COMMISSION DECISION

of 14 December 2010

on State aid granted by Germany to the Biria group (C 38/05 (ex NN 52/04))

(notified under document C(2010) 8289)

(Only the German text is authentic)

(Text with EEA relevance)

(2011/471/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof ([1]),

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 ([2]), and having regard to their comments,

Whereas:

I. PROCEDURE

1.1. Proceedings before the Commission

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

(2) There followed an exchange of correspondence between the Commission and Germany; by letter dated 24 January 2003, registered as incoming mail at the Commission on 28 January 2003, Germany informed the Commission that the plan to grant the guarantee, which was conditional on the Commission's approval, had been withdrawn. The complainant was informed accordingly by letter dated 17 February 2003.

(3) By letters dated 1 July 2003, registered as incoming mail on 9 July 2003, and 8 August 2003, registered as incoming mail on 5 September 2003, the complainant submitted further information concerning another public guarantee to the Biria group and public holdings in companies belonging to the group.

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

(5) The Commission doubted whether the aid granted to the Biria group complied with the schemes on the basis of which it had ostensibly been granted, and on 18 October 2004 it issued an information injunction. In response to the information injunction Germany submitted further information, by letter dated 31 January 2005, registered as incoming mail the same day.

(6) On 20 October 2005 the Commission initiated a formal investigation in respect of three suspected State aid measures. In the same decision the Commission took the view that several other measures that had been alleged to constitute illegal State aid either did not constitute State aid or had been granted in accordance with approved aid schemes. The Commission's decision to initiate the investigation was published in the *Official Journal of the European Union* ([3]). The Commission invited interested parties to submit comments on the supposed aid measures. Comments were submitted by a third party who wished to remain anonymous, in a letter dated 27 January 2006, registered as incoming mail on 30 January 2006; by Prophete GmbH & Co. KG, Rheda-Wiedenbrück, and Pantherwerke AG, Löhne, by letter dated 6 February 2006, registered as incoming mail the same day; and by Vaterland-Werke GmbH & Co. KG, Neuenrade, in two letters, one dated 6 February 2006, registered as incoming mail the same day, and one dated 27 February 2006, registered as incoming mail the same day.

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

([1]) With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty became Articles 107 and 108 respectively of the Treaty on the Functioning of the European Union (TFEU). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 107 and 108 of the TFEU should be understood where appropriate as references to Articles 87 and 88, respectively, of the EC Treaty, and references to the General Court as references to the Court of First Instance.

([2]) OJ C 2, 5.1.2006, p. 14.

([3]) See footnote 2.

(8) Germany's response to the initiation of the formal investigation was provided by letter dated 23 January 2006, registered as incoming mail the same day.

(9) The Commission requested further information on 6 February 2006, and Germany provided this by letter dated 5 April 2006, registered as incoming mail on 7 April 2006. The Commission sent another request for information on 19 July 2006, to which Germany replied by letter dated 25 September 2006, registered as incoming mail on 26 September 2006.

(10) On 24 January 2007 the Commission adopted a Decision ([4]) under Article 7(5) and Article 14(1) 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]).

1.2. **Proceedings before the General Court**

(11) On 5 April 2007 the *Land* of Saxony brought an action challenging the Commission Decision with regard to measures 2 and 3 (Case T-102/07). A further application was lodged on 16 April 2007 by MB Immobilien Verwaltungs GmbH und MB System GmbH & Co. KG, legal successors to the recipients of the aid to which the Decision related (Case T-120/07). This second application concerned all three of the measures that were the subject of the Decision. On 24 November 2008 the President of the Court decided to join the two cases.

(12) By judgment of 3 March 2010, the General Court annulled the Commission's Decision of 24 January 2007.

(13) The pleas of the parties overlapped to a large extent: their main submissions were as follows. First, the Commission had been wrong to conclude that measures 2 and 3 were outside the scope of the approved German aid scheme. Second, the Commission was mistaken in its assessment of the facts with regard to the question whether the recipients were to be considered firms in difficulty. Third, the Decision did not provide a proper statement of reasons for the assessment it had made of the amount of aid involved.

(14) The General Court upheld the finding in the Decision that measures 2 and 3 were outside the scope of the approved scheme. The Court also upheld the Commission's finding that the recipients constituted 'firms in difficulty' under the definition in the Community Guidelines on State aid for rescuing and restructuring firms in difficulty (1999, hereinafter 'the Rescue and Restructuring Guidelines 1999') ([6]). It annulled the Decision only on the ground that it did not provide a proper statement of reasons for the risk premiums it used to determine the aid component. In particular, the General Court held that in order to determine the aid component in a loan to a firm in difficulty, a mere reference to the Commission notice on the method for setting the reference and discount rates (1997, hereinafter 'the Reference Rates Notice 1997') ([7]) was not a sufficient statement of reasons for the application of the different risk premiums.

(15) As required by the first paragraph of Article 266 TFEU, therefore, the present Decision implements the General Court's judgment, and explains in greater detail the method followed by the Commission in order to calculate the aid component in the measures at issue. This Decision changes nothing in the assessment under State aid law that the Commission made in the Decision of 24 January 2007, in particular with regard to the aspects already considered by the Court.

1.3. **Proceedings after the judgment**

(16) Following the judgment, by letter of 7 June 2010, registered as incoming mail the same day, the recipients submitted further comments. The comments were forwarded to Germany on 16 June 2010. Germany sent the Commission a reply to the recipients' comments by letter of 12 July 2010, registered as incoming mail the same day.

(17) On 19 August 2010 the Commission sent Germany a request for information, to which Germany replied by letter dated 14 September 2010, registered as incoming mail the same day.

II. **DESCRIPTION**

2.1. **The recipient**

(18) Until 7 November 2005 the Biria group manufactured and sold bicycles. The parent company of the group was at that time called Biria AG, and was based in Neukirch, Saxony, an area assisted under Article 107(3)(a) TFEU ([8]).

(19) In 2003 the group had a turnover of EUR 93,2 million (compared with EUR 83,8 million in 2002) and made profits of EUR 3,7 million (compared with losses of EUR 5,8 million in 2002). The group had 415 employees in 2003 (490 in 2002), and was therefore to be classified as a large undertaking.

(20) The parent company was created in 2003, by merging the old Biria AG into one of its subsidiaries, Sachsen Zweirad GmbH. The name of the absorbing company was changed from Sachsen Zweirad GmbH to Biria

([4]) OJ L 183, 13.7.2007, p. 27.
([5]) OJ L 83, 27.3.1999, p. 1.
([6]) OJ C 288, 9.10.1999, p. 2.
([7]) OJ C 273, 9.9.1997, p. 3.
([8]) The area was an assisted area at the time of the measure at issue, and under Germany's regional aid map for 2007-2013 it continues to be so (OJ C 295, 5.12.2006, p. 6).

GmbH. In April 2005 Biria GmbH was converted into a new Biria AG. In 2003 Biria GmbH had an annual turnover of EUR 55,7 million and made profits of EUR 3,6 million. The sole owner of Biria AG was Mr Mehdi Biria. The parent company is hereinafter referred to as 'Biria'.

(21) Apart from the parent company the main companies in the group were Bike Systems GmbH & Co. Thüringer Zweiradwerk KG (Bike Systems) — which Biria owned via Biria's subsidiary Bike Systems Betriebs- und Beteiligungsgesellschaft mbH (BSBG) — and Checker Pig GmbH.

(22) Bike Systems was based in Nordhausen, Thuringia, which is an area assisted under Article 107(3)(a) TFEU. In 2003 it had a turnover of EUR 6,1 million, and losses of EUR 0,6 million. It had 157 employees. Bike Systems produced bicycles exclusively for its parent company BSBG, under a production contract known as a *Lohnherstellungsvertrag*. BSBG was responsible for the distribution of the bicycles.

(23) Checker Pig GmbH was based in Dresden, Saxony, which is an area assisted under Article 107(3)(a) TFEU. In 2003, Checker Pig had a turnover of EUR 6,9 million, and made losses of EUR 0,4 million. It had 43 employees.

(24) On 7 November 2005 Biria sold the bulk of its assets to two companies belonging to the Lone Star group, a private equity fund. The real estate remained with Biria, which let it to the Lone Star group. The sales price of the assets was EUR 11,5 million. An external expert had evaluated the market price of the assets at EUR 10,7 million.

(25) According to the information submitted by Germany, the sale was conducted by means of an open, transparent and unconditional tender. The tender was published on the Internet and in several print media. For the involvement of a new investor there were several options: an asset deal, a purchase of the entire assets en bloc, or a share deal. The assets were ultimately taken over by the Lone Star group by means of an asset deal.

(26) According to Germany the efforts to sell the company started before the Commission's decision to initiate the formal investigation, which was taken on 20 October 2005. First offers were to be submitted by 4 October 2005.

(27) At the present time the legal successor to the new Biria AG is MB Immobilien Verwaltungs GmbH (hereinafter 'MB Immobilien'); the legal successor to Bike Systems is MB System GmbH & Co. KG (hereinafter 'MB System'). MB Immobilien has been in liquidation since July 2008.

(28) In this Decision the companies, with the exception of the parent company Biria, are referred to by the names they had at the time of the measures at issue.

2.2. **The financial measures**

(29) Measure 1: In March 2001, gbb Beteiligungs AG (hereinafter 'gbb') provided Bike Systems with a silent participation *(stille Einlage)* amounting to EUR 2 070 732, to run until the end of 2010. gbb was a wholly owned subsidiary of DtA-Beteiligungs-Holding AG, which was itself a wholly owned subsidiary of Deutsche Ausgleichsbank, a Federal Government development bank that had been set up by legislation in the form of a corporation governed by public law.

(30) gbb was already in existence in the time of the former German Democratic Republic, when it was a State bank for agriculture. In 1990, under the Unification Treaty, it became Berliner Genossenschaftsbank, a public-law corporation under the supervision of the Federal Ministry of Finance. In 1991 its name was changed to gbb Beteiligungsholding, and in 1997 it was converted into the form of a public limited company (AG). It was now no longer the property of the Federal Government, but became a subsidiary of Deutsche Ausgleichsbank. Ever since gbb was set up the public administration has exercised far-reaching influence over it. When it was a corporation governed by public law, it was under the direct supervision of the responsible ministry, and the authorities were represented on its supervisory board. When it was converted into a limited company, and became a subsidiary of Deutsche Ausgleichsbank, it came under the supervision that the public authorities exercised over Deutsche Ausgleichsbank (see recitals following).

(31) Deutsche Ausgleichsbank was a corporation governed by public law and was under the supervision of the Federal Ministry of the Interior. A majority of the members of its supervisory board were representatives of federal or *Land* ministries or members of the Bundestag.

(32) Section 4(1) of the Deutsche Ausgleichsbank Act states that the activities of the bank are limited to the financing of measures supporting small and medium-sized firms and the professions, protecting the environment, promoting social policies, and integrating persons displaced as a consequence of the Second World War.

(33) Section 4(4) of the Act provides that Deutsche Ausgleichsbank may acquire interests in other undertakings if its supervisory board and the ministry supervising it agree.

(34) The silent participation in Bike Systems is listed in Deutsche Ausgleichsbank's annual reports for the years 2001 and 2002: the holding represented by the participation amounted to 20 %, which brought it over the threshold that triggered the reporting obligation. In 2001, gbb had interests of 20 % or more in a total of 18 companies.

(35) In 2003, under a Federal Act, Deutsche Ausgleichsbank merged with Kreditanstalt für Wiederaufbau.

(36) Both Deutsche Ausgleichsbank and Kreditanstalt für Wiederaufbau are what are known as development institutions *(Förderinstitute)*, i.e. banks whose activities are limited to supporting regional, economic and social policy measures. In State aid Case E 10/2000 Germany accepted appropriate measures that confined the activities of the development institutions to specific non-commercial activities, including the administration of support programmes for SMEs ([9]).

(37) According to Germany, gbb's participation in Bike Systems was provided on market terms, and consequently did not constitute State aid.

(38) Measure 2: On 20 March 2003 the *Land* of Saxony granted an 80 % guarantee on a working capital loan of EUR 5,6 million to Sachsen Zweirad GmbH, which was originally to run until the end of 2008. The guarantee was returned in January 2004, and replaced by a guarantee for Biria GmbH (see measure 3). The guarantee was granted on the basis of the loan guarantee scheme in Saxony, an aid scheme approved by the Commission ([10]).

(39) Measure 3: On 9 December 2003 the *Land* of Saxony granted an 80 % guarantee on working capital loans amounting to EUR 24 875 000 to Biria GmbH (later Biria AG) to finance the planned increase in turnover and the restructuring of the group's financing plan. The loans were to mature on 31 December 2011, and consisted of EUR 8 million to repay working capital loans *(Betriebsmitteltilgungsdarlehen)*, a EUR 7,45 million overdraft facility *(Kontokorrentlinie)*, and EUR 9,425 million for seasonal financing needs *(Saisonfinanzierungslinie)*. The guarantee was granted on the basis of the loan guarantee scheme in Saxony, an aid scheme approved by the Commission. It was provided subject to the condition that the earlier guarantee for Sachsen Zweirad GmbH (measure 2) would be returned. It entered into force only on 5 January 2004, once the guarantee to Sachsen Zweirad had indeed been returned.

III. GROUNDS FOR INITIATING THE FORMAL INVESTIGATION

(40) The Commission initiated the formal investigation because it doubted whether the silent participation had been contributed on market terms, as Germany claimed. The Commission considered that Bike Systems had just emerged from insolvency, through the adoption of an insolvency plan, so that its future prospects were uncertain. At that time, therefore, it ought to have been considered a firm in difficulty. The Commission doubted whether the remuneration took proper account of the risk, and consequently whether the silent participation had been provided on market terms. With regard to possible exemption under Article 107(2) and (3) TFEU, the Commission had no information to show that the tests of the Rescue and Restructuring Guidelines 1999 were satisfied.

(41) A further ground for initiating the formal investigation was that the Commission provisionally took the view that the conditions of the approved aid scheme on the basis of which the guarantees for Sachsen Zweirad GmbH and Biria GmbH had ostensibly been given were not in fact fulfilled, so that the guarantees granted fell outside the scope of the scheme. The Commission considered that at the time the guarantees were given Sachsen Zweirad GmbH and Biria GmbH were firms in difficulty. In addition, as Sachsen Zweirad GmbH and Biria GmbH were large undertakings, the guarantees ought to have been notified to the Commission individually even under the approved aid scheme. With regard to possible exemption under Article 107(2) and (3) TFEU, the Commission doubted whether the tests of the Rescue and Restructuring Guidelines 1999 were satisfied.

IV. COMMENTS FROM INTERESTED PARTIES

(42) 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. Competitor that wished to remain anonymous

(43) In its comments on the initiation of the formal investigation, the competitor that wished to remain anonymous argued that because of the public guarantee on a EUR 24,5 million loan Biria AG was able to sell bicycles to the competitor's customers below production cost, even though the competitor had the most cost-efficient production site in Germany.

(44) In 2003 Biria AG was able to show a profit only because banks had waived claims amounting to EUR 8,567 million. In the succeeding years 2004 and 2005, Biria AG had again recorded losses.

(45) In addition, Biria had been sold to Lone Star by way of an asset deal. In connection with this deal Landesbank Sachsen and Mittelständische Beteiligungsgesellschaft Sachsen had probably waived large amounts of debt. The new Biria GmbH, which was owned by the Lone Star group, had taken over all the assets of the old Biria AG.

([9]) Commission Decision C(2002) 1286 of 27 March 2002, *Anstaltslast and Gewährträgerhaftung — State guarantees for public credit institutions in Germany* (OJ C 146, 19.6.2002, p. 6).

([10]) State aid measure No N 73/1993, Land *of Saxony guarantee guidelines*, SG(93) D/9273, 7 June 1993.

4.2. **Prophete GmbH & Co. KG and Pantherwerke AG**

(46) In their comments on the initiation of the formal investigation, Prophete GmbH & Co. KG and Pantherwerke AG (hereinafter 'Prophete' and 'Pantherwerke') alleged that the State aid enabled Biria to sell at prices that would be untenable under normal market conditions. The two companies were in competition with Biria, and were thus directly affected by the aid.

(47) Biria group, they argued, was the largest manufacturer of bicycles in Germany, with an annual output of around 700 000 bicycles. The companies of the Biria group operated in two segments of the bicycle market, namely the non-specialised trade and the specialised wholesale trade.

(48) The non-specialised trade included all retailing by the larger retail chains and mail order business. Bicycles in this segment usually sold at a price between EUR 100 and EUR 199. Prophete and Pantherwerke estimated that there were around 1,5 million bicycles sold on this market, and that Biria sold 650 000, giving it a share of around 50 % of the segment.

(49) According to Prophete and Pantherwerke, the Biria group also had a dominant position in the specialised wholesale trade segment. This market segment had a volume of 150 000 to 200 000 bicycles. In the specialised wholesale trade prices ranged up to EUR 400. In this segment Pantherwerke was a direct competitor with Biria.

(50) Prophete and Pantherwerke had observed that that the prices offered by the Biria group had for years been consistently below those offered by other manufacturers. The difference could not be explained by economic factors, because although the Biria group's dominant position meant that it had a larger purchase volume this did not translate into more advantageous terms. Prophete and Pantherwerke surmised that the Biria group had suffered significant losses in recent years as a result of its low selling prices.

(51) As regards the silent participation, Prophete and Pantherwerke doubted whether given the economic situation of Bike Systems in March 2001 such a participation would have been provided by a private investor.

(52) Prophete and Pantherwerke took the view that the guarantees given for Sachsen Zweirad GmbH and Biria in 2003 and 2004 were not compatible with the EU State aid rules. Prophete and Pantherwerke considered that the companies were in difficulty at the time the guarantees were granted. The new Biria was the legal successor to the two former companies from which it had emerged. The opening balance sheet of the newly created company had no informative value.

(53) The granting of the two guarantees violated the 'one time, last time' principle, as the companies of the Biria group had repeatedly been able to stay in business only with State assistance.

(54) No compensatory measures had been taken to offset adverse effects on competitors. No attempt had been made to limit the presence of the Biria group in the market. Quite the reverse, the Biria group's plan was to expand its business further by pursuing an aggressive pricing policy. On its homepage Biria had announced that it planned to increase sales further from their 2004 level by selling 850 000 bicycles in 2005. Prophete and Pantherwerke also drew attention to a press release according to which the owner of Biria AG had sold the business to the private equity fund Lone Star.

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

(55) In its comments on the initiation of the formal investigation, Vaterland-Werke GmbH & Co. KG (Vaterland-Werke) stated that with a total output of between 700 000 and 800 000 bicycles the Biria group was the biggest manufacturer of bicycles in Germany. The only comparable company was MIFA Mitteldeutsche Fahrradwerke, which had an annual output of around 700 000 bicycles; other manufacturers produced only 250 000 to 400 000.

(56) Vaterland-Werke and Biria both operated in the non-specialised trade segment, which included the larger retail chains and large mail order firms. Competition in this segment was fierce, and Biria was known as an aggressive competitor that offered prices below production cost. Conduct of this kind was possible only with external financing, which in Biria's case was provided by State aid. This threatened the existence of all small competitors that were not supported by State aid. Vaterland-Werke was particularly affected, and free capacity could not be filled by alternative work orders. The market was suffering from overcapacity, so that any expansion of a manufacturer's capacity with the help of State aid placed a burden on other competitors.

(57) As regards the silent participation, Vaterland-Werke doubted whether given the economic situation of Bike Systems in March 2001 such a participation would have been provided by a private investor.

(58) Vaterland-Werke took the view that the guarantees given for Sachsen Zweirad GmbH and Biria in 2003 and 2004 were not compatible with the EU State aid rules. Vaterland-Werke considered that the companies were in difficulty at the time the guarantees were granted. The new Biria was the legal successor to the two former companies from which it had emerged. The opening balance sheet of the newly created company had no informative value.

(59) The granting of the two guarantees violated the 'one time, last time' principle, as the companies of the Biria group had repeatedly been able to stay in business only with State assistance.

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4.4. **The recipients**

(61) In their comments of 7 June 2010, following the annulment of the original decision by the General Court, the recipients of the aid submitted further information.

(62) In particular, they argued that when assessing the silent participation in Bike Systems contributed by gbb in 2001 (measure 1), the Commission had to take into account the existence of a 'comfort letter' *(Patronatserklärung)* provided by Biria GmbH. This Biria GmbH is not the legal entity created through the merger of the old Biria AG into its subsidiary Sachsen Zweirad GmbH referred to in recital 20. The Biria GmbH that issued this comfort letter for Bike Systems was the legal predecessor of the old Biria AG.

V. **COMMENTS BY GERMANY**

(63) In its comments on the initiation of the formal investigation, Germany argued that the terms of the silent participation provided by gbb were in line with market conditions. Germany agreed with the Commission that the risk associated with a silent participation was greater than the risk associated with a conventional bank loan. But the terms of the silent participation were such that the Reference Rates Notice 1997 was complied with. That notice stated that the reference interest rate was a floor rate which could be increased in situations involving a particular risk. In such cases, the premium could amount to 400 basis points or more.

(64) The remuneration on the silent participation amounted to 12,25 % (8,75 % fixed and 3,5 % depending on profits). This was 600 basis points above the Commission's reference rate of 6,33 %. gbb had taken account of the fact that the company was going through a restructuring process, and that the risk carried by the silent participation was higher owing to the reorientation of the company and the lack of collateral. The increased risk was reflected in the additional premium of 200 basis points.

(65) In addition, the decision to provide the silent participation was taken on the basis of a forecast of the company's development according to which its turnover would increase from EUR 0,89 million in 2001 to EUR 3,38 million in 2003. Germany concluded that the 12,25 % remuneration agreed for the silent participation properly reflected the associated risk. The fact that part of the remuneration was variable was of no relevance, as this was normal practice in the case of silent participations and was in line with the behaviour of a market economy investor.

(66) As regards the guarantee provided for Sachsen Zweirad GmbH, Germany argued that the company was not in difficulty at the time of the guarantee, and did not display any of the usual signs of a firm in difficulty set out in the Rescue and Restructuring Guidelines 1999. Among other things, in the year 2003 (up to the merger with Biria in October) the company's capital and reserves were positive, at EUR 404 million, and it generated a profit of EUR 2,1 million. The economic situation of the company had improved in 2003 by comparison with 2001/2002, as a result of consolidation efforts started at the end of 2002 and an improved market.

(67) The company's liquidity situation was difficult, but not 'serious'. There had not been any danger that the private banks would not extend their credit lines. Moreover, high interest payments had not led to liquidity problems, as the Commission had claimed.

(68) The basis of the guarantee given for Biria GmbH (later Biria AG) was the new plan for the Biria group, which called for streamlined organisation of the group and a concentration of procurement, production responsibilities and distribution at Biria GmbH. Alongside the financial requirements of the expansion of turnover, the plan provided for a reorganisation of the overall financing of the group.

(69) Biria GmbH (later Biria AG) was not in difficulty at the time the guarantee was granted. A distinction had to be made between the old and the new Biria AG. The new company could be regarded as a firm in difficulty only if it inherited the difficulties of the old company (always assuming that the old company was in fact in difficulty). But the new Biria AG had not inherited any such difficulties. The new Biria AG was the outcome of a merger of Sachsen Zweirad GmbH and the old Biria AG. Sachsen Zweirad GmbH, which was certainly not in difficulty, was economically dominant in the merger. Thus it could not be automatically assumed that the new Biria AG was a firm in difficulty. Even if the old Biria AG had indeed been in difficulty, the merger with Sachsen Zweirad GmbH meant that the new Biria AG was not necessarily so.

(70) Germany argued that the withdrawal of one of the private banks from the financing of the company was due to a reorientation of the bank's strategy following a merger. The two other banks ended their involvement at the same time as this private bank. However, this could not be seen as a sign of distrust, as one of the banks had still provided financing for two individual projects.

(71) Nor was the merger of Sachsen Zweirad GmbH and Biria AG aimed at circumventing the State aid rules and the classification of the company as a firm in difficulty: it was the consequence of a new plan for the group.

(72) In its observations on the comments of the competitor that wished to remain anonymous, Germany argued that the figures for the competitor's cost structure and for Biria's cost structure were not comparable. The competitor's turnover had increased while the Biria group's sales had decreased. At the same time the competitor's EBITDA (earnings before interest, taxes, depreciation and amortisation) had fallen, while the Biria group's EBITDA had remained constant. This showed that Biria was not selling at dumping prices, and that the competitor was pricing more aggressively than the Biria group was.

(73) Germany argued that the competitor's claim to have suffered damage as a result of the Biria group's behaviour was not supported by evidence and was not presented in a coherent manner. In a competitive market it was normal that one company should find itself undercut by another.

(74) With regard to the sale of the assets of the Biria group to the Lone Star group mentioned by the competitor, Germany provided details of the sale itself and of the repayment of the claims of private and public creditors.

(75) In its observations on the comments submitted by Prophete, Pantherwerke and Vaterland-Werke, Germany argued that the market for bicycles was divided into three segments, and not two, as those companies had alleged. The three segments were the specialised trade, mail order selling, and self-service. Biria had a strong position in mail order, which was due less to aggressive pricing than to its just-in-time delivery system. In the self-service trade the leading supplier was MIFA AG, and Biria's market share was less than 10 %.

(76) Referred back to information that had already been submitted in the course of the proceedings, Germany rejected Vaterland-Werke's statement that the Biria group planned to expand its business further by means of an aggressive pricing strategy. Biria AG had produced 670 000 bicycles in 2003, and since then output had been falling.

VI. **ASSESSMENT**

(77) Article 107(1) TFEU states that 'any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'. The Court of Justice has consistently held that trade is affected if the recipient firm carries on an economic activity involving trade between Member States.

(78) In order to consider whether or not there is State aid, the Commission will first identify the relevant undertaking. It will then consider each measure individually and assess whether the conditions of Article 107(1) TFEU are met. It will then calculate the aid component, and assess whether the measure is compatible with the internal market.

6.1. **The recipient undertaking**

(79) The aid was granted to Sachsen Zweirad GmbH, to Biria, and to Bike Systems, a subsidiary of Biria. On 7 November 2005 Biria sold the bulk of its assets to two companies belonging to the Lone Star group, a private equity fund. According to the information provided, the assets were sold following an open, transparent and unconditional tender. Germany states that an expert opinion put the sales value of the assets at EUR 10,7 million. The price paid by the Lone Star group amounted to EUR 11,5 million, which was above that valuation.

(80) On the basis of the information at its disposal, the Commission concludes that there is no evidence to suggest that any benefit of the aid measures was transferred to the Lone Star group so as to make the Lone Star group the direct or indirect recipient of aid granted to Biria and Bike Systems.

6.2. **Measure 1: Measure allegedly on market terms**

State resources and imputability to the State

(81) The silent participation (measure 1) was contributed by gbb. Germany claims that the participation was provided under gbb's own programme, so that State resources were not used. However, as the Commission pointed out in the decision initiating the formal investigation, at the time the participation was provided gbb was a wholly owned subsidiary of Deutsche Ausgleichsbank, which in turn was wholly owned by the Federal Republic of Germany. gbb is therefore an undertaking governed by public law. According to the settled case-law of the Court of Justice, all resources of public undertakings constitute State resources ([11]).

([11]) See Case C-482/99 *France* v *Commission (Stardust Marine)* [2002] ECR I-4397, paragraphs 32 to 43.

(82) In the Commission's view, therefore, the measure is necessarily imputable to the State. In Case C-482/99 *Stardust Marine*, paragraphs 53 to 56, the Court of Justice held as follows:

'53. On that point, it cannot be demanded that it be demonstrated, on the basis of a precise inquiry, that in the particular case the public authorities specifically incited the public undertaking to take the aid measures in question. In the first place, having regard to the fact that relations between the State and public undertakings are close, there is a real risk that State aid may be granted through the intermediary of those undertakings in a non-transparent way and in breach of the rules on State aid laid down by the Treaty.

54. Moreover, it will, as a general rule, be very difficult for a third party, precisely because of the privileged relations existing between the State and a public undertaking, to demonstrate in a particular case that aid measures taken by such an undertaking were in fact adopted on the instructions of the public authorities.

55. For those reasons, it must be accepted that the imputability to the State of an aid measure taken by a public undertaking may be inferred from a set of indicators arising from the circumstances of the case and the context in which that measure was taken. In that respect, the Court has already taken into consideration the fact that the body in question could not take the contested decision without taking account of the requirements of the public authorities (see, in particular, *Van der Kooy*, paragraph 37) or the fact that, apart from factors of an organic nature which linked the public undertakings to the State, those undertakings, through the intermediary of which aid had been granted, had to take account of directives issued by a Comitato Interministeriale per la Programmazione Economica (CIPE) (Case C-303/88 *Italy* v *Commission*, cited above, paragraphs 11 and 12; Case C-305/89 *Italy* v *Commission*, cited above, paragraphs 13 and 14).

56. Other indicators might, in certain circumstances, be relevant in concluding that an aid measure taken by a public undertaking is imputable to the State, such as, in particular, its integration into the structures of the public administration, the nature of its activities and the exercise of the latter on the market in normal conditions of competition with private operators, the legal status of the undertaking (in the sense of its being subject to public law or ordinary company law), the intensity of the supervision exercised by the public authorities over the management of the undertaking, or any other indicator showing, in the particular case, an involvement by the public authorities in the adoption of a measure or the unlikelihood of their not being involved, having regard also to the compass of the measure, its content or the conditions which it contains.'.

(83) In the present case, the Commission has found indicators of this kind that allow it to conclude that the decision taken by gbb is imputable to the State.

(84) gbb was entrusted by the Federal Government with responsibilities for development: for example, it was responsible for the Eastern Germany Consolidation and Growth Fund *(Konsolidierungs- und Wachstumsfonds Ostdeutschland)*, whose purpose was to provide equity capital to small and medium-sized enterprises in eastern Germany in order to strengthen their capital base.

(85) Second, gbb's history indicates that the State has been closely involved in its decision-making. First, as a corporation governed by public law, it was under the supervision of the responsible ministry, and the authorities were represented on its supervisory board. Since it became a limited company, its parent, Deutsche Ausgleichsbank, has been supervised by the responsible ministry, and its supervisory board has been dominated by representatives of public authorities.

(86) Third, at the time of the decision to provide the participation, gbb's parent company, Deutsche Ausgleichsbank, was a corporation governed by public law, under the supervision of the Ministry of the Interior, with a supervisory board dominated by representatives of federal and *Land* ministries and members of the Bundestag. Deutsche Ausgleichsbank is not permitted to take interests in other undertakings without the prior consent of both the supervising ministry and its own supervisory board. Even after gbb was converted from a corporation governed by public law into a limited company, therefore, the State kept control over its business decisions via its parent company.

(87) Fourth, in 2002 Germany accepted appropriate measures with respect to the German development banks ([12]). These appropriate measures also apply to Deutsche Ausgleichsbank. The appropriate measures limit Deutsche Ausgleichsbank's activities to supporting the structural, economic and social policies and the public functions of its public-law owners in accordance with its public mandate. The Commission considers that this makes Deutsche Ausgleichsbank part of the public administration, so that all its actions are imputable to the State.

(88) Fifth, the provision of the silent participation appears to fall within Deutsche Ausgleichsbank's development objective of financing SMEs ([13]).

(89) The Commission concludes that the measure is imputable to the State.

([12]) See footnote 9. The decision establishes that Deutsche Ausgleichsbank is part of the public administration.

([13]) See footnote 9: appropriate measures, p. 11, point (a).

Selective advantage granted to one undertaking

(90) According to Germany, the silent participation that gbb contributed to Bike Systems (measure 1) was provided on market terms. The risk carried by such a silent participation is comparable to that carried by a subordinated loan, so that a silent participation should be treated as a loan carrying a high risk. In case of insolvency or liquidation, a silent participation will be repaid only after all other liabilities have been honoured. The risk associated with the participation thus exceeds the risk carried by a conventional bank loan towards an investment, which will normally be secured on terms requested by the bank. At the time of the acquisition the average level of the interest rates being charged in the market on medium- and long-term loans backed by the customary security was 6,33 %. The remuneration to be paid for a participation of this kind should significantly exceed that rate.

(91) The participation bore a fixed remuneration of 8,75 % plus a variable remuneration of 3,5 % depending on the profits made [14]. The agreed remuneration is consequently above the reference rate.

(92) It should be pointed out, however, that this reasoning supposes that Bike Systems would succeed in returning to profitability: but Bike Systems had just emerged from insolvency, and then only as a result of the adoption of an insolvency plan. Its future prospects were uncertain, as there had been only limited restructuring of its operations. According to the company's annual report for 2001, it continued to make a loss that year. Its equity figure continued to be negative, although because of hidden reserves this did not trigger insolvency. At that time, therefore, Bike Systems had to be considered a firm in difficulty.

(93) At the time of the first Decision the Commission had no information regarding the comfort letter (see recital 62 above). The wording of the comfort letter was submitted only in the course of the court proceedings.

(94) In the comfort letter, dated 6 March 2001, Biria GmbH takes note of the silent participation, and undertakes to ensure that for the duration of the participation Bike Systems is managed and financed in such a way that it is able to meet its obligations in respect of the participation.

(95) The Commission makes the following observations.

(96) With regard to the financial strength of the parent company that issued the comfort letter, Germany has stated that in 2001 Biria GmbH's turnover was negligible: it was merely acting as a distributor for other divisions of the group [15]. As regards financial performance, the company showed a modest after-tax profit of DEM 205 000 in 1999, and net losses of DEM 473 000 in 2000 [16].

(97) Owing to the company's past losses, its equity was negative in 1999. It became positive in 2000, but this was due not to its own performance but to a transfer of profits from its subsidiary Sachsen Zweirad [17]. The Commission notes that the comfort letter was issued not by a company within the group enjoying a solid financial position but by a parent company that was performing less well.

(98) Irrespective of whether Biria GmbH was to be formally regarded as a firm in difficulty within the meaning of the Rescue and Restructuring Guidelines 1999, therefore, the Commission concludes that Biria GmbH had the capacity to satisfy potential claims arising from the comfort letter covering the silent participation, which amounted to over EUR 2 million. As already mentioned, its book profit in 2000 (before the comfort letter was issued) was in fact due only to a transfer of profits from a subsidiary, and not to its own economic performance, and without this transfer of profits it would have had negative equity (including the subscribed capital and other forms such as reserves or cash in the balance sheet). It is thus questionable how Biria GmbH could have prevented a possible insolvency of Bike Systems. Consequently, the Commission considers that the comfort letter has no real economic value that might offset the difficulties of Bike Systems, and thus does not constitute valuable collateral that would reduce the remuneration that a market investor would have sought for the silent participation.

(99) The Commission concludes that the remuneration was not commensurate with the risk, and consequently that the participation was not provided on market terms. The participation thus conferred an advantage on Bike Systems that it could not have obtained on the market.

Distortion of competition and effect on trade

(100) Bike Systems, Sachsen Zweirad GmbH and Biria GmbH were manufacturers of bicycles. As this product is traded across borders, the measures threaten to distort competition and affect trade between Member States.

[14] If the company made a loss, the remuneration would not be paid. In the event of a loss or if the profit was not sufficient, the variable remuneration was to be paid the following year.

[15] Furthermore, according to the documents submitted by Germany, Biria GmbH employed a staff of 13 in 1999 and 21 in 2000.

[16] As the terms and conditions of the silent participation were fixed at the time it was provided, the financial status of the issuer of the comfort letter should be assessed as it was a the time that the letter was issued, even though the letter covered the entire duration of the participation.

[17] Profit transfers from Sachsen Zweirad GmbH amounted to about DEM 2,4 million in 1999 and DEM 3,4 million in 2000.

6.3. **Measures 2 and 3: Aid ostensibly within the scope of approved aid schemes**

The guarantees fell outside the scope of the existing aid schemes

(101) The guarantee given on a working capital loan to Sachsen Zweirad GmbH amounting to EUR 5,6 million (measure 2) and the guarantee given on a working capital loan to Biria amounting to EUR 24,875 million (measure 3) were granted on the basis of the loan guarantee scheme of the *Land* of Saxony ([18]). This is an approved aid scheme that allows guarantees to be given on loans of more than DEM 5 million (EUR 2,6 million) to healthy companies for the financing of new investment, and in special cases for supplementary financing of investment and working capital. In exceptional cases the scheme also allows the financing of reorganisation and restructuring. But any guarantees given to a large undertaking for purposes of restructuring must be notified to the Commission individually.

(102) According to Germany, the conditions of the scheme were fulfilled, so that the guarantees were granted in accordance with the scheme. Germany considers that at the time the guarantees were granted Sachsen Zweirad GmbH and Biria were not in difficulty. The guarantees were provided to secure working capital loans, and this was permissible under the scheme.

(103) The Commission does not agree that the guarantees were in accordance with the aid scheme on the basis of which they were ostensibly granted. As will be explained in more detail below, the Commission, contrary to the German view, considers that when Sachsen Zweirad GmbH was given a guarantee in March 2003 it was a firm in difficulty, and that when Biria GmbH was given a guarantee in December 2003 it too was a firm in difficulty. A guarantee given to a firm in difficulty for purposes of restructuring is notifiable individually.

Guarantee for Sachsen Zweirad GmbH (measure 2)

(104) Germany argues that Sachsen Zweirad GmbH did not display any of the usual signs of a firm in difficulty listed in the Rescue and Restructuring Guidelines 1999. The Commission points out that the usual signs of a firm being in difficulty set out in point 6 of the Rescue and Restructuring Guidelines 1999 are intended only to give an indication of when a company can be considered to be in difficulty, and need not all be present at the same time. Sachsen Zweirad GmbH made a loss of EUR 1 274 000 on its ordinary operations in 2001, and a loss of EUR 733 000 in 2002. The losses were taken over by the parent company, Biria, under an existing contract for the transfer of annual profits and losses *(Ergebnisabführungsvertrag)*. Turnover decreased in 2002 from what it had been in 2001, as did cash flow.

(105) According to the annual report for 2002, Sachsen Zweirad GmbH also faced liquidity problems. It is explicitly stated in the annual report that Sachsen Zweirad GmbH's liquidity position was tight, owing to heavy expenditure for the advance financing of the inventory and the growth of the group. According to the annual report, the survival of the company could be ensured only if the banks agreed to maintain the existing lines of credit or to restructure them.

(106) Germany argues that there was never any danger that the banks would not prolong their credit lines. The Commission points out that this does not invalidate the statement that the company's liquidity situation was tight. According to the annual report the bulk of the credit had a remaining duration of less than 5 years, which is a suboptimal form of financing for a business, and increases the company's risk. The short-term nature of the credit also led to high interest payments (although the payments fell slightly in 2002 compared to 2001), and this put a further burden on the company's liquidity position.

(107) The Commission concludes that at the time the guarantee was granted Sachsen Zweirad GmbH was a firm in difficulty, and that the guarantee consequently has to be considered a guarantee for restructuring. The granting of such a guarantee for a large undertaking has to be notified to the Commission individually, so that the conditions of the approved aid scheme on the basis of which the guarantee was ostensibly granted were not fulfilled, and the guarantee was outside the scope of the scheme.

Guarantee for Biria GmbH (measure 3)

(108) Biria was created with effect from 1 October 2003 by the merger of the old Biria AG into its subsidiary Sachsen Zweirad GmbH.

(109) According to Germany Biria must be clearly distinguished from the old Biria AG and from Sachsen Zweirad GmbH, as the merger created a new company. The question whether this company was in difficulty at the time the guarantee was granted, on 9 December 2004, should therefore be assessed by reference to the balance sheet of the new merged company. According to Germany, this balance sheet demonstrates that Biria GmbH could not be regarded as a firm in difficulty.

(110) The Commission does not accept this reasoning. It considers that the new merged Biria GmbH cannot be seen in isolation from the old Biria AG and Sachsen Zweirad GmbH, because it is was created by merging the two companies. Otherwise it would be easy to circumvent the definition of a firm in difficulty by merging entities or setting up new ones. The old Biria AG suffered losses and liquidity problems in 2002, as did Sachsen Zweirad GmbH. Biria GmbH inherited all the debts and liabilities of the old Biria AG and of Sachsen Zweirad GmbH. Biria GmbH owned the same assets and

([18]) See footnote 10.

carried on the same business as the old Biria AG and Sachsen Zweirad GmbH. The Commission therefore considers that Biria GmbH inherited the difficulties of the old Biria AG and Sachsen Zweirad GmbH.

(111) Germany claims that Sachsen Zweirad GmbH dominated in the merger. According to Germany, Sachsen Zweirad GmbH was not in difficulty, so that it cannot automatically be assumed that the new Biria GmbH was in difficulty. Contrary to the German view, however, the Commission considers that Sachsen Zweirad GmbH was indeed a firm in difficulty. Consequently, the new Biria GmbH also inherited the difficulties of Sachsen Zweirad GmbH.

(112) According to its annual report for 2003, the Biria group continued its restructuring and reorganisation process that year. This process had started in 2002, and included a reorganisation of the group's financing. On the basis of the guarantee given by the *Land* of Saxony on the EUR 24,875 million loan, the Biria group drew up a new plan for the financing of its business in the medium term. The new financing plan provided for a significant adjustment of the interest rates it was paying, and thus a reduction of its heavy interest burden.

(113) At the same time the pool of banks was reorganised: three banks agreed to waive claims amounting to EUR 8 567 000, which seems to have represented significantly more than 50 % of their total claims, in return for immediate redemption of their remaining claims. Consequently, the loan covered by the 80 % guarantee that constitutes measure 3 consists of EUR 8 million to repay working capital loans, a EUR 7,45 million overdraft facility, and EUR 9,425 million for seasonal financing needs.

(114) At the time the guarantee was given, therefore, Biria faced liquidity problems, and was thus a firm in difficulty. This assessment is supported by the fact that three banks withdrew from financing Biria's activities and indeed agreed to waive a large part of their claims in return for the immediate redemption of the remaining claims. This shows that the banks seriously doubted whether Biria would be able to service its debts, and thus whether it was a viable company.

(115) Germany argues that the banks withdrew only because of a reorientation of their business strategy. The Commission points out that the banks agreed to waive probably around 50 % of their claims. Even if the banks withdrew as a result of a reorientation of their strategy, this waiver is a sign that they felt that it was very unlikely that they would be able to recover the full amount of the loans.

(116) The Commission concludes that at the time the guarantee was given Biria was a firm in difficulty, and that the guarantee consequently has to be considered a guarantee for restructuring. The granting of such guarantees for large undertakings has to be notified to the Commission individually, and at the time the guarantee was given Biria was a large undertaking, so that the conditions of the approved aid scheme on the basis of which the guarantee was ostensibly granted were not fulfilled, and the guarantee was outside the scope of the scheme.

Advantage conferred by the guarantees

(117) The guarantees in measures 2 and 3 were granted by the *Land* of Saxony; they were consequently provided from State resources and are imputable to the State.

(118) A State aid measure must confer an advantage on the recipient. The Commission considers that the two guarantees conferred an undue advantage on Sachsen Zweirad GmbH and Biria GmbH (later Biria AG).

(119) For the reasons set out in the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (hereinafter 'the Guarantees Notice'), points 2.2 and 3.2 ([19]), a borrower who does not pay a market price for a guarantee obtains an advantage. In some cases, a firm in financial difficulty would not find a financial institution prepared to lend to it without a State guarantee.

(120) In the case at issue loans to a firm in difficulty were guaranteed, and the guarantor — the State — did not receive a premium on commercial terms.

(121) In point 3.2 of the Guarantees Notice, the Commission sets out four tests which together are sufficient to rule out the possibility that a guarantee may comprise State aid:

1. the borrower is not in financial difficulty;
2. the extent of the guarantee can be properly measured when it is granted;
3. the guarantee does not cover more than 80 % of the outstanding loan;
4. a market-oriented price is paid for the guarantee.

(122) The Commission has applied these tests to the case at hand, and finds, first of all, that at the time the guarantee was given Sachsen Zweirad GmbH and Biria were in financial difficulty.

(123) No premiums were charged for the guarantees, and they were granted on loans to a firm in difficulty. The mere fact that no ordinary commercial fee was paid for the guarantees indicates that the measures conferred an advantage on Sachsen Zweirad GmbH and Biria. On the commercial banking market guarantees cannot be obtained without a commercial premium. This is all the more true in the case of guarantees given to firms in difficulty, who may not be able to repay.

([19]) OJ C 155, 20.6.2008, p. 10.

(124) Following the reasoning set out in the Guarantees Notice, therefore, the guarantees constitute State aid.

(125) The Commission concludes that the guarantees conferred an advantage on Sachsen Zweirad GmbH and Biria GmbH (later Biria AG) because neither of them would have been able to obtain a guarantee on the same terms on the market.

Distortion of competition and effect on trade

(126) For the reasons referred to in recital 100, measures 2 and 3 are liable to distort competition and affect trade.

6.4. **Conclusions on the presence of State aid**

(127) The Commission concludes that the silent participation and the two guarantees constitute State aid within the meaning of Article 107(1) TFEU, and that the guarantees were not granted in accordance with an approved aid scheme. Measures 1, 2 and 3 thus constitute new aid, which has to be assessed accordingly.

6.5. **Calculation of the aid component**

(128) Point 4.1 of the Guarantees Notice states that 'Where an individual guarantee or a guarantee scheme does not comply with the market economy investor principle, it is deemed to entail State aid. The State aid element therefore needs to be quantified in order to check whether the aid may be found compatible under a specific State aid exemption.' Before considering whether the aid is compatible, therefore, the Commission needs to quantify the aid element.

(129) The Commission has laid down general principles for calculating the aid element in a guarantee in the Guarantees Notice.

(130) The Commission takes the view that the aid component in a State guarantee may in principle amount to the whole value of the underlying loan, if the recipient is unable to access financial markets by itself (Guarantees Notice, points 2.2 and 4.1(a)).

(131) The rules for calculating the aid component are set out in the Guarantees Notice in points 4.1 (General), 4.2 (Aid element in individual guarantees) and 4.4 (Aid element in guarantee schemes). In what follows the Commission will apply these rules to the case at hand.

(132) Point 4.2 of the Guarantees Notice states that in the absence of a comparable market premium, a comparison should be made between the all-in financing costs of a loan on the market with and without guarantee (i.e. the interest rate for a similar loan without guarantee should be compared to the total of the interest rate and the guarantee premium for the loan with the guarantee).

(133) In many cases, such a market interest rate is not available. In its notices on the method for setting the reference and discount rates, therefore, the Commission has development a methodology which, for the reasons set out in point 4.2 of the Guarantees Notice, can be used as a proxy for the market interest rate.

(134) Under the Reference Rates Notice 1997 the Commission sets reference rates which are intended to reflect the average level of interest rates charged in the market on medium- and long-term loans backed by normal security. The Reference Rates Notice 1997 also points out that the reference rate thus determined is a floor rate which may be increased in situations involving a particular risk (for example, in the case of 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 Reference Rates Notice 1997 does not explain whether risk premiums for different risks can be added together. Combination of this kind is not ruled out, but in its decision the Commission must justify the method used to combine different risk premiums by referring to an analysis of the practice of the financial markets ([20]).

(135) In 2004 the auditors Deloitte & Touche GmbH carried out a study for the Commission's Directorate-General for Competition (hereinafter 'the study') ([21]). On the basis of empirical research, the study among other things identified risk premiums observable in the market for firms in different categories of risk and for transactions with different collateralisation. The study clearly shows that the combination of different dimensions of risk (such as the creditworthiness of the borrower or the collateral provided) can be reflected in differentiated margins to be added to the base rate.

(136) On the basis of the study, the Commission further refined its approach to the calculation of the aid component in loans in a Communication on the revision of the method for setting the reference and discount rates (2008, hereinafter 'the Reference Rates Communication 2008') ([22]). The Reference Rates Communication 2008 reflects the approach adopted in the study: it takes a base rate and applies premiums for creditworthiness and collateralisation.

([20]) See Joined Cases T-102/07 and T-120/07 *Freistaat Sachsen, MB Immobilien Verwaltungs GmbH and MB System GmbH* v *Commission*, not yet reported, paragraphs 218-222.

([21]) Deloitte & Touche GmbH Wirtschaftsprüfungsgesellschaft, *Study in relation to the updating of the reference rates of interest applied to State aid control in the EU*, October 2004: http://ec.europa.eu/competition/state_aid/studies_reports/full_report.pdf

([22]) OJ C 14, 19.1.2008, p. 6.

(137) The Commission considers, moreover, that the determination of the aid component in the measures to be assessed is linked to the concept of State aid. The Court of Justice has held that the question whether an aid measure constitutes State aid has to be determined on the basis of objective factors which must be appraised on the date on which the Commission takes its decision ([23]).

(138) The Commission therefore considers that the appropriate basis for the determination of the aid component is the Reference Rates Communication 2008, and in what follows it will make its assessment in the light of that Communication.

Aid component in measure 1

(139) The Commission considers that the aid component in the silent participation is the difference between the remuneration that Bike Systems would have had to pay for the participation on the market and the remuneration it actually did pay. Given that Bike Systems was in difficulty at the time the silent participation was provided, and the related risk was high, the aid component may amount to the whole amount of the participation, as it may be that no market economy investor would ever have provided it ([24]).

(140) The Commission takes the view that such a silent participation is not a loan, but that it is nevertheless comparable to a loan with a high risk, because in the event of insolvency it is subordinated to all other claims, including subordinated loans.

(141) As explained in recital 92, the Commission takes the view that the situation of Bike Systems, which had just emerged from insolvency proceedings, had to be considered weak. Its future prospects were uncertain, as there had been only limited restructuring of its operations. As pointed out in recital 92, therefore, the company had to be regarded as a firm in difficulty. Moreover, no collateral was provided for the silent participation, which increased the risk of default. The Commission consequently takes the view that the guarantee has to be considered a transaction with 'low' collateralisation within the meaning of the Reference Rates Communication 2008. Not only is there a lack of collateral, but in the event of insolvency the participation is also subordinated to all other loans, which increases the risk of default even further. The Commission considers that this has to be treated as a risk factor additional to the absence of collateral: low collateralisation increases the risk that if the borrower becomes insolvent it will not be possible to satisfy the creditor's claim direct by realising the security, but the low rank of the claim means that in the event of insolvency the creditor will be able to obtain satisfaction only after other creditors, and hence will probably recover nothing at all.

(142) The Commission considers that since at the time the measure was taken Bike Systems was in difficulty, it must be classified in the credit category 'bad'. The Reference Rates Communication 2008 stipulates that for companies in this category with low collateral, the margin that would rule out the presence of State aid may be as high as 1 000 basis points. Taking into account the absence of collateral and the low ranking of the silent participation, the Commission considers a premium of 1 000 basis points justified.

(143) The aid component in the silent participation is thus the difference between the reference interest rate plus 1 000 basis points and the remuneration paid on the participation.

(144) Moreover, the Commission considers that for the calculation of the aid component the variable remuneration of 3,5 % can be taken into account only partially, as it was dependent on profits. The company's situation was weak, and the prospects of profit were unclear. The Commission considers that account should be taken of only half of the variable remuneration, or 1,75 %. For purposes of the calculation of the aid component, therefore, the remuneration to be taken into consideration should be the fixed remuneration of 8,75 % plus half of the variable remuneration of 3,5 %, giving a total remuneration of 10,5 %. The aid component is consequently the difference between the reference interest rate plus 1 000 basis points and a remuneration of 10,5 %.

Aid components in measures 2 and 3

(145) The guarantees under measures 2 and 3 enabled Sachsen Zweirad GmbH and Biria GmbH to obtain financial terms for loans that were better than those normally available on the financial markets. The Commission considers that the aid component in the guarantees under measures 2 and 3 is the difference between the interest rate that Sachsen Zweirad GmbH and Biria GmbH would have had to pay for a loan on market terms, i.e. without a guarantee, and the interest rate at which the guaranteed loan was actually provided. This difference can be deemed to correspond to the premium that a market economy guarantor would have asked for these guarantees. As Sachsen Zweirad GmbH and Biria GmbH were in difficulty at the time the guarantees were given and the loans were granted, the aid component may even amount to the whole of the guarantee, as it may be that without the guarantee no lender would have granted the loan ([25]).

(146) Moreover, the Commission considers that the loan and the guarantee to Sachsen Zweirad GmbH involved an additional risk, as the collateral provided was particularly low. The guarantee on the loan to Sachsen Zweirad GmbH was secured only by a directly enforceable guarantee *(selbstschuldnerische Bürgschaft)* given by the

([23]) See Joined Cases C-341/06 P and C-342/06 P *Chronopost SA and La Poste* v *Union française de l'express (UFEX) and Others* [2008] ECR I-4777, paragraph 95.

([24]) For similar reasoning see the Guarantees Notice.

([25]) See footnote 24.

companies in the group. The economic value of such guarantees is very low. The Commission consequently takes the view that the guarantee has to be considered a transaction with 'low' collateralisation within the meaning of the Reference Rates Communication 2008.

(147) The security provided for the loan and guarantee to Biria GmbH was of a higher economic value than that for the guarantee to Sachsen Zweirad GmbH. Nevertheless, the security was still lower than normally required. The guarantee to Biria GmbH was secured by a first-rank mortgage on property belonging to Bike Systems worth EUR 15 million. But this mortgage was subordinate to another loan of EUR 2 million. The first-rank mortgage was consequently equal to only just above 50 % of the total amount of the loan. However, there is no indication of what would be a proper liquidation value for the mortgage. There was further collateral, in the form of mortgages, the abandonment of claims, the transfer of ownership of materials in the possession of the group companies, and a directly enforceable guarantee given by the owner of Biria GmbH: this collateral was of low economic value. The Commission considers that, despite the collateral offered, the guarantee has to be considered a transaction with 'low' collateralisation within the meaning of the Reference Rates Communication 2008.

(148) As explained above, at the time the guarantees were given Biria GmbH and Sachsen Zweirad GmbH were in difficulty, so that they had to be classified in the credit category 'bad'. The Reference Rates Communication 2008 stipulates that for firms in this rating category with low collateral the premium that would rule out the presence of State aid may be as high as 1 000 basis points. Taking into account the low collateral, the Commission considers that in the case of Sachsen Zweirad GmbH a premium of 800 basis points is justified. Biria GmbH provided slightly better collateral. Here a premium of 700 basis points is appropriate. The premium in both cases is lower than that for the silent participation as a result of the participation's low ranking.

(149) The aid component in the guarantee for Sachsen Zweirad GmbH (measure 2) is the difference between the reference interest rate plus 800 basis points and the total financing cost of the guaranteed loan (the interest rate at which the guaranteed loan was provided plus any premiums paid for the guarantee).

(150) In the same way, the aid component in the guarantee for Biria GmbH (measure 3) is the difference between the reference interest rate plus 700 basis points and the total financing cost of the guaranteed loan (the interest rate at which the guaranteed loan was provided plus any premiums paid for the guarantee).

6.6. **Exemptions in Article 107(2) and (3) TFEU**

(151) Paragraphs 2 and 3 of Article 107 TFEU provide for exemptions from the general prohibition of State aid imposed by paragraph 1.

(152) The exemptions in Article 107(2) TFEU do not apply in the present case: the aid is not aid of a social character granted to individual consumers, nor aid to make good the damage caused by natural disasters or exceptional occurrences, nor aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany.

(153) The exemptions provided for in Article 107(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.

(154) There remain the exemptions provided for in Articles 107(3)(a) and 107(3)(c) TFEU and the Community guidelines based on those provisions.

Measure 1

(155) The Commission notes, first of all, that Bike Systems was located in an area that qualified for regional aid under Article 107(3)(a) TFEU. When the Commission initiated the formal investigation it expressed doubts on this point, but despite this Germany has not produced any information to show that the measure satisfies the requirements for the granting of regional aid laid down in the Guidelines on national regional aid ([26]).

(156) There are other exceptions in other Community guidelines. As the aid was granted in March 2001, the Rescue and Restructuring Guidelines 1999 apply. The Commission does not possess any information that might show that the aid can be considered compatible with the TFEU on the basis of those Guidelines. Under the Rescue and Restructuring Guidelines 1999, restructuring aid can be granted only if there is a sound restructuring plan, any undue distortion of competition is avoided, and the aid is limited to the minimum. When it initiated the formal investigation the Commission expressed doubts on this point, but despite this Germany has not produced any information to show that the requirements are satisfied. The Commission concludes that the requirements of the Rescue and Restructuring Guidelines 1999 are not satisfied.

(157) The measure under consideration does not fall within the scope of any of the other guidelines or regulations applying to aid in such areas as research and development, the environment, small and medium-sized enterprises, employment and training, or risk capital. Since the measure does not pursue any objective of common interest, it constitutes operating aid that is incompatible with the TFEU.

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

Measures 2 and 3

(158) Sachsen Zweirad GmbH and Biria GmbH were located in an area assisted under Article 107(3)(a) TFEU. However, the exemptions provided for in Article 107(3)(a) and the regional limb of Article 107(3)(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.

(159) The Commission considers that the only provision that the Community guidelines on State aid for rescuing and restructuring firms in difficulty are the only rules that might apply here As the aid was granted in March 2003, the relevant guidelines are the Rescue and Restructuring Guidelines 1999.

(160) The grant of aid is there made conditional on the implementation of a restructuring plan, the duration of which must be as short as possible, and which must restore the long-term viability of the firm within a reasonable timescale and on the basis of realistic assumptions as to future operating conditions. When it initiated the formal investigation the Commission expressed doubts on this point, but despite this Germany has not produced any information to show that the guarantees were given on the basis of a sound restructuring plan that would restore the group to profitability.

(161) In addition, measures must be taken to mitigate, as far as possible, any adverse effects of the aid on competitors. This usually means limiting the presence of the undertaking in its market or markets after the end of the restructuring period. The Commission does not possess any information regarding the relevant market and the Biria group's share of it. Nor has it any information at its disposal regarding any compensatory measures that might limit the undertaking's presence in the market. Quite the reverse, it would appear that with the takeover of Checker Pig and Bike Systems the Biria group expanded in 2001.

(162) According to the Rescue and Restructuring Guidelines 1999, 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 recipients of aid must make a substantial contribution to the restructuring costs, from their own resources or by means of external financing at market conditions. As the aid was not given on the basis of a restructuring plan, the Commission has no information regarding a contribution on the part of the recipient or a limitation of the aid to the minimum.

(163) According to the Rescue and Restructuring Guidelines 1999, restructuring aid should be granted once only. If the firm concerned has already received restructuring aid in the past, and less than 10 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.

(164) Sachsen Zweirad GmbH received restructuring aid on the basis of an approved aid scheme, in the form of a public holding amounting to a total of EUR 1 278 200, in April 1996 and March 1998. Since less then 10 years had elapsed since Sachsen Zweirad GmbH's period of restructuring came to an end, and the Commission is not aware of any exceptional and unforeseeable circumstances, the two guarantees did not satisfy the 'one time, last time' condition.

(165) The Commission concludes that the requirements of the Rescue and Restructuring Guidelines 1999 are not satisfied.

(166) The Commission further takes the view that measures 2 and 3 do not fall within the scope of any of the other Community guidelines or regulations applying to aid in such areas as research and development, the environment, small and medium-sized enterprises, employment and training, or risk capital. Since the measure does not pursue any objective of common interest, it constitutes operating aid that is incompatible with the TFEU.

VII. **CONCLUSION**

(167) The Commission concludes that gbb's participation in Bike Systems, amounting to EUR 1 070 732, the 80 % guarantee given on a loan of EUR 5,6 million to Sachsen Zweirad GmbH, and the 80 % guarantee given on a loan of EUR 24 875 000 to Biria GmbH (later Biria AG) constitute State aid, and do not satisfy the tests of compatibility with the internal market.

(168) Under Article 14(1) of Regulation (EC) No 659/1999, the Commission has a fundamental obligation to order the recovery of this incompatible aid from the beneficiary,

HAS ADOPTED THIS DECISION:

Article 1

The State aid granted by Germany to Bike Systems GmbH & Co. Thüringer Zweiradwerk KG (now MB System), Sachsen Zweirad GmbH, and Biria GmbH (later Biria AG, now MB Immobilien) is incompatible with the internal market. The aid consists of the following measures:

(a) measure 1: a silent participation *(stille Einlage)* amounting to EUR 2 070 732 contributed to Bike Systems GmbH & Co. Thüringer Zweiradwerk KG (now MB System); the aid component is the difference between the reference interest rate plus 1 000 basis points and the remuneration to be paid on the participation (the fixed remuneration plus 50 % of the variable remuneration);

(b) measure 2: a guarantee of EUR 4 480 000 given for Sachsen Zweirad GmbH (later Biria AG, now MB Immobilien); the aid component is the difference between the reference interest rate plus 800 basis points and the total financing cost of the guaranteed loan (the interest rate at which the guaranteed loan was provided plus any premiums paid for the guarantee);

(c) measure 3: a guarantee of EUR 19 900 000 given to Biria GmbH (later Biria AG, now MB Immobilien);. the aid component is the difference between the reference interest rate plus 700 basis points and the total financing cost of the guaranteed loan (the interest rate at which the guaranteed loan was provided plus any premiums paid for the guarantee).

Article 2

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

2. Recovery shall be effected without delay and in accordance with the procedures of national law, provided these allow the immediate and effective enforcement of this Decision.

3. The sums to be recovered shall bear interest from the date on which the aid was placed at the disposal of the recipient until their actual recovery.

4. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ([27]).

5. With effect from the date of notification of this Decision, Germany shall cancel all outstanding payments of the aid referred to in Article 1.

Article 3

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

2. Germany shall ensure that this Decision is implemented within 4 months of the date of notification of the Decision.

Article 4

1. Within 2 months of notification of this Decision, Germany shall submit the following information to the Commission:

(a) the total amount (principal and interest) to be recovered from the recipient;

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

(c) documentary evidence that the recipient 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 the recovery of the aid referred to in Article 1 has been completed. Upon request by the Commission, Germany shall immediately submit information on the measures already taken or planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and interest already recovered from the recipient.

Article 5

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 14 December 2010.

For the Commission

Joaquín ALMUNIA

Vice-President

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