SME definition. According to Germany, to base an assessment on such unwritten criteria would be incompatible with the objective of revising the SME definition stated in recital 8 of the SME block-exemption Regulation: 'In order to eliminate differences that might give rise to distortions of competitions, in order to facilitate coordination between different Community and national initiatives concerning small and medium-sized enterprises, and for reasons of administrative clarity and legal certainty, …'.

([18]) OJ C 118, 20.5.2003, p. 5.
([19]) Commission Recommendation 96/280/EC (OJ L 107, 30.4.1996, p. 4).
([20]) Judgment of the Court of 29 April 2004, Case C 91/01, ECR 2004 Page I-04355.

(41) Germany argues that for the sake of legal certainty and equal treatment, the Commission should first publish possible changes (incorporation of new additional criteria) to the SME definition, before applying such changes to individual cases. Moreover, if the European legislator had wished to consider the criterion of 'suffering the typical handicaps of an SME', it would have taken up this criterion in its new SME definition. Whether a company suffers the typical handicaps of an SME should therefore only be verified using the formal SME criteria. Germany adds that the determination of a 25 % threshold for partner enterprises would be obsolete when in practice this threshold would not be applied.

(42) Germany states that the aim of the new SME definition was to allow for a consistent promotion of SMEs and their control by national administrations and courts on the basis of clear and unequivocal definitions. It deduces that the new SME definition therefore leaves no scope for judgment evaluation or for unwritten conditional elements.

5.1.3. *Solar Tech and Pollmeier cases are not comparable to Sovello*

(43) Germany furthermore brings forward that neither the holding structure nor the economic conditions of the companies referred to in the Solar Tech and the Pollmeier Malchow GmbH & Co. KG v Commission ([21]) cases, which are judgments based on the former SME recommendation of 1996, are comparable to the situation of Sovello.

(44) In the Solar Tech case, the beneficiary Solar Tech was owned for only 24 % by the Permasteelisa concern (a large company), but the founder and majority shareholder of this concern, being also the manager of Solar Tech, owned 46 % of the capital, and the president of the concern as well as a member of the board of Permasteelisa both owned 15 % of the capital. On the basis of this financial interdependence, the possible influence of Permasteelisa shareholders, and the economic and organisational ties with Permasteelisa, the Commission concluded that Solar Tech did not suffer the typical handicaps of an SME and hence did not fulfil the independence criterion. Germany notes that in the Sovello joint venture however, both shareholders Evergreen and Q-Cells were independent from each other, and the minority shareholder Q-Cells did not have more influence in Sovello than that of a shareholder owning 24,9 % (see also point 5.3 below).

([21]) Judgment of the Court of First Instance of 14 October 2004, Case T-137/02, ECR 2004 Page II-03541.

(45) In the Pollmeier case, the beneficiary Pollmeier was fully owned by a natural person through an intermediary company. All the other companies controlled by this natural person were active in the same or parallel economic sectors. The Commission considered the enterprises owned by this natural person as one economic entity and cumulated the financial data and staff headcounts, which exceeded the SME thresholds. Germany notes that at the time of the creation of Sovello however, both shareholders were independent from each other and had different purposes (research and development in the field of solar technology, for Evergreen, and the production of solar cells, for Q-Cells). The typical SME handicaps of Sovello could hence not be compensated by the integration in a group of large companies.

5.1.4. *No exception for joint ventures*

(46) Germany claims that the Commission in its opening decision of 17 June 2008 (see recital 5) goes beyond its authority in that it seems to assume that a beneficiary is automatically to be treated as one economic entity together with its joint venture partners, and that therefore the financial data and staff headcounts of all the joint venture partners should always be cumulated for the calculation of the SME thresholds.

(47) Germany states that thus the Commission claims the authority to take out a whole group of undertakings (namely joint ventures) from the application of the legally binding SME definition and to develop and apply particular SME criteria for this group of undertakings. Germany contests that such right could be derived from the case law of the European Courts on the former SME recommendation of 1996 or from any past Commission practice.

5.2. **Typical SME handicaps of Sovello**

(48) Germany asserts that at the time of notification, with its limited number of employees and limited financial resources, Sovello did suffer from typical SME handicaps related to financing of the investment project, commercialization of the output, as well as business and operational organisation. Germany recognizes the synergy effects of the cooperation with Evergreen and Q-Cells, but contests that these could compensate the typical SME handicaps of Sovello.

5.2.1. *SME handicaps related to financing*

(49) Germany claims that without public support Sovello would not have obtained external financing for its investment project in Thalheim. Germany states that the ratio of external investment financing for the Sovello project (EUR 8 million, i.e. 13 % of the total investment) is typical for SMEs. Germany adds that only […] of the […] solicited banks were interested in financing the project, one of which was only willing to provide EUR […] working capital and bridging finance up to 50 % of the public support. This situation would be typical for SMEs, not for large companies.

(50) Germany informs that the loan contract for the external financing was only concluded on […] November 2005. It was not possible to negotiate favourable lending conditions because of the […] credit rating of Sovello and the […] financial participation of the shareholders (as well as the […] financial situation of Sovello). Sovello had difficulties in providing sufficient securities for the loan (as it was not yet owner of the land, machinery and installations had not yet been delivered, buildings were still being constructed and there was no stock). The shareholders could […] provide […] securities either.

(51) Germany argues that the shareholders could only bring in very limited own resources. Until 2006, only Evergreen provided financing exceeding its share capital and capital reserves. Q-Cells was not […] to bring in such extra capital, as its […] resources were […] tied in its own investment projects.

(52) Germany states that the investment project could not have been carried out if no State aid including SME bonus would have been granted.

5.2.2. *SME handicaps related to commercialization*

(53) Germany further argues that Sovello was confronted to a substantial commercial risk, as it was still to demonstrate that the String-Ribbon technology could lead to industrially marketable products. The fact that Sovello had a sales agreement with Evergreen could not really reduce this risk because Evergreen was an SME itself and had no knowledge on the German market. The other shareholder, Q-Cells, had no experience in selling solar modules, as it only produced solar cells. Moreover, Q-Cells was also an SME ([22]) and had to concentrate its efforts on the commercialisation of its own output.

5.2.3. *SME handicaps related to business and operational organisation*

(54) The German authorities claim that the costs linked to business and operational organisation of Sovello were comparably higher than those of large enterprises. E.g. Sovello had to […].

([22]) On 2 March 2005, the Commission concluded that Q-Cells was a SME, and approved a SME bonus for Q-Cells in its decision N 457/04 (OJ C 131, 28.5.2005, p. 11).

5.3. **Influence of Q-Cells on Sovello**

(55) Germany contests that the influence of Q-Cells on Sovello at the time of notification was higher than the normal influence of a shareholder owning 24,9 % in Sovello. It rather says that such participation percentage is not unusual for similar projects of start-ups in high technology sectors.

(56) Germany explains that Evergreen took the initiative to start the project. In 10 years Evergreen had spent more than USD […] million developing the String-Ribbon technology without succeeding in making it profitable. The share price of Evergreen went down from ca. USD 20 in 2000 to about USD 2 in 2003-2004. Evergreen had to keep maximal control on the investment project, in order to ensure a maximum return for its shareholders in case of success, but it could not raise sufficient capital without the financial participation of a business partner. Q-Cells was a good candidate because in addition to finance, it could also bring in its experience in building industrial plants in the photovoltaic sector and its knowledge in solar cells technology. Germany further reports that for these reasons Evergreen decided to choose Q-Cells as joint venture partner and not […], who was a stronger financial party but wanted more influence.

(57) At the time of concluding the MVJA1 with Evergreen, Q-Cells had already invested in a large project for the production of conventional solar cells. It had only limited resources available for investment in other projects. According to Germany, the purpose of Q-Cells' participation in Sovello was to gain knowledge in new technologies for the production of solar wafers, cells and modules, as well as to exploit its experience in the development of solar cell plants.

(58) For the above reasons, Q-Cells accepted a minority participation of 24,9 %. Germany mentions that in the same logic, Q-Cells had taken a similar minority participation (21,19 %) in CSG Solar AG ([23]), a company producing solar modules based on the thin-film technology. The level of the participation is not only based on the possible financial contribution but also on the technological input.

(59) Germany stresses that the participation quotes of the shareholders in Sovello fully represented the real intention and influence of both joint venture partners, and that the voting rights were shared accordingly. This resulted in the factual situation that Evergreen could take important business decisions on its own, while Q-Cells did not have this possibility.

(60) Germany argues that a potential future increase of Q-Cells' participation was agreed but was subject to certain conditions and contribution of corresponding extra capital. One of the conditions mentioned in the MJVA1 was that such a participation increase should not jeopardise the aid granted to Sovello. Germany points out that the aid measure was the reason for the location of the investment project in Germany instead of the USA, and that this is not in contradiction with State aid rules. Germany adds that Q-Cells had no influence on this, and that it is not illegitimate nor a circumvention of the rules if the joint venture partners aim to safeguard the total financing of Sovello.

(61) Germany is of the view that there is a distinction between influence existing at a certain moment in time and potential future influence based on a possible increase of the participation of Q-Cells. Germany stresses that it was totally uncertain whether this participation increase would take place, and that both parties knew it would not follow quickly and certainly not before the probation of the new technology. In fact, the proposed increase up to 50 % as taken up in the MJVA1 was never realized. Quite to the contrary, on the basis of the second agreement (the MJVA2) dated 22 November 2005, Q-Cells' participation was lowered to 21 %. According to Germany, this clearly shows that there is no 'automatism' allowing to conclude that it was established from the outset that Q-Cells would own more than 24,9 % of Sovello's shares.

(62) Germany furthermore states that the fact that Q-Cells provided an executive officer for Sovello was only a transitional arrangement (December 2004 until April 2005) which did not reduce the decisive influence of Evergreen, who also provided an executive officer as from the start of the joint venture. Germany adds that based on its majority position in the Supervisory Board, Evergreen had the right to appoint or recall any executive officer.

(63) Germany contests that the formulation in the Heads of Agreement, saying that Q-Cells' ownership of Sovello must be less than 25 % in order to qualify for certain German government subsidies, would lead to an influence from Q-Cells going beyond its real participation of 24,9 %. Germany rather explains that it only represents what was later taken up in the MJVA1, namely the intention of the parties not to be in breach of any government support conditions. Germany also points to another paragraph in the Heads of Agreement, where it is mentioned that as Sovello operations will

([23]) On 3 May 2005, the Commission concluded that CSG Solar was a SME, and approved a SME bonus for CSG Solar in its decision N 122/05 (OJ C 235, 23.9.2005, p. 3); on 19 July 2006, the Commission concluded that CSG Solar was still a SME, and approved a second SME bonus for CSG Solar in its decision N 335/06 (OJ C 232, 27.9.2006, p. 2).

represent a substantial majority of the manufacturing capacity of Evergreen, Evergreen will be required to own a majority interest in the equity of Sovello in the near term. Germany finally notes that the Heads of Agreement is only a working base between the parties which was not legally binding.

(64) Germany contests any possible influence of Q-Cells beyond its participation of 24,9 % which could be derived from agreements with Sovello. It stresses that all such agreements were concluded on market conditions and that no further economic, financial, organisational or other relation exists between Q-Cells and Sovello.

(65) Germany concludes that the changes to the distribution of ownership after the foundation of Sovello are not based on the original MJVA1, but are linked with the entry of REC into the joint venture, upon the latter's agreement to supply large quantities of silicon to Sovello, in exchange of a participation of 15 % in the joint venture (as agreed in the MJVA2). Following this entry, Evergreen lowered its participation by 11,1 % and Q-Cells by 3,9 %. According to Germany, this proves the primary willingness of Q-Cells to remain a minority shareholder. It was only at a later stage, when REC agreed to supply additional silicon, and after the technological success of the Sovello1 investment was proven, that the participations of the three shareholders were brought to an equal 33,3 % (modification of the MJVA2, dated 29 September 2006, effective as from 19 December 2006).

5.4. **Participation of Q-Cells based on German company law**

(66) Germany claims that the decisional rights conferred to Q-Cells in the joint venture are not unusual for young technology joint ventures such as Sovello, and are comparable to those given to venture capital investors holding minority financial participations. Q-Cells does not have more influence than that of a minority shareholder. It brought in 24,9 % of the capital, but also its cell manufacturing know-how, and hence wanted some influence on decisions related to the contracts of the joint venture cooperation. Germany argues that these rights to influence certain corporate decisions were necessary to protect Q-Cells, because it was not excluded that otherwise Evergreen could use its influence on the management of Sovello preferentially in its own interest. Germany also adds that it is common practice to allow minority shareholders to appoint a member of the supervisory board.

(67) In order to indicate that the participation of 24,9 % of Q-Cells is not determined by the intention to obtain a SME bonus, Germany also refers to German company law. On the one hand, Germany points out that the influence of Q-Cells is corresponding to the rules on protection of minority shareholders. In this context Germany refers to §§ 50, 61 and 66 of the GmbH Statute. These articles define certain rights of minority shareholders of a GmbH with a participation of minimum 10 % of the shares such as the right to ask for a shareholder's meeting, the right to put items on the agenda of the shareholders' meeting, the right to file a lawsuit in order to liquidate the company etc. According to Germany Q-Cells' influence does not go beyond what a minority shareholder of a GmbH with a participation of minimum 10 % of the shares is entitled to according to German company law. On the other hand, Germany mentions as further reason for the conferral of the decisional rights to Q-Cells the fact that due to the participation of only 24,9 % Q-Cells did not dispose of a blocking minority, which would have required a participation of more than 25 %. Therefore, the missing protection of Q-Cells by means of law was substituted by the corresponding decisional rights granted on the basis of the agreements.

5.5. **Summary**

(68) Germany contests the legal grounds on which the Commission initiated the procedure, arguing that at the time of notification it submitted complete and correct information, and that hence Article 9 of Regulation (EC) No 659/1999 is not applicable. Germany also claims that the Commission should only base its assessment of the SME status of a company on the respect of the formal criteria (staff headcount and financial ceilings) of the SME definition, and not add 'unwritten criteria' to verify whether a company suffers from typical SME handicaps. Germany contests that the SME bonus was obtained by Sovello in breach of the State aid rules, and claims that the Commission's allegations of possible manipulation cannot be maintained.

(69) Germany states that at the time of notification, Sovello fulfilled the conditions of the SME definition: Q-Cells only held a minority participation of 24,9 % in Sovello, and was nor a partner nor a linked enterprise with Sovello in the sense of the SME definition. Therefore, no data from Q-Cells were to be taken into account for the calculation of the SME thresholds. Germany contests that the influence of Q-Cells on Sovello at the time of notification was higher than that of an investor owning 24,9 % of the shares. Moreover, Germany is of the opinion that Sovello suffered indeed from the typical handicaps of an SME, and that without the State aid including the SME bonus, the investment project would not have been carried out.

6. ASSESSMENT OF THE AID

6.1. Preliminary remarks

(70) On 7 June 2006, the Commission approved a SME bonus of 15 % GGE (granted as a top-up to regional aid) for Sovello. Subsequently, the Commission uncovered evidence that this initial Commission decision might have been taken on the basis of incorrect information provided with the original notification and, insofar as that information could constitute a decisive factor for the decision, the Commission decided on 17 June 2008 to open the procedure laid down in Article 108(2) TFEU in respect of the aid at issue, with a view to revoking the decision N 426/05 and adopting a new decision.

6.2. Notification requirement, legal basis and applicable law

(71) Germany notified the SME bonus to Sovello by letter dated 29 August 2005, registered as received on 1 September 2005.

(72) The SME bonus to Sovello was granted on 21 April 2005 (subject to Commission approval) as a top-up to regional aid granted lawfully under the German GA scheme. This scheme contains a specific provision [24] requiring Germany to notify individually any award of SME bonuses which exceeds the individual notification threshold of SME block-exemption Regulation. The SME block-exemption Regulation, applicable at the time of notification, exempts investment aid to be given to SMEs at an intensity of 7,5 % net grant equivalent (NGE) for medium-sized companies and 15 % NGE for small companies anywhere within the EU. Where aid is granted in the assisted areas, the SME block-exemption Regulation also exempts aid up to the amount allowed under the RAG 1998 plus the additional SME bonus. The SME block-exemption Regulation does not exempt aid for certain projects with eligible expenses over EUR 25 million, or any project which will receive gross aid in excess of EUR 15 million. Such aid has to be individually notified.

(73) To establish whether a firm constitutes a SME, the Commission applies the SME Recommendation.

[24] 'The individual notification requirements for SMEs within the meaning of the Community definition, which can be found in Article 6 of SME Regulation (EC) No 70/2001, will be complied with in the same way as the in Article 9 of the same Regulation required record-keeping and reporting obligations.' The authentic German text reads: 'Die Einzelnotifizierungspflichten für KMUs im Sinne der Gemeinschaftsdefinition, die sich aus Artikel 6 der KMU-Verordnung 70/2001 ergeben, werden ebenso eingehalten wie die in Artikel 9 derselben Verordnung vorgeschriebenen Aufzeichnungs- und Mitteilungspflichten'.

6.3. Assessment of SME status of Sovello

6.3.1. *Applicability of Article 9 of Regulation (EC) No 659/1999*

(74) Article 9 of Regulation (EC) No 659/1999 stipulates that 'the Commission may revoke a decision (…) after having given the Member State concerned the opportunity to submit its comments, where the decision was based on incorrect information provided during the procedure which was a determining factor for the decision. Before revoking a decision and taking a new decision, the Commission shall open the formal investigation procedure pursuant to Article 4(4). (…)'.

(75) Germany contests to have submitted at any stage of the preliminary examination incorrect, or even incomplete information, as (a) it submitted all information required by the Commission Communication on the Model declaration, and (b) none of the relevant Community tests and provisions contained in the Recommendation required to give additional information on the construction of a joint venture and/or the Articles of Association of a company.

(76) The Commission Communication on the Model declaration however mentions that the use of the declaration is not mandatory, but designed as a possible example, and that such declarations are without prejudice to the checks or investigations provided for under national or EU rules. In the course of the preliminary investigation, the Commission requested Germany to either submit a declaration under oath from Q-Cells that this shareholder did not fulfil any of the conditions of Article 3(3)(a-d) [25] of the Annex to the SME Recommendation, or, if this was not possible, to provide a copy of the Articles of Association of Sovello. On 28 October 2005, the German authorities submitted such declaration under oath from Q-Cells. As the shareholder structure of Sovello was modified in the course of the preliminary examination of the notified aid by incorporating a third joint venture partner (REC), the German authorities also submitted a declaration under oath from this new shareholder (on 4 April 2006). The decision N 426/05 was taken after a preliminary examination on the basis of the information submitted by Germany.

[25] Article 3(3)(a-d) of the Annex to the SME Recommendation states: 'Linked enterprises' are enterprises which have any of the following relationships with each other:
(a) an enterprise has a majority of the shareholders' or members' voting rights in another enterprise;
(b) an enterprise has the right to appoint or remove a majority of the members of the administrative, management or supervisory body of another enterprise;
(c) an enterprise has the right to exercise a dominant influence over another enterprise pursuant to a contract entered into with that enterprise or to a provision in its memorandum or articles of association;
(d) an enterprise, which is a shareholder in or member of another enterprise, controls alone, pursuant to an agreement with other shareholders in or members of that enterprise, a majority of shareholders' or members' voting rights in that enterprise.

(77) The relevant question to be examined by the Commission was whether the beneficiary company was an SME. If at the time of the preliminary examination documents exist which explicitly reflect in writing that the shareholder structure of a joint venture is designed in order to comply with the SME definition, or which show clear intentions to change the company structure, as soon as a SME bonus is secured, it cannot be argued that such information is not at least relevant to assess the SME status of the joint venture in question and would not constitute a determining factor for the Commission decision.

(78) Therefore, as the Commission did not receive any of these documents (Heads of Agreement, Articles of Association, MJVA1 and MJVA2), it had an incomplete view of the relevant factual situation at that time, and hence took its initial positive decision on the SME bonus for Sovello on the basis of incomplete, and thus incorrect information.

(79) The Commission considers that Germany was under an obligation to submit all information which was available at the time and which was relevant for the decision N 426/05. Therefore, the Commission concludes that the information Germany provided was incomplete and thus incorrect. Consequently Article 9 of Regulation (EC) No 659/1999 is applicable, as it is an objective procedure, which allows the Commission to withdraw wrong decisions.

(80) Under the provisions of the national German rules, Germany was obliged to verify whether any circumvention of the SME definition existed. Indeed, the text of the German scheme ([26]) on the basis of which the SME bonus was granted explicitly states that the SME status is excluded — even if the formal criteria of the SME definition are fulfilled — in cases where larger enterprises have factual control, or in the case of economic entities which economically speaking cannot be considered an SME.

([26]) 33. Rahmenplan der Gemeinschaftsaufgabe 'Verbesserung der regionalen Wirtschaftsstruktur' (GA): 'Zur Ermittlung der Schwellenwerte für eigenständige Unternehmen, Partnerunternehmen bzw. verbundene Unternehmen gelten die in der KMU-Empfehlung der EU-Kommission enthaltenen Berechnungsmethoden. Diese Beurteilungskriterien dürfen nicht durch solche Unternehmen umgangen werden, die die Voraussetzungen für die Eigenschaft als kleine und mittlere Unternehmen zwar formal erfüllen, jedoch tatsächlich durch ein größeres oder mehrere größere Unternehmen kontrolliert werden. Es sind sämtliche rechtliche Gebilde auszuschließen, die eine wirtschaftliche Gruppe bilden, deren wirtschaftliche Bedeutung über die eines kleinen und mittleren Unternehmens hinausgeht.'

6.3.2. *Admissibility of 'additional criteria' for the assessment of the SME status*

(81) Germany argues that as in the SME Recommendation no other than the formal criteria concerning the thresholds are clearly defined, these formal criteria for the determination of the SME status of an enterprise should be decisive, in order to ensure legal certainty and calculability of the Commission State aid control policy. Germany further argues that possible additional criteria could only be envisaged in the context of a review of the SME definition, and not in the context of individual cases.

(82) For the definition of partner enterprises, the Commission Recommendation does indeed not foresee any other criteria than the 25 % threshold in shares, respectively voting rights. It also does not contain a specific anti-circumvention clause. However, the Commission enjoys a degree of discretionary power in the field of State aid, with a view to protect the internal market against not justifiable distortions of competition.

(83) The Commission acknowledges the need for legal certainty and transparency in the application of the State aid rules. Therefore, an assessment which goes beyond that of the application of the formal criteria should in any event be limited to very exceptional cases that can be clearly qualified as circumvention.

(84) Nevertheless the Commission does not add 'additional criteria' to the SME definition, but simply goes beyond a purely formal analysis which must be possible if the Commission has to take an individual decision based on Article 6 of the SME block-exemption Regulation. By doing so the Commission makes sure that the SME bonus is only granted to genuine SMEs for which size truly represents a handicap and not to enterprises which through linked and/or partner enterprises have access to funds and assistance not available to competitors of equal size. In order to ensure that only genuine SMEs are included, there has to be a way of eliminating legal arrangements in which the SME definition is circumvented. Such an approach is in conformity with the findings of the jurisprudence (Solar Tech and Pollmeier cases, see footnotes 20 and 21), where the Courts of the European Union have accepted that the Commission shall refuse the SME bonus where this would lead to circumvention. It is therefore inherent in the definition of an SME that it does not apply where such a risk exists and the criteria are only formally respected.

(85) The argumentation of Germany that the situation of Sovello is different from that of Solar Tech and

Pollmeier, and that this jurisprudence refers to the SME Recommendation of 1996 and hence is not applicable to the current SME definition is not relevant. The key elements of the SME Recommendation of 1996 for the determination of a partner enterprise (share of 25 % or more of the capital or the voting rights) have been taken up and just refined by SME Recommendation 2003/361/EC. Nevertheless as even the most sophisticated criteria may always be circumvented, a control of attempts to circumvent the applicable definition of an SME must in any case be possible. Indeed, it is rather a general principle — no circumvention — which the Courts have accepted.

6.3.3. *Company documents and factual situation*

(86) There are clear indications in the company documents (Heads of Agreement, Articles of Association of Sovello dated 13 January 2005, and MJVA1) that the initial corporate architecture was designed and aimed at obtaining the SME bonus. Point 5 of the Heads of Agreement is most explicit on this issue:

'The Parties understand that, in order to qualify for maximum grants, it is in the interest of JVCo that Q restricts its equity portion of JVCo until such time that either E or JVCo are no longer categorised as "small or medium enterprises" under the rules for investment grants etc., or that this restriction becomes null and void. As such, Q's ownership of JVCo must be less than 25 % in order to qualify for certain German government subsidies'. *(Underlining added)* ([27])

(87) This clear intention is confirmed by Article 2.5(c) of the MJVA1:

'The Parties shall use reasonable best efforts to obtain the Government Investment Grant Approval as soon as reasonably practicable following the Closing Date, including, but not limited to, making changes to the overall structure of the joint venture, this Agreement, the shareholdings in VentureCo, the Articles of Association and the Concurrent Agreements in order to ensure that the maximum amount of Government Investment Grants available for small and medium size enterprises will be secured by VentureCo; and to obtain the funds necessary to fund to VentureCo the amounts specified in Section 2.4 (b) and 2.4 (c) when due.' *(Underlining added)*

(88) Several elements suggest that from the start the intention of Evergreen and Q-Cells was to give equal power to both partners as soon as the SME bonus was secured:

— The MJVA1 lays down in its Article 3(6) that, 'if it is possible under the applicable grant regulations, that Q-Cells increases its ownership interest in Sovello to 50 %, without such increase of Q-Cells' ownership interest in Sovello possibly resulting in an application for Government Investment Grants being turned down, (…), then Q-Cells shall be offered to increase its ownership interest in Sovello to a level equal to the percentage' then held by Evergreen. In this context, a preferential price shall apply.

— The MJVA1 contains in its Article 3(6) even an emergency plan, foreseeing to find other ways than shareholding participation to increase Q-Cells ownership, if necessary:

'If at the time of an Additional Financing request the Grant Impunity Notice cannot be obtained, the Parties shall enter into discussions as to whether Q can participate in the Additional Financing to the extent necessary to enable it to increase its ownership in VentureCo to 50 %, as provided herein, in a manner other than by share subscription.' ([28]) *(Underlining added)*

([27]) 'JVCo' stands for EverQ (Sovello), 'Q' stands for Q-Cells, and 'E' stands for Evergreen.

([28]) 'VentureCo' stands for EverQ; 'Q' stands for Q-Cells. The Grant Impunity Notice is the written confirmation of the German authorities that the ownership increase is possible under the applicable grant regulations without resulting in a lowering of the grant or in a reimbursement obligation.

(89) The Commission considers that the provisions contained in the Articles of Association, the Heads of Agreement, and the MJVA1 give Q-Cells a level of influence on Sovello's business decisions that goes beyond what a minority shareholder with a participation of 24,9 % could expect under normal company law (though in a joint venture arrangement, this is not necessarily unusual). The Heads of Agreement stipulates that:

'The Governance of JVCo will generally be structured and balanced to take into account each Party's relative economic interest in JVCo and the fact that E needs initially to have a higher degree of control of JVCo as a result of the materiality of the operations of JVCo relative to E's operations on a consolidated basis. At the same time, the JVCo governance structure will include provisions that ensure that both E and Q have a shared voice in major actions of JVCo.' *(Underlining added)*

(90) In addition, the Heads of Agreement mentions that the parties will agree to identify certain major corporate actions that require the consent of both parties in a mutually agreed upon manner.

(91) Indeed, the initial Articles of Association of Sovello foresee that:

— The Supervisory Board is composed of three persons (two nominated by Evergreen, of which the president, who should be 'acceptable' for Q-Cells; one by Q-Cells, who is at the same time the substitute president).

— The agreement of at least one of each of both Evergreen and Q-Cells nominees is required for several important corporate actions (approval of annual plan and balance sheet; strategic decisions concerning timing and volume of production, capacity extension, sale of wafers/cells additionally to module; definition of brands and brand names; agreements concerning intellectual property…).

(92) As a consequence, since Q-Cells has substantial decisional rights, the German argument that Evergreen needed a participation exceeding 75 % to protect its interests (and thus the 24,9 % participation of Q-Cells is justified by other than circumvention-considerations) cannot be upheld. The Commission notes that Evergreen indeed desired to initially have a majority interest in Sovello (as stated in point 5 of the Heads of Agreement: 'E will be required to own a majority interest in the equity of JVCo in the near term'), but such majority could also be achieved with another participation percentage (between 51 % and 75 %).

(93) The influence of Q-Cells on strategic decisions is confirmed by Evergreen's annual report 2004 which mentions that:

'the strategic partnership is highly dependent on Q-Cells's expertise', *(Underlining added)*

and that:

'although initially a minority shareholder in the strategic partnership, Q-Cells will have the ability to influence the strategic direction of the strategic partnership and other material decisions of the strategic partnership; as a result, we may be unable to take certain actions that we believe would be in our best interests, which, given the expected materiality of the strategic partnership to our combined operations, could significantly harm our business; further, we may be liable to third parties for the material decisions and actions of Q-Cells in the strategic partnership, which actions may harm the strategic partnership and our business'. *(Underlining added)*

(94) The following extracts from the Heads of Agreement demonstrate that the role of Q-Cells in Sovello was essential for the operability of the joint venture:

'It is anticipated that because the facility will be located in Germany near Q's current operations, that Q will be a major source of transferred and seconded employees for JVCo. In addition, initially Q will take primary responsibility for recruiting new employees for the facility.'

'JVCo may outsource to a Party on a permanent or temporary basis, certain services (Infrastructure, management, operational, technology support and development, etc.) that can be provided by a party to JVCo on a more cost effective basis than if JVCo were to provide such services itself. In particular for the early phases of JVCo, both Parties commit to enter into agreements to supply necessary services to JVCo for a period of at least 2 years, until JVCo is in a position to function cost effectively without this support from its owner entities.'

'For example, it is anticipated that because of the proximity of the JVCo facility to Q, that Q will be in a position to effectively provide JVCo with infrastructure services until such time as JVCo is able to provide such services independently.'

(95) The MJVA1 also lists a whole range of services which may be provided to Sovello (by both parties Q-Cells and Evergreen): general advice regarding management issues, assistance with respect to Government investment grant application process, assistance with German permit applications, assistance with German management staff selection and recruitment process, Assistance with tax issues, advice regarding corporate and organizational structure, Advice and support regarding financing activities, making the parties' suppliers available, advice in connection with the transfer of the Parties' technology, technology support, local infrastructure purchasing, human resources and recruitment support (Article 9.9 of the MJVA1). It is true that the texts mention that these services will be provided on a market-rate or cost-plus basis, but the above shows that there are close relations between Sovello and Q-Cells.

(96) A press release issued by the parties on 24 January 2005 states that 'The proposed facility is expected to be constructed on property near Q-Cells' existing solar cell factories, and should therefore capture strong synergies with Q-Cells' operations.'

(97) Furthermore, Q-Cells acquired the shelf-company for the creation of Sovello, and the managing directors of this company were the CEO of Q-Cells and the CFO of Q-Cells, whereas the COO of Q-Cells had signing authority.

(98) Q-Cells provided an executive officer to Sovello, and even if Germany argues that this was only a transitional arrangement, and that Evergreen also provided an executive officer, this nevertheless is again an indication that the relations between Q-Cells and Sovello were very close, at least at the start of the joint venture.

(99) Germany argued that Evergreen had negotiated with other possible joint venture partners on the basis of a participation exceeding 75 %, but failed to submit evidence in writing of such negotiations. Germany offered in some correspondence to provide declarations under oath by representatives of Evergreen and Q-Cells on the considerations behind the 24,9 % share, but did finally not submit them.

(100) For these reasons, the Commission cannot follow the argument that the participation of 24,9 % of Q-Cells results necessarily from German company law and is not determined by the intention to obtain an SME bonus.

(101) The Commission is not convinced by the German argument that the possibility in the MJVA1 for Q-Cells to increase its participation to 50 % was not only conditional to the maintenance of the State subsidy, but also to a capacity expansion decision of both partners based on economic success of Sovello1, since the provisions of Article 3(6)(c) of the MJVA1 state:

'Additional Financing. If, be it in relation to a Capacity Expansion or otherwise, VentureCo requests in writing from both E and Q additional financing in addition to the Aggregate Equity Funding or Alternative Funding (an "Additional Financing"), and the Shareholders approve the corresponding capital increase in accordance with the Articles of Association (an "Additional Financing Request"), the following shall apply:

(i) If it is possible under the applicable grant regulations, as demonstrated by a written confirmation of the relevant grant authority (the "Grant Impunity Notice"), that Q increases its ownership interest in VentureCo to 50 %, without such increase of Q's ownership interest in VentureCo possibly resulting in an application for Government Investment Grants being turned down, in part or in full, or Government Investment Grants already obtained being reclaimed, in part or in full, by the competent authorities, then Q shall be offered in writing to provide such amount of an Additional Financing to enable it to increase its ownership interest in VentureCo to a level equal to (but not in excess of) the percentage then held by E (…).' *(Underlining added)*

(102) As a conclusion, upon careful analysis of different company documents, the Commission considers that at the time of the original notification, the formal ownership and decisional structure of Sovello, including both the 24,9 % share of Q-Cells and substantial influence of Q-Cells on Sovello decision making, was indeed deliberately and essentially designed to enable Sovello to obtain the SME bonus, whilst at the same time it was always the objective of the two strategic partners to establish the partnership on equal terms, once the SME bonus was obtained.

(103) Germany argues also that the participation of Q-Cells is based on German company law. Germany argued in particular that the successful development of the Sovello joint venture was of such importance for the economic success of Evergreen that Evergreen wanted to keep a maximum of decisional rights and influence on Sovello, and therefore did not accept, for the first phase of development of Sovello, to have shares and voting rights which did not exceed 75 %. This argument can only be understood to mean that Evergreen was not prepared to give shares and voting rights to Q-Cells which would have exceeded 25 %.

(104) To understand and assess the credibility of this line of argumentation, the Commission verified the provisions of the German GmbH Statute which is the applicable national law since Sovello AG was at the time EverQ GmbH, and fell under its provisions.

(105) The German GmbH Statute creates certain statutory minority rights in several paragraphs, in particular in §§ 50, 61, 66, and 53. The minority rights contained in §§ 50, 61, and 66 refer to rights of shareholders exceeding 10 % of votes, and are therefore irrelevant for the present assessment, since they are acquired by Q-Cells. Only § 53 contains a minority right which is not obtained by statute by Q-Cells by virtue of its share of 24,9 %. According to § 53, a minority of more than 25 % of the voting rights is entitled to block a modification of the Articles of Association of the limited company. By sole application of the law, Evergreen, as majority shareholder with voting rights exceeding 75 % could thus indeed take all important business decisions, including on changes to the Articles of Association. If the decisional rights included in the provisions of the Articles of Association and the MJVA did not contain additional decisional rights in favour of Q-Cells, the argument brought forward by Germany that Evergreen needed a share exceeding 75 % was credible, and the 24,9 % share of Q-Cells could be justified as the consequence of strict application of statutory rights, and could therefore be considered not to reflect an artificial corporate architecture aimed at circumventing the SME definition.

(106) However, under German company law, and notwithstanding the respect of the statutory provisions, freedom of contract applies, and the company's articles of association may contain provisions that give protection exceeding that foreseen by statute.

(107) This is exactly the situation of Sovello where the parties laid down in the Articles of Association that both of them have to agree to all important decisions, especially to a modification of the articles. If unanimity — like in the present case — is agreed, then the rule above does not apply, because it shall only protect the rights of a minority shareholder, but not restrict his rights. On the other hand, nothing of course would have restricted the parties' freedom to insert the same clause in the Articles of Association, if they had not agreed on a share of 24,9 %, but on a different share for Q-Cells. Therefore, in the case at hand the argument referring to the blocking rights of minority shareholders is not relevant. The German statements are therefore contradictory in itself; the statutory rights of a majority shareholder with a majority exceeding 75 % are an irrelevant argument when the substantial decisional rights given by that majority are limited by contract. In view of the above, the Commission concludes that under German company law there is no reason to choose a percentage of 24,9 %. The temporary reduction of Q-Cells shares following the entry of REC into the joint venture which was only upheld until three months after the initial approval of the SME bonus by the Commission, does not change this analysis.

(108) Germany argues that in November 2005 (with the entry of REC acquiring 15 % of the shares), and thus before the Commission took the decision N 426/05 on the SME bonus, both (1) the MJVA1 was abolished and replaced by the MJVA2, and (2) the participation of Q-Cells was lowered to 21 %.

(109) In general, the Commission assesses a case on the basis of the facts as they exist at the moment of the notification, unless the Member State explicitly modifies the notification. However, in a case where a company is already not an SME (even if the SME thresholds were formally respected) at the time of the original notification, and in a context of possible circumvention of the SME definition, the Commission would be particularly vigilant in checking subsequent changes which were communicated to the Commission after the original notification. In any event, in the present case, the modifications of the shareholder structure communicated to the Commission after the original notification cannot change the legal assessment. Indeed, the alleged intention to artificially keep the ownership of Q-Cells below 25 % was not altered by the later changes to the company structure (before the decision N 426/05 on the SME bonus), and the strong role of Q-Cells in Sovello is maintained in the MJVA2.

(110) The fact that the role of Q-Cells in the initial joint venture exceeded its 24,9 % share is also confirmed by the MJVA2, which provides that if part of the grants will have to be reimbursed, the three partners will lend the amount to be repaid to Sovello based on the following arrangement: REC will make a loan in proportion to its ownership percentage and the rest of the loan will be split evenly between Evergreen and Q-Cells.

(111) The rules after REC joined the joint venture are set out in the MJVA2. The MJVA2 provides that following an Additional Financing request, be it linked to capacity expansion or otherwise, Q-Cells may increase its participation up to the same level as Evergreen (Art. 3.5.c). Subject to a further silicon supply contract signed before […], REC may increase its shares up to 21 %, obtaining 6 % from Evergreen (Art. 3.4). In the case of Additional Financing, and still subject to a further silicon supply contract, REC will be entitled to increase its shareholding in Sovello to 33,3 % (Art. 3.5.d), i.e. the same level as Evergreen and Q-Cells. The internal company decision to expand its capacity was taken end June 2006. Equal participation of the three partners was agreed about three months after the initial Commission approval of the SME bonus, when both Q-Cells and REC increased their participation to 33,3 % (amended MJVA2).

(112) The rules on the appointment of directors and the decisional procedures in the supervisory board are largely maintained: under the MJVA2, both Q-Cells and REC have the right to appoint one director (two, once their participation exceeds 30 %), and decisions are taken by the majority of directors, with the proviso that at least two of the three owner firms must agree. Again, this goes beyond the decisional powers a minority shareholder may expect in a normal company situation (although maybe less unusual in a joint venture).

(113) Furthermore, it was Q-Cells who brought REC into the joint venture. Q-Cells had close customer and supplier relationships with REC and its subsidiaries ScanModule AB, Glava, Sweden ('ScanModule'), ScanCell AS, Narvik, Norway ('ScanCell'), and ScanWafer ASA, Høvik, Glomfjord, Porsgrunn, Norway. Indeed, REC supplied silicon and was the main wafer supplier to Q-Cells, and Q-Cells sold an important part of its cell production to ScanModule. The cells produced by ScanCell were sold on the market by Q-Cells. Moreover, in 2004 a verbal agreement was concluded between Q-Cells and REC with regard to sales and marketing support services on the part of Q-Cells in Norway. In addition, clear links also exist through M. Brenninkmeijer, who was member of the supervisory board of both Q-Cells and REC, and also managing director of Good Energies, the company which held 16 % of the shares of Q-Cells and 39 % of the shares of REC (see point 2.2). A similar structure was created for CSG Solar, where both Q-Cells and REC were minority shareholders and Q-Cells' CEO as well as M. Brenninkmeijer were members of the supervisory board.

(114) As a consequence of the above considerations the Commission considers that both at the time of notification and the time of the decision N 426/05, the formal ownership and decisional structure of Sovello was deliberately designed to enable Sovello to obtain the SME bonus (by keeping the participation of Q-Cells below 25 %), whilst at the same time it was always the objective of the two, later three strategic partners (REC ensuring the availability of silicon) to establish the partnership on equal terms, once the SME bonus was obtained. Indeed, three months after the Commission approval of the SME bonus, an amendment to the MJVA2 conferred equal participation (33,3 % each) to the three partners.

6.3.4. *Calculation of the SME threshold assuming that Q-Cells holds 25 %*

(115) According to Article 2 of the Annex to the SME Recommendation, small and medium-sized enterprises are defined as enterprises which

— have fewer than 250 employees, and

— have an annual turnover not exceeding EUR 50 million, and/or

— an annual balance-sheet total not exceeding EUR 43 million.

(116) The calculation of these thresholds depends on the structure of the target company (if it is an autonomous or partner/linked enterprise according to Article 3 of the Annex to the SME Recommendation). According to Article 4 of the Annex to the SME Recommendation, the data relevant for the staff headcount and the financial amounts to determine whether the beneficiary of an aid is an SME are those relating to the last approved accounting period and calculated on an annual basis. According to Article 6 of the Annex to the SME Recommendation, data of linked/partner enterprises have to be taken into account for the calculation of the SME thresholds (100 % for linked enterprises, and a proportion reflecting their participation for partner enterprises, i.e. minimum 25 %).

(117) As a consequence of all the above considerations, the Commission considers that Q-Cells should have been qualified as a partner enterprise (as if it held 25 %) of Sovello in the original decision if the Commission had been provided with all relevant information. On this basis, the Commission recalculated the SME thresholds for Sovello as defined in the SME Recommendation.

(118) Based on its majority share, Evergreen was a linked enterprise to Sovello. On this basis, 100 % of its data has to be taken into account for the calculation of the SME thresholds. The data used for Evergreen relate to the year 2004 (215 employees, an annual turnover of EUR 18,9 million and a balance sheet total of EUR 36,5 million). In the same year, Sovello had no employees, no turnover and a balance sheet of EUR 0,025 million. End 2004, Q-Cells had 350 employees, an annual turnover of EUR 128,7 million and a balance sheet total of EUR 105,6 million.

(119) The Commission recalculated the SME thresholds for Sovello including 100 % of the staff headcount, turnover and balance sheet for Sovello itself (data as submitted with the notification), 100 % of the data for Evergreen (linked enterprise, data end 2004 as submitted with the notification), and 25 % of the data for Q-Cells. Based on this calculation, all SME thresholds are exceeded and hence Sovello would not qualify for the SME status and thus not be entitled to receive an SME bonus.

(120) Germany claims that the Commission seems to assume that a joint venture should be automatically treated as one economic entity together with its joint venture partners, thereby developing and applying particular SME criteria for joint ventures. The Commission observes that the assessment of the present case demonstrates that this argument is not valid. Indeed, in line with Article 6 of the SME Recommendation, the Commission only took the pro rata (25 %) data of Q-Cells into account, as it considers that the participation of Q-Cells was artificially kept below this threshold.

6.4. **Lack of necessity of the SME bonus**

(121) As the SME thresholds are exceeded, there is no need to further investigate if Sovello really suffered from SME handicaps and if the granting of the SME bonus was therefore necessary. Germany nevertheless lists several 'SME handicaps' from which Sovello would have suffered (see point 5.2). As for the limited access to finance, and the German argument that without SME bonus the investment would not have been carried out, the Commission notes that the MJVA1 foresees ways to try to obtain 'Alternative Financing' in case of a shortfall of government subsidies. The MJVA2 foresees compensation of grant repayment obligations by the three joint venture partners (through a loan to Sovello, see recital 110). The Commission is therefore not convinced that the investment would not have taken place without the SME bonus. As for the commercial risk, the Commission takes the view that it is compensated by the possibility for Sovello to rely on the combined experience of Evergreen (for distribution and sales), Q-Cells (presence on the German market) and REC (active on the solar modules market through its subsidiaries) (see recital 113). The Commission rejects the German argument that Sovello had higher operational and business costs than large enterprises, as it received substantial support from Q-Cells, as described in recitals 94 and 95, and had secured access to silicon through REC (which was a serious bottle-neck for the solar industry in 2005).

(122) At any event, the Commission considers that its assessment based on the new information demonstrates that through its joint venture partners active in the same industrial sector Sovello potentially had access to funds and assistance not available to competitors of equal size which were not supported by linked or partner enterprises. Contrary to the German argumentation, the Commission therefore concludes that the SME bonus granted to Sovello was not necessary in order to ensure the financing of the investment.

6.5. **Conclusion**

(123) As a result, the Commission considers that Sovello was not eligible for the SME bonus of 15 %, and the SME bonus granted is incompatible with the internal market.

(124) Pursuant to Article 14(1) of Regulation (EC) No 659/1999, the Commission is in principle under an obligation to order the recovery of this incompatible aid from the beneficiary,

HAS ADOPTED THIS DECISION:

Article 1

The Decision adopted on 7 June 2006 in State aid case N 426/05 is hereby revoked.

Article 2

The State aid amounting to EUR 9 130 995 in prices of 2007 unlawfully granted by Germany, in breach of Article 108(3) TFEU, in favour of Sovello is incompatible with the internal market.

Article 3

1. Germany shall recover the aid referred to in Article 2 from the beneficiary.

2. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiary until their actual recovery.

3. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ([29]).

4. Germany shall cancel all outstanding payments of the aid referred to in Article 2 with effect from the date of notification of this decision.

Article 4

1. Recovery of the aid referred to in Article 2 shall be immediate and effective.

2. Germany shall ensure that this decision is implemented within four months following the date of notification of this Decision.

Article 5

1. Within two months following notification of this Decision, Germany shall submit the following information to the Commission:

(a) the total amount (principal and recovery interests) to be recovered from the beneficiary;

(b) a detailed description of the measures already taken and planned to comply with this Decision;

(c) documents demonstrating that the beneficiary has been ordered to repay the aid.

2. Germany shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 2 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiary.

Article 6

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 27 January 2010.

For the Commission

Neelie KROES

Member of the Commission

([29]) OJ L 140, 30.4.2004, p. 1.