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Legislation

Contents

I Acts whose publication is obligatory

.....

II Acts whose publication is not obligatory

Commission

2002/820/EC:

- ★ **Commission decision of 11 July 2001 on the State aid scheme implemented by Spain for firms in Álava in the form of a tax credit amounting to 45 % of investments** ⁽¹⁾ (notified under document number C(2001) 1759) 1

2002/821/EC:

- ★ **Commission decision of 15 January 2002 on the State aid implemented by Germany for Pollmeier GmbH, Malchow** ⁽¹⁾ (notified under document number C(2001) 4447) 20

⁽¹⁾ Text with EEA relevance.

Price: EUR 18,00

(Continued overleaf)

EN

Acts whose titles are printed in light type are those relating to day-to-day management of agricultural matters, and are generally valid for a limited period.

The titles of all other Acts are printed in bold type and preceded by an asterisk.

- ★ **Commission decision of 30 January 2002 on the State aid granted by Spain to a number of steel undertakings in the Basque Country ⁽¹⁾ (notified under document number C(2002) 309)** 35

- ★ **Commission decision of 3 April 2002 on the State aid granted by the Federal Republic of Germany for ILKA MAFA Kältemaschinenbau GmbH ⁽¹⁾ (notified under document number C(2002) 1190)** 42

- ★ **Commission decision of 9 April 2002 on State aid C 72/2001 (ex N 361/2001) which Germany plans to grant to Hamburger AG ⁽¹⁾ (notified under document number C(2002) 1340)** 50

- ★ **Commission decision of 24 April 2002 on the State aid implemented by Belgium for the Beaulieu Group (Ter Lembeek International) ⁽¹⁾ (notified under document number C(2002) 1341)** 60

- ★ **Commission decision of 2 July 2002 on financial measures by Spain in respect of the coal industry in 2001 and in the period 1 January 2002 to 23 July 2002 ⁽¹⁾ (notified under document number C(2002) 2438)** 73

- ★ **Commission decision of 2 July 2002 on the granting by Spain of aid to the undertaking González y Díez SA in 1998, 2000 and 2001 ⁽¹⁾ (notified under document number C(2002) 2441)** 80

(¹) Text with EEA relevance.

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 11 July 2001

on the State aid scheme implemented by Spain for firms in Álava in the form of a tax credit amounting to 45 % of investments

(notified under document number C(2001) 1759)

(Only the Spanish text is authentic)

(Text with EEA relevance)

(2002/820/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

Having, in accordance with the abovementioned Articles ⁽¹⁾, called on interested parties to submit their comments, and having regard to those comments,

Whereas:

SA ⁽³⁾, the Commission learned of the existence of a scheme of non-notified tax aid for investments in Spain, in the Province of Álava, in the form of a 45 % tax credit. The scheme was entered in the register of non-notified aid on 13 November 1998, under the number NN 129/98.

(2) By letter dated 17 August 1999, SG(99) D/6873, the Commission informed the Kingdom of Spain of its decision to initiate in respect of this aid the procedure laid down in Article 88(2) of the Treaty.

(3) By letter from the Permanent Representation dated 9 November 1999, registered on 12 November 1999, the Spanish authorities submitted their comments under the abovementioned procedure.

(4) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* ⁽⁴⁾. The Commission invited interested parties to submit their comments on the aid within one month of the date of publication.

I. PROCEDURE

(1) As a result of the information received in response to the proceedings initiated following complaints about State aid granted to Daewoo Electronics Manufacturing España SA ⁽²⁾, Ramondín SA and Ramondín Cápsulas

⁽¹⁾ OJ C 71, 11.3.2000, p. 8.

⁽²⁾ Commission Decision 1999/718/EC, OJ L 292, 13.11.1999, p. 1.

⁽³⁾ Commission Decision 2000/795/EC, OJ L 318, 16.12.2000, p. 36.

⁽⁴⁾ See footnote 1.

- (5) Comments were received from: the Autonomous Community of Castile-Leon, on 31 March 2000; the Basque Business Confederation (Confederación Empresarial Vasca/Euskal Entrepresarien Konfederakuntza) (hereinafter Confebask), on 13 April 2000, plus, outside the time limit, supplementary comments by letter dated 29 December 2000, registered on 3 January 2001; and from the Rioja Regional Government, outside the time limit, by fax on 19 April 2000, registered on 25 April 2000. By letter dated 18 May 2000, D/53023, the Commission sent these comments to Spain, asking for observations, but did not receive any.
- (6) By letter from the Permanent Representation dated 22 June 2000, the Spanish authorities informed the Commission that, since the seventh additional provision of Provincial Law No 36/1998 of 17 December 1998, which formed the legal basis for the 45 % tax credit in 1999, had not been extended, the new tax credits had ceased to be applicable as from 1 January 2000.

II. DETAILED DESCRIPTION OF THE AID

- (7) According to the information at the Commission's disposal, which has not been questioned by the Spanish authorities or by third parties, the tax aid in question entered into force on 1 January 1995, pursuant to the sixth additional provision of Provincial Law ⁽⁵⁾ No 22/1994 of 20 December 1994 ⁽⁶⁾, for a period of one year. These measures were subsequently extended under the fifth additional provision of Provincial Law ⁽⁷⁾ No 33/1995 of 20 December 1995 until the end of 1996, and under the seventh additional provision of Provincial Law ⁽⁸⁾ No 31/1996 of 18 December 1996 until the end of 1997. In addition, they were amended under point 2.11 of the derogating provision in Provincial Law No 24/1996 of 5 July 1996 on corporation tax ⁽⁹⁾. Under the eleventh additional provision of Provincial Law No 33/1997 of 19 December 1997 ⁽¹⁰⁾, the provincial authorities introduced new incentives for 1998, similar in large part to the above aid. Under the seventh additional provision of Provincial Law No 36/1998 of 17 December 1998 ⁽¹¹⁾, the provincial authorities

introduced further new incentives exclusively for 1999, which were also largely similar to the tax aid for the previous year.

- (8) As regards the 45 % tax credit in force from 1 January to 31 December 1995, the sixth additional provision of Provincial Law No 22/1994 of 20 December 1994 reads as follows:

'Investments in new tangible fixed assets carried out between 1 January 1995 and 31 December 1995 and exceeding ESP 2 500 million shall, by decision of the Álava Provincial Council, qualify for a tax credit equivalent to 45 % of the amount of the investment, as determined by the Álava Provincial Council, to be offset against the amount of personal tax liability.

Any tax credit not used up because it exceeds the amount of tax liability may be carried forward and used for up to nine years following that in which the decision of the Álava Provincial Council is taken.

The decision of the Álava Provincial Council shall lay down the time limits and restrictions applicable in each individual case.

Benefits granted under this provision shall be incompatible with any other tax concessions for which the same investments may be eligible.

The Álava Provincial Council shall also decide on the duration of the investment process, which may include investments made during the preparatory phase of the project which generates the investments.'

- (9) As regards the legal basis for the 45 % tax credit in force from 1 January 1996 to 31 December 1997, the amendment to the above text consisted in deleting the reference to nine years in the second paragraph. Thus, non-deduction on account of insufficient liability could be applied indefinitely.

- (10) As regards the legal basis of the tax credit in force from 1 January to 31 December 1998, the eleventh additional provision of Provincial Law No 33/1997 of 19 December 1997 reads as follows:

'1. For 1998 only, investments initiated as from 1 January 1998 which exceed ESP 2 500 million will be eligible for the tax credit of 45 % of the investment. The tax credit shall apply to net personal liability.

⁽⁵⁾ Norma Foral 22/1994 de 20 de diciembre de 1994 (disposición adicional sexta).

⁽⁶⁾ Boletín del territorio Histórico de Álava, 13.1.1995.

⁽⁷⁾ Norma Foral 33/1995 de 20 de diciembre de 1995 (disposición adicional sexta).

⁽⁸⁾ Norma Foral 31/1996 de 18 de diciembre de 1996 (disposición adicional séptima).

⁽⁹⁾ Norma Foral 24/1996 de 5 de julio 1996 (disposición derogatoria punto 2.11).

⁽¹⁰⁾ Norma Foral 33/1997 de 19 de diciembre de 1997 (disposición adicional undécima).

⁽¹¹⁾ Norma Foral 36/1998 de 17 de diciembre de 1998 (disposición adicional séptima).

2. Any tax credit not used up because it exceeds the amount of tax liability may be carried forward to subsequent years.
 3. The investment process shall include those investments made during the preparatory phase of the project which generates the investments and with a necessary, direct link to that process.
 4. The application of the tax credit to which this general provision refers shall be notified by the taxpayer to the Álava Provincial Council, using the form approved for that purpose by the Provincial Commission for Tax, Finance and Budgets.
 5. Concessions granted under this provision may not be combined with any other tax concessions available in respect of the same investments.'
- (11) As regards the 45 % tax credit in force from 1 January to 31 December 1999, the eleventh additional provision of Provincial Law No 36/1998 of 17 December 1998 reads as follows:
- '1. For 1999 only, investments initiated as from 1 January 1999 which exceed ESP 2 500 million will be eligible for the tax credit of 45 % of the investment. The tax credit shall apply to net personal liability.
 2. Any grants received by the taxpayer shall not be included in the figure of ESP 2 500 million referred to in the previous paragraph.
 3. Any grants received by the taxpayer shall not be included in the base to which the tax credit applies.
 4. Any tax credit not used up because it exceeds the amount of tax liability may be carried forward to subsequent years.
 5. The investment process shall include those investments made during the preparatory phase of the project which generates the investments and with a necessary, direct link to that process.
 6. The application of the tax credit to which this general provision refers shall be notified by the taxpayer to the Álava Provincial Council, using the form approved for that purpose by the Provincial Commission for Tax, Finance and Budgets.
7. Concessions granted under this provision may not be combined with any other tax concessions available in respect of the same investments.'
- (12) In short, it is clear from the above provisions that the aid is granted in respect of, firstly, investments in new tangible fixed assets made during the period from 1 January 1995 to 31 December 1997, and then the investment process from 1 January 1998 to 31 December 1999, and secondly the investment expenditure incurred in the preparatory stage⁽¹²⁾ of the project which generates the investments, provided that they exceed ESP 2 500 million and were initiated between 1 January 1995 and 31 December 1999.
- (13) In addition, between 1 January and 31 December 1999, any grants received by the beneficiary are not taken into account either when establishing whether the investment exceeds the threshold of ESP 2 500 million or when determining the taxable income to which the tax credit of 45 % applies.
- (14) Since the scheme does not require the investment entitling firms to the aid to be located in Álava, a firm resident there for tax purposes could obtain a tax credit equivalent to 45 % of the amount of investments made outside Álava.
- (15) The scheme is furthermore applicable to investments made in any sector and is not subject to any sectoral restriction such as those laid down in the Community sectoral rules applicable to the production, processing and marketing of the agricultural products in Article I to the Treaty, fisheries, coalmining, steelmaking, transport, shipbuilding, synthetic fibres and the motor industry.
- (16) Furthermore, any firm may qualify for the 45 % tax credit in question irrespective of its economic and financial position, even if it is a firm in difficulty.
- (17) Although the 45 % tax credit may not be combined with any other tax concessions that may be granted in respect of the same investment, combination with other, non-tax aid, including grants, subsidised loans, guarantees, equity purchases, etc., relating to the same investments is not ruled out.
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- (12) No precise definition has been supplied of what the Spanish authorities understand by 'investments made during the preparatory phase' for the purposes of applying the tax aid in question.

- (18) In its decision initiating the procedure, the Commission pointed out that as far as the application of the Community State aid rules is concerned, the tax nature of the measures in question is irrelevant, since Article 87 of the Treaty applies to aid measures 'in any form'. The Commission also emphasised, however, that, to be regarded as aid, the measures must meet all four of the criteria set out in Article 87 and explained below.
- (19) Firstly, the Commission pointed out that the tax credit confers on the recipients an advantage amounting to 45 % of the amount of the investments and relieves them of charges that are normally borne from their budgets through a partial reduction in their net tax liability.
- (20) Secondly, the Commission considered provisionally that the said tax credit involves a loss of tax revenue and is therefore equivalent to the consumption of public resources in the form of fiscal expenditure.
- (21) Thirdly, the Commission considered that the tax credit affects competition and trade between Member States. Since the recipients conduct business which may be the subject of intra-Community trade, the aid strengthens their position vis-à-vis competitors who are also involved in intra-Community trade and therefore affects such trade. Furthermore, the recipient firms' profitability is improved by the increase in their net profit (profit after tax). In this way they are more able to compete with firms which are not eligible for the aid.
- (22) Lastly, the Commission considered that the 45 % tax credit is specific or selective in that it favours certain firms, since only firms which make investments exceeding the ESP 2 500 million (ECU 15 025 303) threshold are eligible. All other firms whose investments do not exceed that threshold are ineligible.
- (23) Furthermore, the Commission considered that the selective nature of the concession is also due to a discretionary power of the tax authorities: the Álava Provincial Council has a discretionary power to determine, in particular, the investments that are eligible for the 45 % tax credit and the duration of the investment process and of the preparatory phase of the investments qualifying for the aid.
- (24) In short, the Commission considered that the 45 % tax credit is State aid within the meaning of Article 87(1) of the Treaty and Article 61(1) of the Agreement on the European Economic Area, since it meets the cumulative criteria of constituting an advantage, being granted by the State from State resources, affecting trade between Member States and distorting competition in favour of certain firms.
- (25) Since the tax incentive in question is not subject, among other requirements, to the condition that it does not exceed EUR 100 000 over a period of three years, the Commission considered, at that stage, that it cannot be regarded as subject to the *de minimis* rule⁽¹³⁾.
- (26) The Commission stated that State aid which is not governed by the *de minimis* rule is subject to the obligation of prior notification laid down in Article 88(3) of the Treaty and Article 62(3) of the EEA Agreement. However, the Spanish authorities have not fulfilled this obligation. The Commission therefore considered provisionally that the aid could be regarded as unlawful.
- (27) The Commission also found that the 45 % tax credit is aid conditional on investment⁽¹⁴⁾. However, in the absence of a precise definition of the eligible expenditure, the Commission could not rule out at that stage the possibility that some of the investment expenditure qualifying for the 45 % tax credit might fall within the scope of the Community definition of initial investment⁽¹⁵⁾.
- (28) As regards the investment expenditure falling within the scope of the Community definition, the Commission took the view at that stage that the 45 % tax credit wholly or partly constitutes investment aid. It must therefore be examined in the light of the Community rules on investment aid. On the other hand, any aid to defray investment expenditure which does not fall within the Community definition cannot be regarded as investment aid and has to be considered as aid for other purposes, for example operating aid.
- (29) The 45 % tax credit, which is not restricted to a particular sector, may be granted to firms that are subject to Community sectoral rules. The Commission therefore questioned at that stage whether the aid was compatible where the recipient belongs to a sector subject to special Community rules.
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- ⁽¹³⁾ See point 3.2 of the Community guidelines on State aid for small and medium-sized enterprises (OJ C 213, 19.8.1992, p. 2) and the Commission notice on the *de minimis* rule for State aid (OJ C 68, 6.3.1996, p. 9).
- ⁽¹⁴⁾ See the Annex to the Commission communication on regional aid systems (OJ C 31, 3.2.1979, p. 9).
- ⁽¹⁵⁾ See point 18 of the Annex to the Commission communication on regional aid systems (OJ C 31, 3.2.1979, p. 9) or point 4.4 of the guidelines on national regional aid (98/C 74/06).

- (30) The same applies where the 45 % tax credit is granted to firms in difficulty within the meaning of the Community guidelines on State aid for rescuing and restructuring firms in difficulty. However, the grant of the tax aid in question is not subject to the conditions laid down in those guidelines. Since it does not meet the said conditions, the aid gave rise at that stage to doubts as to its compatibility with the common market where it is intended for firms in difficulty.
- (31) As regards the application of the derogation in Article 87(3)(c) of the Treaty to the aid for investment in Álava, the Commission pointed out that, during the period 1995 to 1999, two successive regional aid maps were in force. Firstly, the map approved in 1998 by Commission Decision 88/C 351/04 provided that only certain areas of Álava (subject to 20 % and 30 % ceilings) could apply for aid and that the rest of the territory was not eligible for the derogation in Article 87(3)(c) of the Treaty. Secondly, the map approved by the Commission Decision of 26 July 1995 provided that from that date the whole of Álava could qualify for aid (subject to a ceiling of 25 % nge).
- (32) The Commission also pointed out provisionally that the ceilings in question apply only to certain eligible expenditure included in the standard base and complying with the Community definition of initial investment, which excludes *inter alia* replacement investments. It stressed that aid granted between 1 January and 31 December 1999 is subject to the above regional aid guidelines, so that investment aid not exceeding the ceilings is also subject to certain additional conditions laid down in those guidelines.
- (33) However, the Commission observed, at this preliminary stage, that the 45 % tax credit was not limited (in the period from 1 January to 26 July 1995) to the industrial zone of the Nervión valley and the areas in the Pyrenees (which were the only areas eligible for aid under the regional aid map current at the time) and was not subject to the 30 %, 25 % and 20 % nge ceilings, depending on the area and the period in question, in the case of large firms, nor to the 30 % nge ceiling in the case of SMEs located in the eligible areas. Outside these areas, the aid was not limited to 15 % gge in the case of small enterprises and 7,5 % gge in the case of medium-sized enterprises. The Commission also found that the eligible expenditure could not be adapted to that in the said standard base. Accordingly, it could not rule out the possibility that the aid could rank as operating aid, since it was intended to reduce the recipient firms' current expenditure. It therefore took the view that there were doubts about the compatibility of the tax incentives with the rules on regional aid.
- (34) As regards the period after 1 September 1998, the Commission considered that the possibility that investment for which aid was granted was covered by the multisectoral framework on regional aid for large investment projects (98/C 107/05) could not be ruled out. However, the tax aid in question was not subject to the notification requirement where large projects are concerned or to a possible reduction in aid intensity that might result from the Commission's assessment. The Commission therefore stated provisionally that there were doubts as to the compatibility of the tax aid where large projects were concerned.
- (35) To sum up, the Commission questioned the compatibility of the tax aid with the common market in the light of the derogation in Article 87(3)(c), which concerns 'aid to facilitate the development (...) of certain economic areas (...)'. Neither did it appear that the other derogations in Article 87(2) and (3) of the Treaty could apply. The tax credit could not be regarded as aid having a social character under Article 87(2)(a), was not intended to make good the damage caused by natural disasters or exceptional occurrences under Article 87(2)(b) and is not subject to the provisions of Article 87(2)(c) concerning 'aid to facilitate the development of certain economic activities (...)'. Furthermore, its object was not to promote the execution of an important project of common European interest, nor to remedy a serious disturbance in the economy of a Member State, as provided for in Article 87(3)(b). Finally, it was not intended to promote culture and heritage conservation within the meaning of Article 87(3)(d).
- (36) As well as inviting them to submit their comments under the Article 88(2) procedure, the Commission also asked the Spanish authorities to supply all the information necessary for assessing the 45 % tax credit in Álava. This information related in particular to: any tax credit for investments available in any year during the period 1986 to 1994, copies of all decisions granting the aid during the period 1995 to 1997 and copies of the declarations made by the firms concerned to the Provincial Council in 1998 and 1999, on the official form, setting out, at least, the nature of the investment expenditure qualifying for the aid, the amount of the tax credit granted to each recipient, the aid actually paid to each recipient and any balance still outstanding, whether the recipient constituted a firm in difficulty within the meaning of the Community guidelines on State aid for

rescuing and restructuring firms in difficulty, the details of any combination of aid (amount, eligible expenditure, where appropriate the aid schemes applied, etc.), and precise and detailed definitions of what constituted 'investments' and 'investments made during the preparatory phase'.

III. COMMENTS OF THE SPANISH AUTHORITIES

- (37) The Spanish authorities submitted their comments by letter from the Permanent Representation dated 9 November 1999. Essentially, they take the view that the tax credit does not constitute State aid within the meaning of Article 87 of the Treaty. In support of their view, they challenge the Commission's assumption that trade will be affected because the companies benefiting from the incentive carry out economic activities which may involve trade between Member States. In their opinion, it cannot be established, *pace* the Commission, that trade is affected generally, but only in specific cases, since there is a possibility that in some cases it will not be affected. In such cases, therefore, one of the prerequisites for classifying an official measure as State aid is missing.
- (38) They also argue that the measure is not specific or selective in character. In their opinion, the opening of the measure to all sectors and to all taxpayers that meet the appropriate criteria removes any specific character. Furthermore, since there are five separate tax systems in Spain, one of which in Álava, the tax rules applicable in that territory have the status of general measures for the taxpayers to whom they apply. The measure therefore has no regional specificity.
- (39) As to specificity of scope, this does not exist, since the measure is open to all sectors and to all taxpayers. The Spanish authorities maintain that the requirement to invest ESP 2 500 million is not discriminatory, but an objective condition deriving from the need to ensure the effectiveness of the measure and thus achieve the proposed objective. However, even if the Commission were to consider that the measure was specific, it would be justified by the nature and general scheme of the system, as provided for in Commission notice 98/C 384/03⁽¹⁶⁾. The measure in question is justified by the nature of the tax system, since it forms part of the single tax system applicable in the territory of Álava and derives from the exercise of the Provincial Council's powers to adopt measures in the tax field; it is also justified by the general scheme of the tax system, since its objective is to promote economic activity. Moreover, it seems logical that the incentives should be targeted at large investments, since, firstly, it is these that will actually benefit Álava in the long term, enabling the tax authorities to collect tax revenues in excess of the fiscal expenditure borne at the start of the investment projects, and, secondly, the minimum investment threshold does not harm small and medium-sized firms, as they already benefit from many Community financing programmes.
- (40) In addition, the Spanish authorities dispute that the relevant measures between 1995 and 1997 are discretionary, arguing that the aid is granted automatically once the condition of investing a minimum of ESP 2 500 million is satisfied. The Provincial Council can thus check only that all the conditions are satisfied; it cannot alter or add any conditions. The Spanish authorities also stress that Spanish tax law does not allow arbitrary decisions when it comes to determining the fundamental characteristics of taxpayers' obligations. The rules have been amended since 1997 and all the features which the Commission regards as discretionary have been repealed.
- (41) The Spanish authorities reject the Commission's view that the tax rules do not satisfy the conditions of the sectoral rules. In their opinion, the Commission ought to determine what the specific conditions are that are infringed by the said tax rules. As regards the application of the tax rules to firms in difficulty, they consider that the condition of investing at least ESP 2 500 million makes it extremely difficult for such firms to obtain the tax credit; it should be regarded more as a guarantee that firms in difficulty will not qualify for the incentive. The Spanish authorities consider that the application of the rules on regional aid is inappropriate, since in this specific case no State aid is involved.
- (42) In view of the above arguments, the Spanish authorities consider that the Commission should terminate the Article 88(2) procedure by a decision finding that the tax measures in question do not meet the criteria for being regarded as State aid.
- (43) For the rest, the Spanish authorities do not consider it necessary to supply the information requested by the Commission concerning, in particular, decisions to

⁽¹⁶⁾ Commission notice on the application of the State aid rules to measures relating to direct business taxation (OJ C 384, 10.12.1998, p. 3).

grant the tax credit, since no State aid is involved. Consequently, they are not providing any of the information requested in the decision initiating the procedure.

IV. OTHER COMMENTS RECEIVED BY THE COMMISSION

- (44) The Commission emphasises that the comments set out below are without prejudice to the question of whether the parties which submitted them can be considered interested parties within the meaning of Article 88(2) of the Treaty.

Comments by the Comunidad Autónoma de Castilla y León

- (45) The Autonomous Community of Castile-Leon points out first of all that the tax measures in question are part of a set of tax measures adopted by the Álava Provincial Council that have been contested both in Spain and at Community level.
- (46) It states that the tax measures in question constitute State aid, since they satisfy all four criteria laid down in Article 87 of the Treaty. In support of this contention it basically puts forward the same arguments as those given in the decision initiating the procedure.
- (47) It also considers that the tax aid cannot be regarded as compatible by virtue of the derogations in Article 87 of the Treaty. Furthermore, the obligation to notify laid down in Article 88(3) of the Treaty has not been complied with.
- (48) The Autonomous Community of Castile-Leon takes the view, therefore, that the tax measures in question should be regarded as State aid which is unlawful, since the notification procedure laid down in Article 88(3) has not been followed, and which is incompatible with the common market.

Comments from the Basque Business Confederation (Confederación Empresarial Vasca/Euskal Entrepresarien Konfederakuntza (Confebask))

- (49) Confebask started by drawing attention to the underlying historical reasons for the tax autonomy enjoyed by Álava. As regards substance, Confebask's views are essentially as follows:

- (a) the presumed reduction of the tax debt: the Commission is wrong to think that there is a tax debt whose reduction involves a loss of tax revenue. If this argument were sound, any tax deduction would always involve a loss of revenue compared with the amount initially due. Confebask therefore asks the Commission to reconsider its position, since otherwise it could be argued that taxes were being unlawfully harmonised by establishing a normal amount in relation to which any losses of tax revenue would have to be determined;
- (b) the effect on trade: according to the Commission, where the recipients participate in intra-Community trade, the tax measures in question distort that trade. However, differences between tax systems always affect trade. To determine the extent to which trade is affected, the Commission should therefore analyse the entire tax system and not specific provisions. Confebask emphasises in this respect that, according to one study, the tax burden in the Basque Country is greater than in the rest of Spain. The Commission should explain why these specific measures and not other tax differences affect trade. In any event, even if such an effect did exist, the way to remove it would be through harmonisation, not State aid;
- (c) the selective character of the aid: in Confebask's opinion, the selective nature of the tax measures should be assessed in one of two ways, either as an enabling rule conferring power on the tax authority subsequently to grant a specific relief, or as a rule directly granting the tax relief without requiring subsequent specification. The Commission, however, is using one argument which fits the first category, and another which fits the second. Given that the two are mutually exclusive, the Commission should explain in which category the tax measures in question fall, since otherwise it would be contradictory to try and use both.
- Confebask questions the approach whereby the tax measures are regarded as enabling rules, since the reduction is granted automatically and the authorities, accordingly, had no discretionary power either before 1997 or thereafter. The authorities are restricted to checking that the applicant satisfies the tests of eligibility. Moreover, if the tax measures are regarded as enabling rules which subsequently make it possible to grant the aid, it has to be concluded that the current procedure, in so

far as it is the rules that are being questioned and not specific instances of their application, is meaningless. Similarly, according to the first paragraph of the Commission's letter to the Member States ⁽¹⁷⁾, a general provision conferring relief is regarded as aid only if 'legislative machinery enabling it to be granted without further formality has been set up'. By contrast, because it is abstract, an enabling rule cannot be regarded as State aid and, hence, cannot be assessed for its effect on competition and trade between Member States.

- As for regarding the tax measures as rules granting aid directly, Confebask points out that, according to points 19, 20 and 17 of notice 98/C 384/03, a tax measure may be specific and, hence, may be State aid, if it is aimed solely at public undertakings, certain types of undertaking or undertakings in a given region. However, the tax measures in question have none of these characteristics, not even territorial specificity, since they apply to the whole territory for which the regional authorities that introduced them are competent. As to the specific character of the threshold of ESP 2 500 million, Confebask considers that the use of objective thresholds is normal practice in national and Community tax rules. Confebask also draws attention to the basis of various judgments of the Court of Justice and Commission decisions: hitherto, it has never been held that thresholds imply specificity. Moreover, the Commission itself acknowledges, in point 14 of the above notice, that the effect of promoting certain sectors does not necessarily mean that the measures are specific and, in point 207 of the 1998 Competition Report, that measures which have a cross-sectoral impact and are intended to favour the whole of the economy are general measures and do not involve State aid. In short, the tax measures in question are

not specific, since they do not promote a particular sector or particular undertakings. On the contrary, they are open to all sectors and to all undertakings established in the territory for which the provincial authorities are competent;

- (d) illegality of the 45 % tax credit: while still disputing that the tax credit constitutes State aid, something that has to be proven in order to classify the measure as illegal, Confebask argues that the Commission's description of the tax credit as unlawful aid calls into question the principles of legitimate expectations, the ban on arbitrary decisions by institutions, legal certainty and proportionality, since the Commission regarded the Basque tax arrangements as lawful in its Decision 93/337/EEC ⁽¹⁸⁾. In any event, the Commission could change its position as regards future cases but not as regards past ones. Confebask furthermore regards the tax measures in question as existing aid. In 1983 there were already rules providing for concessions of the same type (deduction of 65 % of the tax payable where new investments were made). In 1984 a threshold of ESP 500 million was introduced as a qualifying condition for a tax credit amounting to 50 % of investments. According to the definition given in Article 1(a) 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 ⁽¹⁹⁾, 'existing aid' means 'all aid which existed prior to the entry into force of the Treaty in the respective Member States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the Treaty'. The aid under examination here is therefore legal for the purposes of Article 88(3) of the Treaty;
- (e) incompatibility with the common market: if the tax measures in question are regarded as enabling rules, Confebask considers that their compatibility cannot be assessed while the aid is not granted through an administrative decision. The procedure is meaningless and incapable by definition of yielding any results as to the compatibility of the aid. On the other hand, if the tax measures in question are regarded as rules granting aid directly, Confebask takes the view that the practice of the Commission and the Court requires that measures have to have sectoral specificity before the compatibility of the aid can be assessed. Furthermore, it would be necessary to establish the overall tax burden on firms and the reference tax burden.

⁽¹⁷⁾ Commission letter to Member States, SG(89) D/5521, of 27 April 1989.

⁽¹⁸⁾ OJ L 134, 3.6.1993, p. 25.

⁽¹⁹⁾ OJ L 83, 27.3.1999, p. 1.

Lastly, this approach would lead to the absurd conclusion that any tax burden lower than the highest tax burden in all the Member States would constitute State aid. Confebask also rejects the Commission's argument that the said tax measures are incompatible since they do not contain specific provisions on sectoral or regional aid, or aid for large investment projects, etc.: tax measures may not and should not contain this type of provision. According to the Court of Justice⁽²⁰⁾, the Commission should specify in its decisions what the adverse effects on competition are, determining the real effect of the measures examined. Incompatibility cannot be determined, therefore, in abstract situations specific to a tax system, since in that case any differences between tax systems would necessarily become aid. This leads Confebask to repeat that there is no normal tax debt which has been reduced by the tax measures in question;

- (f) Confebask therefore asks the Commission to adopt a final decision terminating the procedure and finding that the tax measures in question comply with Community law.

- (50) Confebask's additional comments, communicated by letter dated 29 December 2000, registered on 3 January 2001, were not taken into account, as they reached the Commission after the deadline had expired⁽²¹⁾. Furthermore, Confebask did not apply for an extension of the time limit pursuant to Article 6(1) of Council Regulation (EC) No 659/1999.

Comments from the Rioja Regional Government

- (51) The Rioja Government's comments, sent by fax dated 19 April 2000, registered on 25 April 2000, were not taken into account, as they reached the Commission after the deadline had expired. Furthermore, the Rioja Regional Government did not apply for an extension of the time limit pursuant to Article 6(1) of Council Regulation (EC) No 659/1999.

V. COMMUNICATION OF THE THIRD PARTIES' COMMENTS TO SPAIN

- (52) By letter to the Spanish Permanent Representation, dated 18 May 2000, the Commission sent, pursuant to Article 6(2) of the aforesaid Regulation (EC) No 659/1999, the third parties' comments to Spain, inviting it to submit its observations within one month of the date of the letter, but it received only a request for a 20-day extension of the deadline for replying. Spain has not submitted any such observations, therefore.

VI. ASSESSMENT OF THE AID

VII. CLASSIFICATION AS STATE AID

- (53) The Commission would point out that, for the purpose of applying the Community rules on State aid, the tax nature of the measures in question does not matter, since Article 87 of the Treaty applies to aid measures 'in any form'. Nevertheless, the Commission emphasises that, to be regarded as aid, the measures in question should together satisfy all four of the criteria set out in Article 87 and explained below.
- (54) Firstly, the measure must confer on recipients an advantage which relieves them of charges that are normally borne from their budgets. The advantage may be provided through different types of reduction in the firm's tax burden and, in particular, through an exemption from or reduction in tax liability. The 45 % tax credit meets this criterion, since it reduces the recipient firms' tax burden by an amount equivalent to 45 % of the eligible investment. In the absence of the tax credit, the recipient firm would have to pay its full final tax liability. The tax credit thus implies an exception to the common tax system applicable.
- (55) Secondly, the Commission considers that the said 45 % tax credit involves a loss of tax revenue and is therefore equivalent to the consumption of public resources in the form of fiscal expenditure. This criterion is also applied to aid granted by regional and local bodies in the Member States⁽²²⁾. Furthermore, the intervention of the State can be effected both through tax provisions of a statutory, regulatory or administrative kind and through the practices of the tax authorities. In this specific case, State intervention is effected through the Álava Provincial Council on the basis of a statutory provision.

⁽²⁰⁾ See Joined Cases C-278/92, C-279/92 and C-280/92 Spain v Commission [1994] ECR I-4103.

⁽²¹⁾ The deadline for submitting comments was one month from the date of publication of the notice in the *Official Journal of the European Communities*, i.e. 26 February 2000.

⁽²²⁾ See Case 248/84 Germany v Commission [1987] ECR 4013.

- (56) The argument put forward in certain comments by third parties, to the effect that it would be wrong to regard the 45 % tax credit as involving a loss of tax revenue compared to the normal amount (determined by the Commission) of the tax due, is a fallacious one. It has to be pointed out that the normal level of tax derives from the tax system in question and not from any Commission decision allegedly pursuing a hidden agenda of tax harmonisation. Furthermore, according to the second indent in point 9 of notice 98/C 384/03, to qualify as State aid, 'firstly, the measure must confer on recipients an advantage which relieves them of charges that are normally borne from their budgets. The advantage may be provided through a reduction in the firm's tax burden in various ways, including: (...) a total or partial reduction in the amount of tax (such as exemption or a tax credit)'. This is the case with the relief in the form of the 45 % tax credit. The comment is therefore without foundation.
- (57) Thirdly, the measure must affect competition and trade between Member States. It should be pointed out in this respect that, according to a report on the external dependency of the Basque economy in the period 1990 to 1995 ⁽²³⁾, exports abroad went up ⁽²⁴⁾, not only in absolute terms but, in particular, in relative terms as well, to the detriment of exports to the rest of Spain. The foreign market thus partly replaced the market which is the rest of Spain. Furthermore, according to another statistical report on the foreign trade of the Basque Country ⁽²⁵⁾, at 28,9 % the Basque economy's 'propensity to export' (ratio of exports to GDP) is greater than that of Germany and the other Member States, where it is about 20 %. According to this report, the Basque trade balance was clearly in surplus during the period 1993 to 1998. In particular, in 1998, for each ESP 100 of imports there were ESP 144 of exports. In short, the Basque economy is very open to the outside, and its production is very much geared to exporting. Given these characteristics of the Basque economy, it may be deduced that recipient firms are engaged in economic activities which are likely to include intra-Community trade. Consequently, aid strengthens their position vis-à-vis their competitors in intra-Community trade, thereby affecting such trade. Furthermore, the recipient firms' profitability is improved by the increase in their net profit (profit after tax). This enables them to compete with firms which are not eligible for the tax credit, either because they have not invested, or because their investments have not reached the threshold of ESP 2 500 million following the introduction of the tax credit.
- (58) Since, in this case, the tax rules under examination are general and abstract in character, the Commission would point out that the analysis of their impact on trade can only be carried out at a general, abstract level; it is not possible to specify to what extent they affect a market, sector or specific product, as is stated in the abovementioned comments by third parties. This position has been confirmed on a number of occasions by Court of Justice case-law ⁽²⁶⁾.
- (59) As regards certain comments from third parties which maintain that the effect on trade should be assessed by the Commission on the basis of a comparison of all tax systems, the Commission would point out that the distortions of competition which are the subject of this procedure under Articles 87 and 88 of the Treaty are due to a derogating rule which favours certain firms vis-à-vis the other firms of the Member State; they are not possible distortions of competition which are due to differences between the tax systems of the Member States, which might, as appropriate, be caught by the provisions of Articles 93 to 97.
- (60) As regards the specific character which State aid must have, the Commission takes the view that the 45 % tax credit is specific or selective in that it favours certain firms, since only firms which, after 1 January 1995, make investments exceeding the ESP 2 500 million (EUR 15 025 303) threshold are eligible. All other firms whose investments do not exceed that threshold are ineligible. The objective character of the threshold cited does not prevent it, as the Spanish authorities and some

⁽²³⁾ Patxi Garrido Espinosa and Victoria García Olea, 'La dependencia exterior vasca en el periodo 1990-1995', Euskal Estatistika-Erakundea/Instituto Vasco de Estadística (Eustat), the statistical office of the Basque Government.

⁽²⁴⁾ Exports abroad accounted for 28,5 % of total exports (including sales to the rest of Spain) in 1990, and for 40,8 % five years later in 1995.

⁽²⁵⁾ 'Estadística de Comercio Exterior para la Comunidad Autónoma de Euskadi en el año 1998', prepared by Eustat.

⁽²⁶⁾ See Case C-75/97 (Maribel) Belgium v Commission, paragraphs 48 and 51; Case T-298/97 Alzetta Mauro and others v Commission, paragraphs 80 to 82; the Opinion of Advocate General Ruiz-Jarabo in Case C-310/99 Italy v Commission, paragraphs 54 and 55; and the Opinion of Advocate General Saggio in Case C-156/98 Germany v Commission, paragraph 31, which ran thus: 'It should be pointed out in this respect that, with regard to a general aid scheme, to be able to determine the effect of that scheme on trade, it is sufficient if, from an *ex ante* assessment, it can reasonably be considered that the said effect may come about. If the position of a firm (or, as in the present case, an indefinite number of firms) is reinforced by an aid scheme, this privilege may in principle affect competition between Member States.'

of the third-party comments claim, from being selective and excluding firms which do not satisfy the conditions in question.

- (61) The Commission is of the opinion, in the alternative, that the 45 % tax credit is specific on the grounds of the discretionary power of the tax authorities. In this case, the Commission finds that Álava Provincial Council had more of a discretionary power to alter the aid than to grant it. In 1995, 1996 and 1997, the Álava Provincial Council had to decide whether to grant the 45 % tax credit, since it was not automatic, determine the size of the investments to which the tax credit would apply, set the time limits and limitations that would apply in each case and, lastly, decide on the duration of the investment process, which could include investments made during the preparatory phase of the project generating the investments. All these powers of the Álava Provincial Council give it discretion to determine the size or the characteristics of the 45 % tax credit in the light of the particular circumstances of each applicant. A further discretionary feature is the scope for determining the investments made in the preparatory stage of the project which generates the investments. It should be noted that, in the decision initiating the procedure, the Commission pointed out that there was no precise, objective definition of this type of investment. No information on this point has been supplied, either in the comments submitted by the Spanish authorities or in those of third parties. However, the fact that there is no precise and generally accepted definition would seem to give the regional authorities scope to determine the amount of this type of investment.
- (62) The Commission notes, furthermore, that from 1 January 1998 some of the conditions were altered or even abolished. Instead, a new concept, the 'investment process', was introduced, replacing 'investments in new tangible fixed assets', which had applied from 1 January 1995 to 31 December 1997. It should be noted that the provincial laws introducing the concept of 'investment process' do not define it. Unlike the concept of 'investments in tangible fixed assets', which is defined in accounting rules⁽²⁷⁾ and other provisions⁽²⁸⁾, there is no precise and generally accepted definition of the 'investment process'. In the absence of a precise definition, therefore, the regional authorities have some leeway in determining exactly what is meant by the 'investment process' in the case of each recipient.
- (63) It should also be stressed that, while in Decision 93/337/EEC the Commission used only the criterion of territorial or sectoral specificity in order to demonstrate the specific or selective nature of the aid under the scheme in question, this does not mean that the aid could not have displayed other types of specificity in relation to other criteria. For an official measure to be classed as selective or specific, in relation to State aid, it is enough to identify a single feature. There is therefore no need for each Commission decision to examine exhaustively every specific feature that may be displayed by the official measures under consideration in order to demonstrate that they are selective. Consequently, the argument put forward in some third-party comments, to the effect that because the Commission did not mention the selective nature of the minimum investment threshold as a condition of eligibility for the aid, it did not deem it to be selective, cannot be accepted.
- (64) As regards the existence of tax measures in the form of tax credits for investments above a given threshold in other Member States, which the Commission did not consider selective in scope because of the threshold; according to certain comments by third parties, this leads to a legitimate expectation concerning all similar tax credits. The Commission would point out that the schemes mentioned by some of the parties are very different from the 45 % tax credit. Furthermore, even supposing that certain schemes were similar and that the Commission had not reacted, it would not be justified in taking this misguided approach in the present case. It should be pointed out that, according to the case-law of the Court of Justice, 'any breach by a Member State of an obligation under the Treaty in connection with the prohibition laid down in Article 92 cannot be justified by the fact that other Member States are also failing to fulfil this obligation. The effects of more than one distortion of competition on trade between Member States do not cancel one another out but accumulate and the damaging consequences to the common market are increased'⁽²⁹⁾.
- (65) Concerning the question raised in some of the third-party comments about whether the Provincial Law in question has the character of an enabling rule or a rule granting aid directly, the Commission would point out that, in this case, the rules which introduced the 45 % tax credit have the character of an aid scheme. In support of this assessment, it is sufficient to point out that under Article 1(d) of Regulation (EC) No 659/1999 an aid

⁽²⁷⁾ For example, the 'Plan General de Contabilidad'.

⁽²⁸⁾ For example, the 'Ley de Sociedades Anónimas'.

⁽²⁹⁾ See Case C-78/76 *Steinike & Weinlig v Federal Republic of Germany*, paragraph 24. On the other hand, Case C-313/90 *Comité International de la rayonne et des fibres synthétiques and others v Commission*, paragraph 45, states that, 'neither the principle of equal treatment nor that of the protection of legitimate expectations may be relied upon in order to justify the repetition of an incorrect interpretation of a measure'.

scheme is defined as 'a system on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner (...)'. However, this character of an aid scheme does not predetermine, as certain third-party comments claim, whether there is any discretionary power in the execution of the scheme or not. Discretionary power in regard to the granting of the aid will depend on the specific characteristics of the scheme.

(66) As regards invoking the nature or general scheme of the tax system as justification for the 45 % tax credit, as the Spanish authorities seek to do, the Commission emphasises that what matters is determining whether the tax measures involved meet the objectives inherent in the tax system itself, or whether, on the contrary, they pursue other, possibly legitimate, objectives outside the tax system. In the case at issue, the 45 % tax credit does not fulfil the internal objectives of the Spanish tax system, which, apart from the principal objective inherent in any tax system of collecting revenue for financing public expenditure, is founded on the principles of equality and progressiveness.⁽³⁰⁾ In this regard it has to be pointed out that the 45 % tax credit involves⁽³¹⁾ a discrimination in favour of large economic units at the expense of other smaller and less powerful units, without such discrimination being justified by the internal logic of the tax system. In short, because it does not comply with the internal principles inherent in the tax system, the 45 % tax credit cannot be justified by the nature or general scheme of that system. Neither does the fact that the tax credit was introduced by the provincial authorities with powers in the tax field demonstrate, contrary to what the Spanish authorities claim in their comments, that it is consistent with the nature of the tax system.

(67) Moreover, the Spanish authorities state in their comments that the 45 % tax credit satisfies the objective of promoting economic activity. It thus helps to achieve the industrial policy objectives pursued by the Basque Government. According to the Basque Government document entitled Industrial Policy: General Framework of Activities 1996-1999 (Política Industrial. Marco General de Actividades 1996-1999), 'tax policies are essential for boosting economic development and, similarly, for promoting industrial projects based on the industrial development of the Basque Country' (page 131), and in the chapter 'Tax policy instruments' one reads: 'the tax autonomy which we have (in the Basque Country) enables us to search for imaginative made-to-measure

tax solutions, e.g. for priority projects or even tax incentives for large firms' (page 133). The 45 % tax credit in question, therefore, is part of an industrial policy whose objectives are not inherent in the tax system.

(68) In short, the Commission finds that, as the Spanish authorities have pointed out, the 45 % tax credit pursues an economic policy objective which is not inherent in the tax system. It is therefore not justified by the nature or general scheme of the system.

(69) As to the argument put forward in certain third-party comments concerning the existence of a higher overall tax burden in the Basque Country, the Commission repeats that this is not relevant in the case at issue, since the procedure was initiated in respect of a specific measure and not the whole the tax system of each of the three Basque provinces.

(70) To sum up, the Commission finds that the 45 % tax credit in question is State aid under Article 87(1) of the Treaty and Article 61(1) of the EEA Agreement, since it involves aid granted by a State, from State resources, which favours certain undertakings, distorts competition and affects trade between Member States.

VIII. ILLEGALITY OF THE 45 % TAX CREDIT

(71) Since the scheme does not require a commitment from the Spanish authorities to grant the aid in accordance with the conditions for *de minimis* aid⁽³²⁾, the Commission considers that the aid cannot be regarded as subject to those rules. It should be stressed in this respect that the Spanish authorities never maintained, in the procedure, that the aid in question should be classed as *de minimis* aid, either in full or in part. Moreover, it could not comply with the *de minimis* rules, since in particular there is no guarantee that the ceiling of EUR 100 000 would not be exceeded. The incentive does not qualify as existing aid either, since it does not meet the conditions laid down in Article 1(b) of Regulation (EC) No 659/1999.

⁽³⁰⁾ Article 31 of the Spanish Constitution.

⁽³¹⁾ See the sixth paragraph of Judgment 411/99 of 17 May 1999 of the High Court of the Basque Country (Tribunal Superior de Justicia del País Vasco) in Case 907/98 Administración del Estado v Juntas Generales de Álava.

⁽³²⁾ The result of the assessment of the aid is the same, whether that assessment is based on the Commission notice on the *de minimis* rule for State aid (OJ C 68, 6.3.1996) or on Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid (OJ L 10, 13.1.2001, p. 30).

(72) The claim made by some third parties that the 45 % tax credit constitutes existing aid must be rejected. In support of that argument, some third-party comments mention the existence of two tax credits prior to the introduction of the 45 % tax credit. However, scrutiny of those two schemes reveals that they differed substantially from the 45 % tax credit under examination. The first scheme did not specify any threshold and the second one established a threshold of ESP 500 million, which is much lower than the ESP 2 500 million threshold in the case at issue. In Article 1(c) of Regulation (EC) No 659/1999, new aid is defined as 'all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid'. The tax credit in question, which involves substantial changes with respect to those schemes, is therefore to be classed as new aid and, in accordance with Article 2(1) of the Regulation, should be notified, save as otherwise provided in regulations adopted pursuant to Article 89 of the Treaty⁽³³⁾. In any case, even the two earlier schemes did not qualify as existing aid since they were apparently not in force on 1 January 1986, when Spain acceded to the European Union. They therefore did not meet the aforesaid criterion laid down in Article 1(b)(i) of Regulation (EC) No 659/1999 of having been put into effect before, and being still applicable after, the date of accession.

(73) The Commission would point out that State aid which is not covered by the *de minimis* rule and is not existing aid is subject to the obligation of prior notification laid down in Article 88(3) of the Treaty and Article 62(3) of the EEA Agreement. However, the Spanish authorities have not fulfilled this obligation. The Commission therefore considers that the aid should be regarded as unlawful. The Commission regrets this failure by the Spanish authorities to fulfil their obligation to notify the aid in advance.

(74) As regards the argument in some of the third-party comments that basically there is a violation of legitimate expectations and legal certainty, the Commission feels bound to reject this, since firstly the 45 % tax credit is not existing aid and, secondly, as it was not notified under Article 88(3) of the Treaty, the Commission was not able to determine whether it is compatible with the common market. Neither can it be accepted that there is a legitimate expectation of the 45 % tax credit being compatible with the common market on the grounds that, as claimed in some of the third-party comments,

the Basque tax system was already deemed compatible by Commission Decision 93/337/EEC concerning a scheme of tax concessions for investment. In that Decision, the Commission in fact found that the tax measures concerned were to be classed as State aid and, as such, were subject to the Community rules on State aid (rules on regional aid or aid for SMEs, rules on combination of aid and sectoral rules). Therefore, if as claimed in some third-party comments the 45 % tax credit was a measure similar to the scheme examined in the 1993 Decision, it should, in the first place, have been notified as it is new State aid and, secondly, comply in particular with the rules on regional aid or aid for SMEs, the rules on combination of aid and the sectoral rules. In these circumstances, the recipients cannot rely on any legitimate expectations or legal certainty as regards the State aid nature of the 45 % tax credit.

(75) In short, as regards the principles of legitimate expectations and legal certainty invoked in the third-party comments, the Commission gave no specific assurances either to the Spanish authorities or to third parties, who could not therefore harbour any legitimate expectations with regard to the legality or compatibility of the aid in question. It should be pointed out in this connection that 'it is settled case-law that the right to protection of legitimate expectations may be claimed by any individual who finds himself in a position in which it is shown that the Community administration gave rise to justified hopes on his part (...). However, no one may plead infringement of the principle of the protection of legitimate expectations in the absence of specific assurances given to him by the administration'⁽³⁴⁾. This is why the argument that legitimate expectations or legal certainty have been violated is without foundation in this case. The Commission would also point out in this respect that in its Decision 93/337/EEC it had already deemed certain tax credits introduced in 1988 by the Provinces of Álava, Guipúzcoa and Vizcaya to be State aid.

IX. ASSESSMENT OF COMPATIBILITY WITH THE COMMON MARKET

(76) As a preliminary, the Commission would repeat that the 45 % tax credit has to be classed as an aid scheme. Given the general, abstract nature of an aid scheme, the Commission does not know the circumstances of existing or possible future recipient firms and is not, therefore, able to examine the exact repercussions on competition for specific firms. In this context it is sufficient to

⁽³³⁾ At no time during the period of validity of the scheme in question was any such exemption regulation in force.

⁽³⁴⁾ Joined Cases T-132/96 and T-143/96 Freistaat Sachsen and others v Commission [1999] ECR II-3663, paragraph 300.

ascertain that potential recipients could benefit from aid that is not consistent with the Community directives, guidelines and frameworks applicable on this subject. Moreover, the Commission would emphasise that, in its decision initiating the procedure, it asked for all relevant information relating to the aid and the particular circumstances of each recipient. However, the Spanish authorities have not provided any such information. This is why it is contradictory to criticise the Commission, as certain third-party comments do, for providing only a general assessment while at the same time refusing to supply the detailed data requested.

(77) The State aid in the form of a 45 % tax credit has the effect of encouraging large investments costing more than ESP 2 500 million. According to Annex I to the guidelines on national regional aid (98/C 74/06), 'tax aid may be considered to be aid connected with an investment where it is based on an amount invested in the region. In addition, any tax aid may be connected with an investment if one sets a ceiling expressed as a percentage of the amount invested in the region'. In the case in point, the 45 % tax credit fulfils these conditions, at least partly, since it is based on investment expenditure and its amount does not exceed 45 % of the investment. The Commission accordingly takes the view that the 45 % tax credit should be classed as investment aid to the extent that it fulfils the above criteria. It must therefore be examined in the light of the Community rules on investment aid.

(78) If State aid for investment is to qualify for one of the regional derogations in Article 87(3)(a) or (c) of the Treaty, the region in which the scheme is applied must have been recognised as eligible for one of those derogations on the regional aid map. As regards the admissibility of Álava, the Commission would point out that the territory has never been eligible for the Article 87(3)(a) derogation, since the per capita GDP ⁽³⁵⁾ of the NUTS ⁽³⁶⁾ II region of the Basque Country, of which it forms part, has always been higher than 75 %

of the Community average. According to the rules on regional aid ⁽³⁷⁾, ⁽³⁸⁾, the conditions of eligibility for the derogation in Article 87(3)(a) of the Treaty are met only if the region, at NUTS level 2, has a per capita GDP of not more than 75 % of the Community average.

(79) As regards admissibility for the derogation in Article 87(3)(c), during the period 1995 to 1999 two successive regional aid maps were in force. The first was adopted in 1988 under Commission Decision (88/C 351/04). This provided that investment aid for regional development could be regarded as compatible with the common market under the derogation in Article 87(3)(c), provided that it did not exceed the ceiling of 30 % nge in the case of large firms in the industrial zone of the Nervión valley and 20 % nge in the case of large firms in the Pyrenees. However, investment aid in the rest of Álava could not be regarded as compatible with the common market under the derogation in Article 87(3)(c) of the Treaty.

(80) The Commission would also point out that, in its Decision of 26 July 1995 ⁽³⁹⁾ amending Spain's regional aid map, it proposed, under the procedure laid down in Article 88(1) of the Treaty, that the Spanish authorities should revise the map and consider in future that the whole of Álava was a region in which aid for regional development could be regarded as compatible with the common market under the derogation in Article 87(3)(c), provided that it did not exceed the ceiling of 25 % nge in the case of large firms. By letter from the Permanent Representation dated 26 September 1995, the Spanish authorities accepted this proposal. The new map thus came into force from that date.

⁽³⁵⁾ Per capita gross domestic product (GDP) measured in purchasing power standards (PPS).

⁽³⁶⁾ Nomenclature of Territorial Units for Statistics.

⁽³⁷⁾ The references to the regional rules are, in some of the subsequent recitals, to the guidelines on national regional aid (98/C 74/06) or to the earlier rules. In any event, the result of the assessment is the same in all cases.

⁽³⁸⁾ See point 1 of the Commission communication to the Member States on the method for the application of Article 92(3)(a) and (c) to regional aid (OJ C 212, 12.8.1988, p. 2) and point 3.5 of the guidelines on national regional aid (98/C 74/06).

⁽³⁹⁾ OJ C 25, 31.1.1996, p. 3.

- (81) The Commission would also point out that, in the case of SMEs⁽⁴⁰⁾, the intensity of investment aid may, in accordance with the SME guidelines⁽⁴¹⁾, be 10 percentage points higher than the regional ceiling for large firms, provided that the total does not exceed 30 % nge.
- (82) It should also be stressed that, to be eligible for investment aid, investments in tangible assets must correspond, in particular, to the Community definitions of initial investment and the standard base⁽⁴²⁾. Conversely, all other investment expenditure that does not correspond to those definitions, such as replacement investments or expenditure on items other than land, buildings or plant/machinery, is not deemed eligible. Although there is no doubt that the 45 % tax credit is aid granted subject to the carrying-out of a tangible investment⁽⁴³⁾ in new tangible fixed assets, it does not exclude replacement investments⁽⁴⁴⁾ or expenditure related to the 'investment process' and 'investments made during the preparatory phase'. In the absence of a precise definition of those terms, the possibility cannot be ruled out that the 45 % tax credit could be applied not only to expenditure included in the standard base but also to expenditure linked to replacement investments or other items of expenditure lying outside the standard base. The Commission consequently takes the view that the aid may be applied to initial investment but also to other items of expenditure that cannot be deemed compatible with the relevant Community rules, such as replacement investments.
- (83) The Commission notes that, since the entry into force of the guidelines on national regional aid (98/C 74/06), aid that may qualify for the derogation in Article 87(3)(c) of the Treaty in Álava must not only comply with the abovementioned Community definitions of initial investment and the standard base and observe the applicable ceilings; it must also satisfy other requirements. In the case in point, the aid must be subject to certain conditions: the recipient's contribution to the investment must be at least 25 % (point 4.2); the application for aid must be submitted before the investment projects begin to be implemented (point 4.2); the investment must be maintained for a minimum period of five years (point 4.10); and the respective aid intensity ceilings must be complied with where different types of aid are combined (points 4.18 to 4.21).
- (84) In this particular case, the Commission would observe that the 45 % tax credit was not limited (in the period culminating in the entry into force of its Decision of 26 September 1995) to the industrial zone of the Nervión valley and the areas in the Pyrenees (which were the only areas eligible for aid under the regional aid map current at the time) and were not subject to the 30 %, 25 % and 20 % nge ceilings, depending on the area and the period in question, in the case of large firms, nor to the 30 % nge ceiling in the case of SMEs. Furthermore, the costs that may be accepted for aid may not fully correspond to those included in the standard base since replacement investments are not excluded and other items of expenditure may be accepted. In these circumstances, the Commission finds that a tax credit amounting to 45 % of investments which does not comply with the Community rules on regional aid cannot be deemed compatible with the common market under the regional derogation in Article 87(3)(c) of the Treaty.
- (85) Aid for investment expenditure⁽⁴⁵⁾ that does not correspond to the Community definition cannot be regarded as investment aid. In accordance with Annex I to the regional aid guidelines (98/C 74/06), any tax aid may be classed as investment aid where its amount is subject to a ceiling expressed as a percentage of investment expenditure in accordance with the Community rules. However, in the case in point, the amount of the aid
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- ⁽⁴⁰⁾ For the purposes of the Community guidelines on State aid for small and medium-sized enterprises (OJ C 213, 19.8.1992, p. 2) or the Commission recommendation of 3 April 1996 concerning the definition of small and medium-sized enterprises (96/C 213/04).
- ⁽⁴¹⁾ Community guidelines on State aid for small and medium-sized enterprises (92/C 213/02) (OJ C 213, 19.8.1992, p. 2) or Community guidelines on State aid for small and medium-sized enterprises (96/C 213/04).
- ⁽⁴²⁾ See the Annex to the Council resolution of 20 October 1971 (OJ C 111, 4.11.1971, p. 1), point 5(c); the Annex to the Commission communication on regional aid systems (OJ C 31, 3.2.1979, p. 9), point 18; the Community guidelines on State aid for small and medium-sized enterprises, point 4.2.1; or the guidelines on national regional aid (98/C 74/06) (OJ C 74, 10.3.1998, p. 9), point 4.4 (initial investment means an investment in fixed capital relating to the setting-up of a new establishment, the extension of an existing establishment, or the starting-up of an activity involving a fundamental change in the product or production process of an existing establishment (through rationalisation, diversification or modernisation)), point 4.5 (aid for initial investment is calculated as a percentage of the investment's value. This value is established on the basis of a uniform set of items of expenditure (standard base) corresponding to the following elements of the investment: land, buildings and plant/machinery) and footnote 23 (in the transport sector, expenditure on the purchase of transport equipment (movable assets) cannot be included in the uniform set of items of expenditure (standard base). Such expenditure, therefore, is not eligible for aid for initial investment).
- ⁽⁴³⁾ See the Annex to the Commission communication on regional aid systems (OJ C 31, 3.2.1979, p. 9).
- ⁽⁴⁴⁾ Footnote 21 in the guidelines on national regional aid (98/C 74/06) states that 'replacement investment is thus excluded from the concept. Aid for this type of investment falls within the category of operating aid, to which the rules described at points 4.15 to 4.17 apply'.
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- ⁽⁴⁵⁾ It should be pointed out that neither the Spanish authorities nor others have questioned the existence of this type of investment expenditure.

represents a percentage of investment expenditure that does not comply with the Community rules. That is why, under those rules, the aid cannot be regarded as investment aid. On the contrary, the aid may finance expenditure of a periodic and necessary nature such as that linked to replacement investments. Such current or periodic expenditure is the type of expenditure that has to be incurred by a firm as part of its day-to-day operations or its normal activities. Aid for this type of investment therefore has to be classed as operating aid and as such is subject to specific rules.

- (86) In this respect, the Commission would point out that, in accordance with the 1988 communication⁽⁴⁶⁾ and the regional aid guidelines (98/C 74/06), regional aid which is classed as operating aid is normally prohibited. Exceptionally, however, such aid may be granted in regions eligible under the derogation in Article 87(3)(a) of the Treaty, provided that it meets certain conditions laid down in point 6 of the communication and points 4.15 to 4.17 of the guidelines, in the outermost regions or in regions of low population density if it is intended to offset additional transport costs. However, the NUTS III territory of Álava is not eligible for the derogation in Article 87(3)(a) of the Treaty, and the grant of the said operating aid does not meet the conditions described. The NUTS III territory of Álava is not an outermost region⁽⁴⁷⁾ nor a region of low population density⁽⁴⁸⁾. This is the reason why the operating aid elements in the 45 % tax credit are prohibited, in particular because they are not granted in a region that is eligible for the derogation in Article 87(3)(a) of the Treaty, in an outermost region or a region of low population density. The aid is therefore incompatible in this case.

- (87) The Commission therefore considers that the tax incentive scheme in question cannot be regarded as compatible with the common market under the regional derogations in Article 87(3)(a) and (c) of the Treaty, since it does not comply with the rules on regional aid.

- (88) With regard to investments made by SMEs outside the assisted areas of Álava in the period from 1 January to 26 July 1995, and outside Álava in the period from 1 January 1995 to 31 December 1999, the Commission would point out that the related aid cannot be considered regional aid and therefore does not qualify for the regional derogation in Article 87(3)(c) of the Treaty. The same applies where such investments are made by large firms. On the other hand, in accordance with the Community guidelines on State aid for small and medium-sized enterprises (96/C 213/04), where the recipient is an SME, the other derogation in Article 87(3)(c), for aid to facilitate the development of certain economic activities, may apply. In addition to requiring compliance with the definition of initial investment and the rules on eligible expenditure forming part of the standard base, the above guidelines state that the exception will apply to aid for tangible investments up to a ceiling of 15 % gross grant equivalent (gge) in the case of small enterprises and 7,5 % gge in the case of medium-sized enterprises. The Commission notes, however, that the 45 % tax credit is not limited to 15 % gge in the case of small enterprises and 7,5 % gge in the case of medium-sized enterprises. Neither are the eligible investments fully in line with the definition of initial investment given in point 4.2.1 of the guidelines, nor are the costs that may be accepted compatible with those forming part of the standard base also laid down in point 4.2.1, since the scheme does not rule out replacement investments or expenditure items other than those covered by the standard base. The Commission accordingly finds that the tax aid under examination cannot be deemed compatible with the common market under the derogation in Article 87(3)(c) of the Treaty for aid to facilitate the development of certain economic activities.

- (89) Furthermore, the scope of the regional aid guidelines (98/C 74/06) excludes the production, processing and marketing of the agricultural products listed in Annex I to the Treaty, fisheries and the coal industry. Transport, steelmaking, shipbuilding, synthetic fibres and the motor industry are subject to special rules over and above those set out in the abovementioned guidelines, while specific rules apply to investments covered by the multisectoral framework on regional aid for large investment projects (98/C 107/05). Those rules must therefore be taken into account in assessing the compatibility of the aid in question where the recipient company belongs to one of those sectors or where the investment falls within the scope of the multisectoral framework.

⁽⁴⁶⁾ Commission communication to the Member States on the method for the application of Article 92(3)(a) and (c) to regional aid (OJ C 212, 12.8.1988, p. 2).

⁽⁴⁷⁾ It is not in the list of outermost regions in Article 299 of the Treaty.

⁽⁴⁸⁾ According to point 3.10.4 of the guidelines on national regional aid (98/C 74/06).

(90) The derogation in Article 87(3)(c) of the Treaty has to be examined to see whether it might not apply, in the above cases, for other purposes as well as the development of certain economic activities. It should be

noted in this respect that the aim of the 45 % tax credit is not to develop an economic activity within the meaning of Article 87(3)(c) of the Treaty, such as the development of measures to assist small and medium-sized enterprises, research and development, environmental protection, job creation or training in accordance with the appropriate Community rules. Consequently, the tax incentive in question cannot qualify for the derogation in Article 87(3)(c) of the Treaty in respect of the said purposes.

(91) Similarly, the 45 % tax credit, which is not subject to any sectoral limitation, may be granted without any restriction to undertakings in sensitive sectors subject to specific Community rules, such as those applicable to the production, processing and marketing of the agricultural products in Annex I to the Treaty, fisheries, coalmining, steelmaking, shipbuilding, synthetic fibres and the motor industry⁽⁴⁹⁾. In the circumstances, the Commission considers that the tax incentive in the form of a 45 % tax credit cannot comply with the said sectoral rules. In this particular case, the 45 % tax credit does not meet the condition that it should not promote new production capacity so as not to exacerbate the overcapacity problems from which these sectors traditionally suffer. Therefore, where the recipient belongs to one of the abovementioned sectors, the Commission considers that, since it is not subject to the sectoral rules mentioned, the aid is incompatible with the common market and the derogation in Article 87(3)(c) of the Treaty on the promotion of certain activities does not apply.

(92) As far as the period after 1 September 1998 is concerned, the Commission further takes the view that the aided investment may possibly fall within the scope of the multisectoral framework on regional aid for large investment projects (98/C 107/05)⁽⁵⁰⁾. All investment projects costing at least EUR 50 million (EUR 15 million in the case of the textile and clothing sector), with an aid intensity of at least 50 % of the regional aid ceiling and involving aid per job of at least EUR 40 000 (EUR 30 000 in the case of the textile and clothing sector), as well as investment projects for which the total aid is at least EUR 50 million, are subject to the conditions laid down in that framework. Each such investment project must be notified in advance, in

accordance with Article 88(3) of the Treaty, to enable the Commission to determine the maximum aid intensity that is compatible with the common market. However, the tax aid in question is not subject either to prior notification in the case of the abovementioned large projects or to possible reduction in intensity following the Commission's assessment. The Commission therefore finds that the tax aid under examination is not compatible with the common market under the derogation in Article 87(3)(c) of the Treaty, since the derogation in Article 87(3)(a) does not apply in Álava.

(93) Since the tax aid in question is granted irrespective of the economic and financial position of the recipient firms, the Commission considers that there is no way of ruling out the possibility that the recipient may be a firm in difficulty within the meaning of the Community guidelines on State aid for rescuing and restructuring firms in difficulty (1999/C 288/02)⁽⁵¹⁾, despite the Spanish authorities' claim that the tax credit, as it has been designed, is unlikely to be applied to firms in difficulty. The Commission would point out that the grant of the tax aid in question is not subject to the conditions⁽⁵²⁾ laid down in those guidelines. As stated in point 20 of the abovementioned rescue and restructuring aid guidelines (1999/C 288/02), 'the Commission considers that aid for rescue and restructuring may contribute to the development of economic activities without adversely affecting trade to an extent contrary to the Community interest if the conditions set out in these guidelines are met'. If those conditions are not met, the aid is incompatible with the common market where it is intended for firms in difficulty. The Commission therefore finds that the tax aid in question, where granted to firms in difficulty, is not compatible with the common market under the derogation in Article 87(3)(c) of the Treaty on the promotion of certain activities.

Application of the other exceptions

(94) The aid in question, which cannot qualify for the derogations in Article 87(3)(a) and (c) of the Treaty, cannot qualify either for other derogations in Article 87(2) and (3). It cannot be regarded as aid of a social nature under Article 87(2)(a); it is not intended to make good the damage caused by natural disasters or

⁽⁴⁹⁾ For the sectoral rules currently in force see, in addition to the *Official Journal of the European Communities*, the website of the Directorate-General for Competition http://europa.eu.int/comm/competition/state_aid/legislation/.

⁽⁵⁰⁾ Multisectoral framework on regional aid for large investment projects (OJ C 107, 7.4.1998, p. 7).

⁽⁵¹⁾ OJ C 288, 9.10.1999, p. 2. These guidelines have since 1999 replaced a previous version (94/C 368/05) of the same guidelines (OJ C 368, 23.12.1994, p. 12).

⁽⁵²⁾ Among other things, that the aid is conditional on implementation of a restructuring plan which enables the long-term viability of the firm to be restored.

exceptional occurrences within the meaning of Article 87(2)(b). Furthermore, its object is not to promote the execution of an important project of common European interest, nor to remedy a serious disturbance in the economy of a Member State, as provided for in Article 87(3)(b). Finally, it is not intended to promote culture and heritage conservation within the meaning of Article 87(3)(d).

Summary

(95) The Commission finds that the State aid in question in the form of a 45 % tax credit does not qualify for the derogation in Article 87(3)(a) of the Treaty, since Álava is not eligible for assistance under that provision, or for the derogation in Article 87(3)(c) for 'aid to facilitate the development (...) of certain economic areas', since it does not comply with the Community rules on regional aid. Neither does it qualify for the derogation in Article 87(3)(c) for 'aid to facilitate the development of certain economic activities', since, on the one hand, it does not comply with the Community rules applicable to SMEs in this context and, on the other hand, as far as large firms are concerned, it does not relate to certain activities. It cannot be regarded as aid of a social nature under Article 87(2)(a); it is not intended to make good the damage caused by natural disasters or exceptional occurrences within the meaning of Article 87(2)(b). Furthermore, its object is not to promote the execution of an important project of common European interest, nor to remedy a serious disturbance in the economy of a Member State, as provided for in Article 87(3)(b). Nor does it qualify for the derogation in Article 87(3)(d) as its purpose is not to promote culture or heritage conservation. The aid is therefore incompatible with the common market.

(96) Since any tax credit that is not used because it exceeds the final amount of tax payable may be carried over and used for several years following adoption of the decision granting the tax credit ⁽⁵³⁾, there could still be some tax

aid left to pay. However, this aid is unlawful and incompatible. The Spanish authorities should therefore cancel the payment of any balance from the 45 % tax credit which could still be due to certain recipients.

(97) As regards incompatible aid already paid, it should be pointed out that, in accordance with the above arguments, the recipients may not rely on general principles of Community law such as legitimate expectations or legal certainty. Consequently, there is nothing to prevent the application of Article 14(1) of Regulation (EC) No 659/1999, according to which 'where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary'. In this case, therefore, the Spanish authorities should take all necessary measures to recover the aid already paid in order to restore the economic situation which the recipient firms would be in without the unlawful grant of the aid. The aid should be recovered in accordance with the procedures and provisions of Spanish law and should include all interest due, calculated from the date the aid was granted until the date of actual repayment on the basis of the reference rate used at that date to calculate the net grant equivalent of regional aid in Spain ⁽⁵⁴⁾.

(98) This decision relates to the scheme and should be implemented immediately, including the recovery of any individual aid granted under that scheme. The Commission would also point out that, as usual, this Decision is without prejudice to whether individual aid may be regarded, in full or in part, as compatible with the common market on its own merits, either in a subsequent Commission decision or under exempting regulations.

(99) Since the compatibility of the State aid in the form of tax credits granted to Daewoo Electronics Manufacturing España SA, Ramondín SA and Ramondín Cápsulas SA has already been assessed in various Commission decisions, this Decision does not refer to that aid.

X. CONCLUSIONS

(100) In view of the above, the Commission concludes that:

⁽⁵³⁾ In the case of tax credits granted under Provincial Law No 22/1994 of 20 December 1994, the period in which they may be used is limited to 9 years. Tax credits granted under subsequent provincial laws are no longer subject to any such limitation.

⁽⁵⁴⁾ Commission letter to Member States, SG(91)D/4577, of 4 March 1991. See also Case 142/87 Belgium v Commission [1990] ECR I-950.

- Spain has unlawfully put into effect, in Álava, the 45 % tax credit for investments, thereby infringing Article 88(3) of the Treaty,
- the 45 % tax credit for investments is incompatible with the common market,
- the Spanish authorities must cancel the payment of any balance of the tax credit which could still be due to certain recipients. As regards the incompatible aid already paid, the Spanish authorities must take all necessary measures to recover it, so as to restore the economic situation which the recipient firms would be in without the unlawful grant of the aid,
- this Decision does not cover the tax credits granted to Daewoo Electronics Manufacturing España SA, Ramondín SA and Ramondín Cápsulas SA,

HAS ADOPTED THIS DECISION:

Article 1

The State aid in the form of a 45 % tax credit for investments, which, in violation of Article 88(3) of the Treaty, has been unlawfully put into effect by Spain in Álava pursuant to Provincial Law No 22/1994 of 20 December 1994, the fifth additional provision of Provincial Law No 33/1995 of 20 December 1995, the sixth additional provision of Provincial Law No 31/1996 of 18 December 1996, as amended by point 2.11 of the derogating provision in Provincial Law No 24/1996 of 5 July 1996 on corporation tax, the eleventh additional provision of Provincial Law No 33/1997 of 19 December 1997 and the seventh additional provision of Provincial Law No 36/1998 of 17 December 1998, is incompatible with the common market.

Article 2

Spain shall abolish the aid scheme referred to in Article 1, since it is continuing to produce effects.

Article 3

1. Spain shall take all necessary measures to recover from the recipients the aid referred to in Article 1 which has been unlawfully made available to them.

Spain shall cancel all payment of outstanding aid.

2. Recovery shall be effected without delay in accordance with the procedures of national law, provided these allow the immediate and effective execution of this Decision. The sums to be recovered shall bear interest from the date on which they were available to the recipients until their actual recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant equivalent of regional aid.

Article 4

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

Article 5

This Decision does not cover the tax credits granted under the scheme in question to Daewoo Electronics Manufacturing España SA, Ramondín SA and Ramondín Cápsulas SA.

Article 6

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 11 July 2001.

For the Commission

Mario MONTI

Member of the Commission

COMMISSION DECISION

of 15 January 2002

on the State aid implemented by Germany for Pollmeier GmbH, Malchow

(notified under document number C(2001) 4447)

(Only the German text is authentic)

(Text with EEA relevance)

(2002/821/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

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

Whereas:

1. PROCEDURE

- (1) In 1999, following a series of complaints related to State aid granted to companies of the Pollmeier group, the Commission requested Germany to provide it with all information necessary to examine whether the measures in question were compatible with the common market. The measures related to State aid granted to Pollmeier GmbH, Malchow, and Pollmeier GmbH & Co. KG, Kässlitz, for the construction of a second sawmill in Malchow (Mecklenburg-Western Pomerania) and a third sawmill in Kässlitz (Thuringia). The information provided by Germany was incomplete, however, and insufficient to allay the Commission's doubts as to whether the measures had been granted in accordance with previously authorised schemes.
- (2) Pursuant to Article 10(3) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ⁽²⁾ and in line with the judgment of the Court of Justice of the European Communities of 5 October

1994 in Case C-47/91, ⁽³⁾ the Commission requested Germany by letter dated 17 April 2000 to provide all information necessary to assess whether the aid measures granted to Pollmeier GmbH, Malchow, and Pollmeier GmbH & Co. KG, Kässlitz, fell under a scheme previously approved by the Commission.

- (3) By letter dated 22 May 2000 (received on 29 May), the annexes to which were received separately on 16 June 2000, and finally by supplementary letter dated 9 August 2000 (received on 11 August), Germany provided the requested information, on the basis of which the Commission is deciding whether the beneficiaries of the measures are to be viewed as SMEs within the meaning of the Community guidelines on State aid for small and medium-sized enterprises (SMEs) ⁽⁴⁾ (Community guidelines) and Commission recommendation of 3 April 1996 concerning the definition of small and medium-sized enterprises ⁽⁵⁾ (the recommendation) and thus are entitled to receive the maximum permissible aid intensity of 50 % gross in the assisted areas where the two projects are located.
- (4) The Commission informed Germany by letter dated 13 March 2001 that it had decided to initiate the procedure provided for in Article 88(2) of the EC Treaty in respect of the aid and at the same time to require the provision of information in accordance with Article 10(3) of Council Regulation (EC) No 659/1999.
- (5) Germany responded to the initiation of proceedings and the request for the provision of information by letter dated 15 May 2001.
- (6) The Commission's decision initiating proceedings was published in the *Official Journal of the European Communities* ⁽⁶⁾. At the same time, the Commission called on interested parties to submit their comments.

⁽³⁾ Italy v Commission [1994] ECR I-4635.

⁽⁴⁾ OJ C 213, 23.7.1996, p. 4.

⁽⁵⁾ OJ L 107, 30.4.1996, p. 4.

⁽⁶⁾ See footnote 1.

⁽¹⁾ OJ C 166, 9.6.2001, p. 5.

⁽²⁾ OJ L 83, 27.3.1999, p. 1.

- (7) The comments which the Commission received from interested parties were forwarded to Germany, which submitted its comments in this regard by letter dated 30 August 2001.

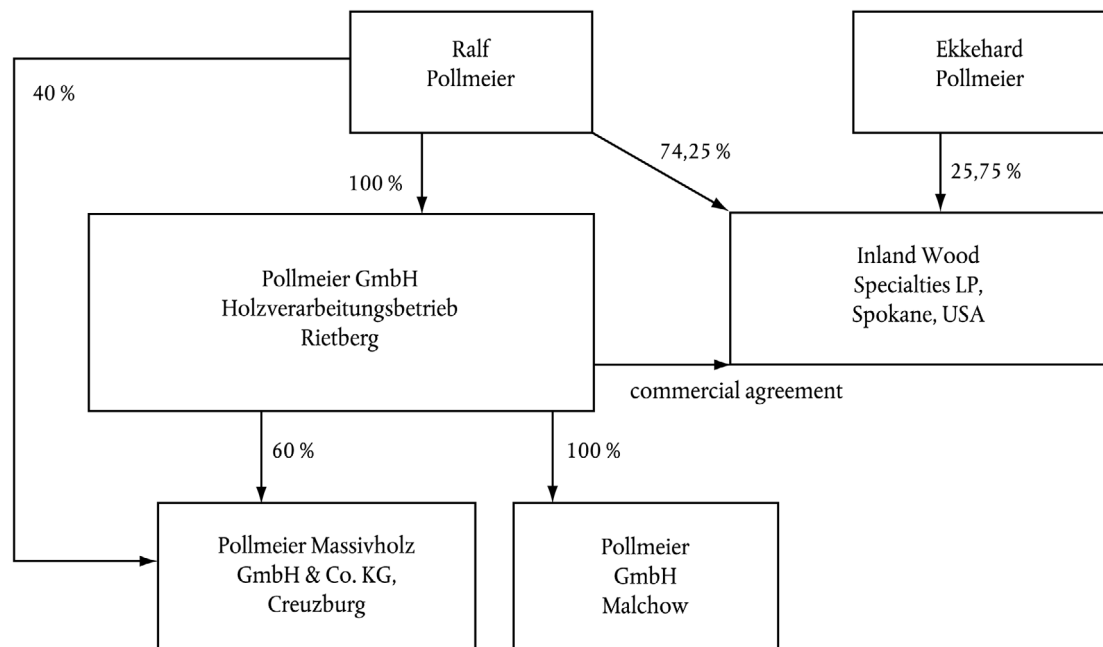
2. DESCRIPTION OF THE AID

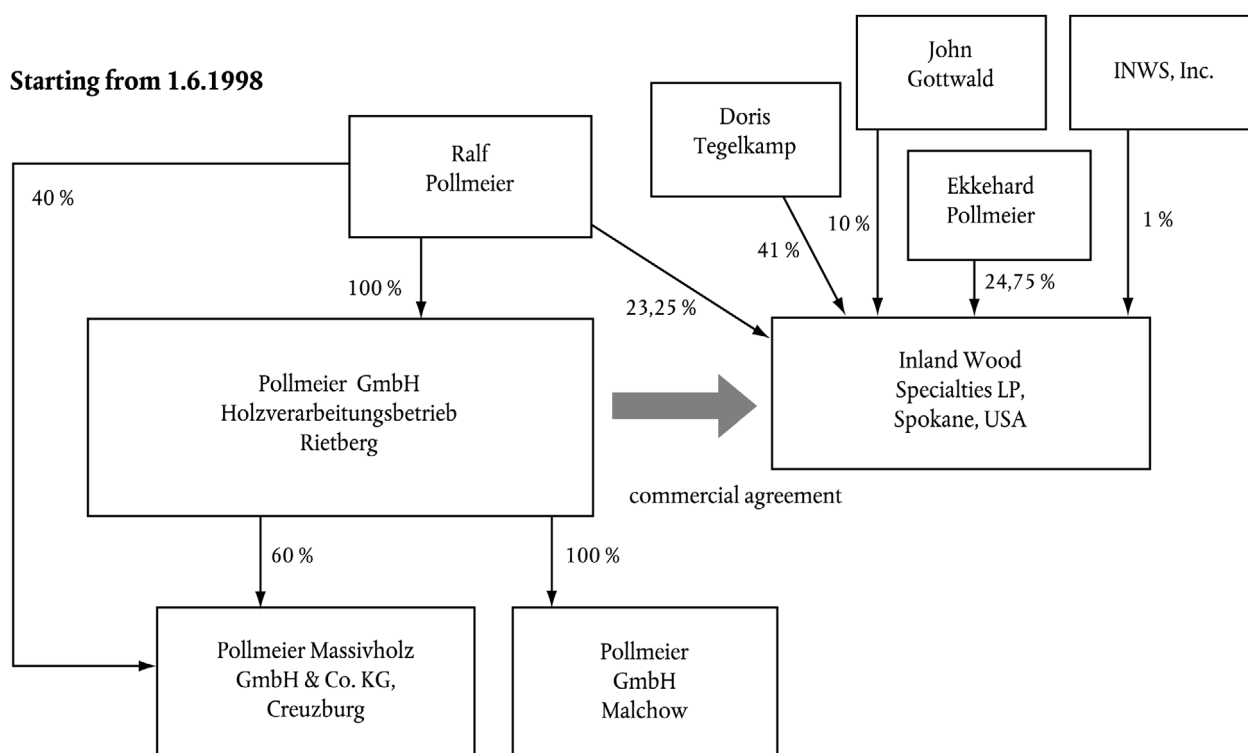
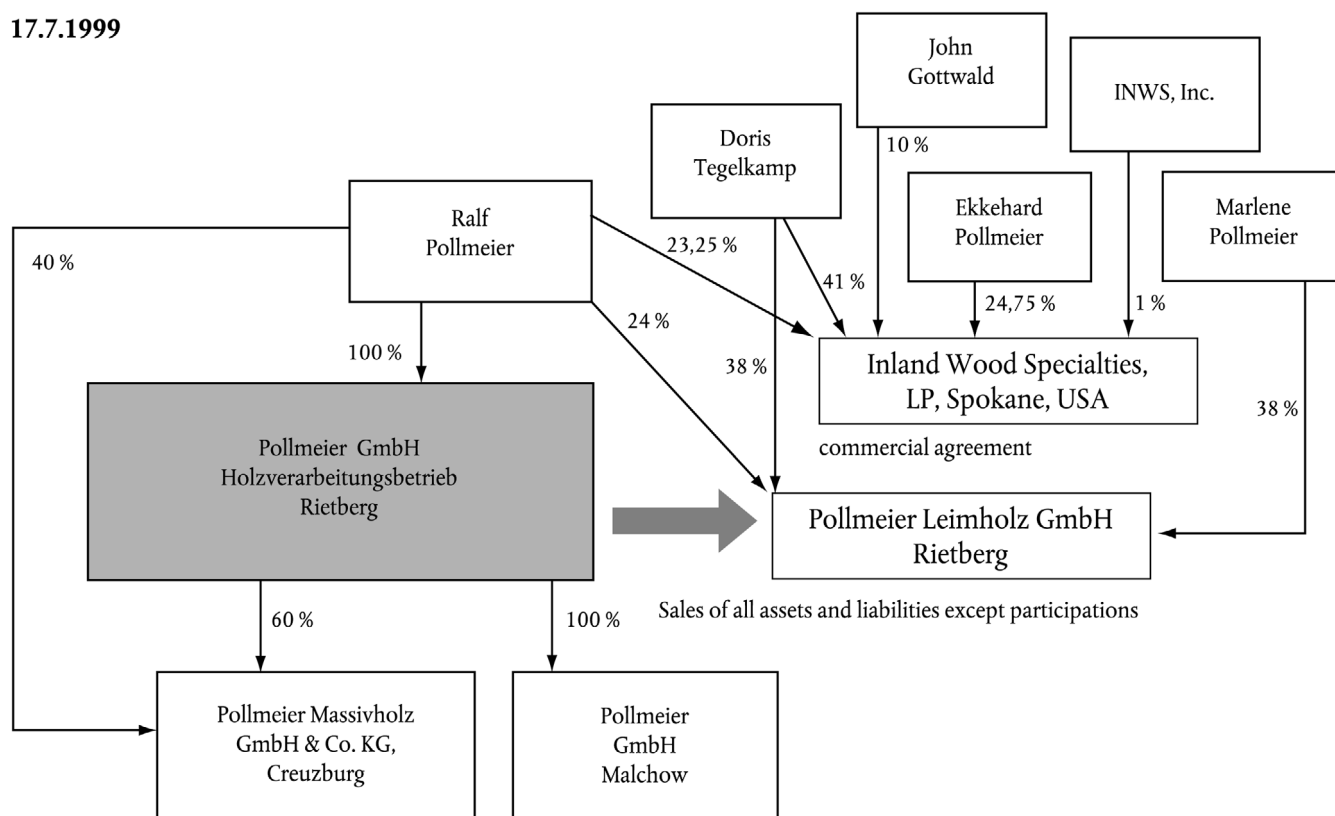
2.1. The beneficiary

2.1.1. The development of the Pollmeier group

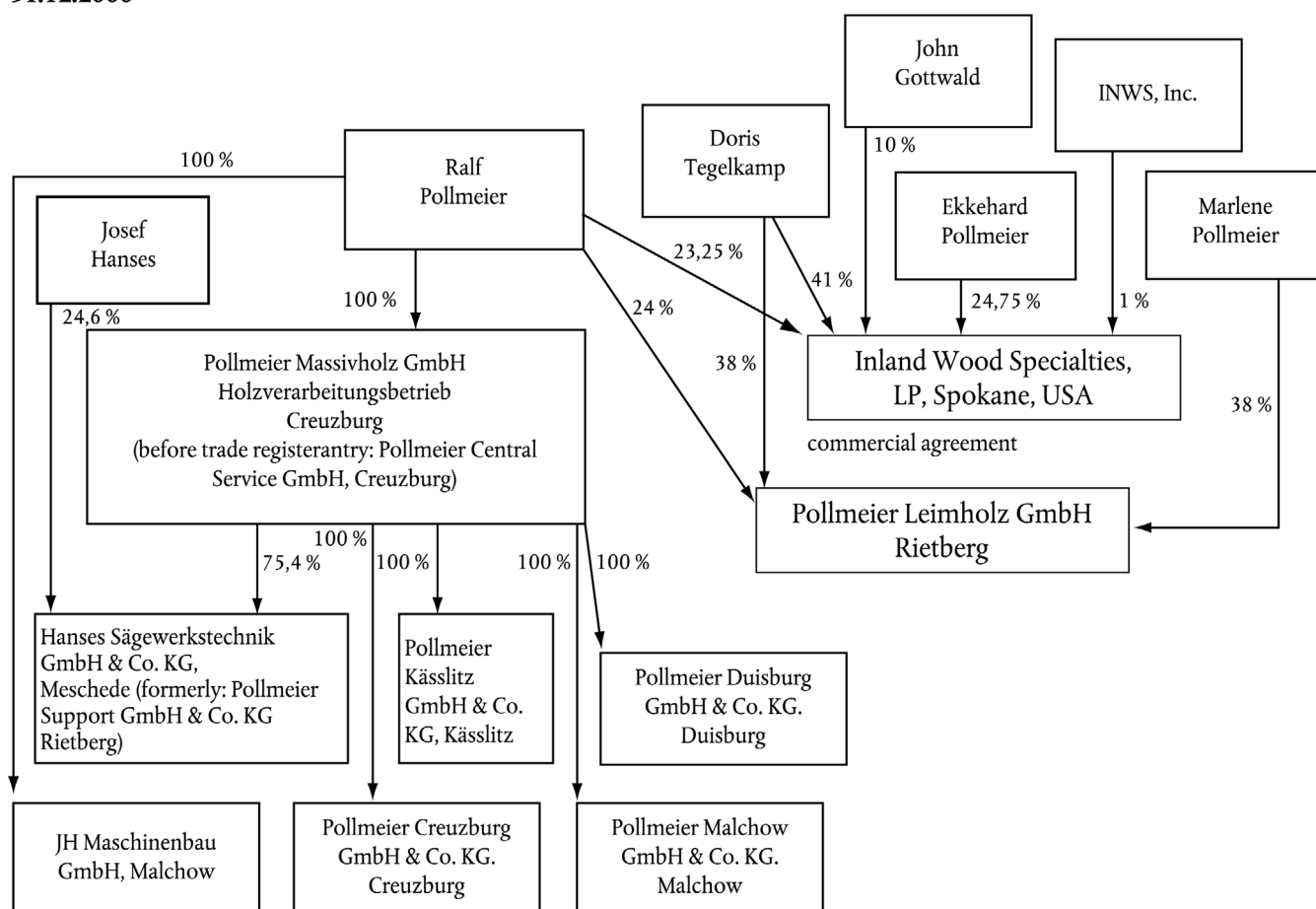
- (8) Pollmeier GmbH, Malchow, the legal person granted the aid, is a company of the Pollmeier group. Formed in the mid-1980s by Ralf Pollmeier in Rietberg (North Rhine-Westphalia), the Pollmeier group supplies the German, European and Asian furniture markets with edge-glued panels from various plants in Germany and the United States.
- (9) The first company in the Pollmeier group, Pollmeier GmbH Holzverarbeitungsbetrieb, Rietberg, which was formed in 1987, was active in the further processing of German edge-glued panels for the furniture industry. The Pollmeier group has developed strongly since the start of the 1990s. In 1994 and 1998, Ralf Pollmeier decided to set up two hardwood sawmills, one in Creuzburg (Thuringia) under the name 'Pollmeier Massivholz GmbH & Co. KG' and another in Malchow (Mecklenburg-Western Pomerania) under the name 'Pollmeier GmbH, Malchow'.
- (10) In 1999, Ralf Pollmeier decided to focus his activity on the operation of the sawmills and to relinquish the entrepreneurial management of the downstream wood-processing business. In July 1999, the first company
- formed by Ralf Pollmeier, Pollmeier GmbH Holzverarbeitungsbetrieb, Rietberg, sold all its assets and liabilities except for the holdings in the two hardwood sawmills to a newly formed company, Pollmeier Leimholz GmbH. The name 'Pollmeier GmbH Holzverarbeitungsbetrieb, Rietberg' was changed to 'Pollmeier Massivholz GmbH'. This company today manages all central functions for the sawmills, such as centralised round timber purchasing, centralised sales, personnel management and accounting.
- (11) The legal structure of the individual sawmill companies was also reorganised. Pollmeier Massivholz GmbH & Co. KG was renamed 'Pollmeier Creuzburg GmbH & Co. KG', while Pollmeier GmbH, Malchow, was renamed 'Pollmeier Malchow GmbH & Co. KG'. A further sawmill was established in Kässlitz under the name 'Pollmeier Kässlitz GmbH & Co. KG'.
- (12) For stock purposes, a new company was formed under the name 'Pollmeier Support GmbH & Co. KG'. Another new company was likewise formed: Pollmeier Duisburg GmbH & Co. KG, which does not so far have any business activity. All these companies belong to Pollmeier Massivholz GmbH and are managed by companies belonging to Pollmeier Massivholz GmbH.
- (13) In 2000, Pollmeier Support GmbH & Co. KG took over the business of a mechanical engineering company which had gone into bankruptcy, changing its name into 'Hanses Sägewerkstechnik GmbH & Co. KG'. In addition to this company, Ralf Pollmeier formed another company to wind up existing contracts under the name 'JH Maschinenbau GmbH'; Ralf Pollmeier holds all the shares in the latter company.
- (14) The following diagrams illustrate the structural development of the Pollmeier group.

Until 1.6.1998



Starting from 1.6.1998**17.7.1999**

31.12.2000



- (15) The various group companies and their respective shareholders:

Pollmeier Massivholz GmbH & Co. KG, Creuzburg (Thuringia)

As of 1999, 'Pollmeier Creuzburg GmbH & Co. KG, Creuzburg'

Pollmeier GmbH, Holzverarbeitungsbetrieb, Rietberg (North Rhine-Westphalia)

Name changed as of July 1999 to 'Pollmeier Massivholz GmbH, Creuzburg' (Thuringia)

Year	Shares held by Ralf Pollmeier
1996	100 %
1997	100 %
1998	100 %
1999	100 %

Year	Shares held by Ralf Pollmeier	Other shareholders: Pollmeier GmbH, Holzverarbeitungsbetrieb, Rietberg
1996	40 %	60 %
1997	40 %	60 %
1998	40 %	60 %
1999	40 %	60 %
2000	0 %	100 %

Pollmeier GmbH, Malchow, (Mecklenburg-Western Pomerania)**As of 1999, 'Pollmeier Malchow GmbH & Co. KG, Malchow'**

Year	Shares held by Pollmeier Massivholz GmbH, Creuzburg (formerly, Pollmeier GmbH, Holzverarbeitungsbetrieb, Rietberg)
1998	100 %
1999	100 %
2000	100 %

Pollmeier Kässlitz GmbH & Co. KG, Kässlitz (Thuringia)

Year	Shares held by Pollmeier Massivholz GmbH, Creuzburg (formerly, Pollmeier GmbH, Holzverarbeitungsbetrieb, Rietberg)
1999	100 %
2000	100 %

Pollmeier Duisburg GmbH & Co. KG, Duisburg

Year	Shares held by Pollmeier Massivholz GmbH, Creuzburg (formerly, Pollmeier GmbH, Holzverarbeitungsbetrieb, Rietberg)
2000	100 %

Pollmeier Support GmbH & Co. KG, Rietberg**As of 2000, 'Hanses Sägewerkstechnik GmbH & Co. KG, Meschede'**

Year	Shares held by Pollmeier Massivholz GmbH, Creuzburg (formerly Pollmeier GmbH, Holzverarbeitungsbetrieb, Rietberg)	Shares held by Josef Hanses
1999	100 %	
2000	75,4 %	24,6 %

JH Maschinenbau GmbH

Year	Shares held by Ralf Pollmeier
2000	100 %

Pollmeier Leimholz GmbH, Rietberg (North Rhine-Westphalia)

Year	Shares held by Ralf Pollmeier	Shares held by Doris Tegelkamp	Shares held by Marlene Pollmeier
1999	24 %	38 %	38 %
2000	24 %	38 %	38 %

Inland Wood Specialties, LP, Spokane, United States of America

Year	Shares held by Ralf Pollmeier	Other shareholders
1996	74,25 %	24,75 %: Ekkehard Pollmeier
1997	74,25 %	24,75 %: Ekkehard Pollmeier
Until 1 June 1998	74,25 %	24,74 %: Ekkehard Pollmeier
1 June 1998/31 December 1998	23,25 %	24,75 %: Ekkehard Pollmeier 41 %: Doris Tegelkamp 10 %: John Gottwald 1 %: IWS, Inc
1999	23,25 %	24,75 %: Ekkehard Pollmeier 41 %: Doris Tegelkamp 10 %: John Gottwald 1 %: IWS, Inc
2000	23,25 %	24,75 %: Ekkehard Pollmeier 41 %: Doris Tegelkamp 10 %: John Gottwald 1 %: INWS, Inc

2.1.2. *Economic integration of the individual group enterprises*

- (16) On the web site of the Pollmeier group, the various group companies, including the United States-based Inland Wood Specialties LP (IWS), are described as 'production sites'. The activity of the group is described as the supply of the German, European and Asian furniture industry with top-quality edge-glued panels from plants in Germany and the United States of America. IWS products were distributed in Europe until 17 July 1999 by Pollmeier GmbH Holzverarbeitungsbetrieb Rietberg on the basis of a commercial agency agreement and thereafter by Pollmeier Leimholz GmbH, Rietberg.
- (17) Prior to 1 June 1998, all companies of the Pollmeier group were controlled directly or indirectly by Ralf Pollmeier via Pollmeier GmbH Holzverarbeitungsbetrieb, Rietberg. Active on the same market and controlled by the same person, the companies did not enjoy any economic autonomy and are therefore to be viewed as forming a single economic unit. Pollmeier GmbH, Malchow, cannot therefore be considered separately, at least until 1 June 1998.
- (18) On 1 June 1998, Ralf Pollmeier sold 51 % of the shares in IWS to his sister, Doris Tegelkamp, and to John Gottwald. As of this date, he has held only 23,25 % of the IWS shares. IWS is still described as a production site of the Pollmeier group, its products being distributed until 17 July 1999 by Pollmeier GmbH, Holzverarbeitungsbetrieb, Rietberg.
- (20) The grant amounts to a maximum of DEM 16 384 600 (EUR 8 377 313), which corresponds to 30,23 % gross of the eligible investment cost of DEM 54,2 million (EUR 27,7 million). According to Germany, the aid was granted contingent on the creation of 80 jobs. The investment project commenced on 1 June 1998 and was to be concluded by 31 May 2001.
- (21) Moreover, pursuant to the Investment Allowance Law of 1999⁽⁸⁾, a supplementary investment allowance of DEM 9,3 million (EUR 4,75 million) was granted, corresponding to 17,15 % gross of the eligible investment cost.
- (22) On 27 January 1999, Pollmeier GmbH, Malchow, further received a loan assisted out of ERP resources from IKB Deutsche Industriebank AG, North Rhine-Westphalia Branch in the amount of DEM 5 million (EUR 2,55 million) at an interest rate of 3,75 % p.a. The interest subsidy corresponds to an aid element of 0,80 % gross.
- (23) The overall aid intensity for the measures described in recitals 19 to 22 is thus 48,18 % gross.
- (24) On 29 July 1999, Pollmeier GmbH, Malchow, requested further aid in the amount of DEM 7,5 million (EUR 3,58 million) for investments in additional facilities for wood processing and the refining of sawmill products totalling DEM 25 million (EUR 12,78 million). Germany emphasises that no decision has been made on the granting of the investment aid, which will have to be decided on under the then applicable outline plan for the joint Federal Government/Länder scheme (probably the 29th plan) and would correspond to an aid intensity of 30 % gross. This also applies to the granting of a supplementary investment allowance in the amount of DEM 4,5 million (EUR 2,3 million), which would correspond to an aid intensity of 18 % gross. Germany has not yet decided on the application, as it confirmed in its response to the initiation of the proceedings.

2.2. The measures

2.2.1. Measures for Pollmeier GmbH, Malchow

- (19) The Ministry of Economic Affairs of the Land of Mecklenburg-Western Pomerania decided on 2 September 1998 to grant Pollmeier GmbH, Malchow, investment aid for the construction of a second sawmill in Malchow under the 27th outline plan, approved by the Commission, for the joint Federal Government/Länder scheme for improving regional economic structures (1998 to 2002)⁽⁷⁾ (hereinafter, the 27th outline plan). This decision was modified on 12 May 1999. The sawmill is located in an assisted area covered by Article 87(3)(a) of the EC Treaty.
- (25) The aid intensity for these measures amounts to 48 % gross.
- (26) The investment project, which began on 2 January 2000 and is to be completed on 1 January 2003, is linked to the creation of 25 jobs.

⁽⁷⁾ OJ C 166, 12.6.1999, p. 9.

⁽⁸⁾ SG (98) D 12438, 30.12.1998.

2.2.2. Measures for Pollmeier GmbH & Co. KG, Kässlitz

- (27) By decision of 3 April 2000, Germany decided to grant Pollmeier GmbH & Co. KG, Kässlitz, under the 27th outline plan, investment aid in the amount of DEM 19,03 million (EUR 9,73 million), corresponding to 21,65 % of the eligible investment costs of DEM 87,88 million (EUR 44,93 million). Moreover, the finance plan foresaw a further investment allowance under the Investment Allowance Law of 1999 in the amount of DEM 19 136 250 (EUR 9,78 million), which corresponded to a planned gross aid intensity of 21,75 %. The overall aid intensity for the abovementioned measures thus amounted to 43,4 % gross.
- (28) The purpose of the measures was to create new sawmill and wood-processing capacities in Kässlitz (Hellingen), i.e. at a site which is located within an assisted area covered by Article 87(3)(a) of the EC Treaty. According to Germany, the granting of aid was linked to the creation of 180 jobs and 20 trainee places. The investment period was specified as being from 1 December 1999 to 30 November 2002.
- (29) In its reply to the initiation of proceedings, Germany informed the Commission that Pollmeier GmbH & Co. KG, Kässlitz, had not been granted any aid. The firm had withdrawn its application, whereupon the decision to grant investment aid was revoked.

2.3. Grounds for initiating the procedure

- (30) The Commission harboured doubts as to whether the aid recipient could be considered an SME and whether the aid as a whole was covered by approved aid schemes. Despite the information submitted by Germany in response to the order to provide information⁽⁹⁾, these doubts could not be allayed.
- (31) In order to be entitled to the granted aid with gross aid intensities of 48,18 %, 48 % and 43,4 %, Pollmeier GmbH, Malchow, and Pollmeier GmbH & Co. KG, Kässlitz, had to be genuine SMEs. They thus had to fulfil all the criteria set out in the Community guidelines. The regional aid schemes under which the State aid was granted or was to be granted had been approved subject

to the condition *inter alia* that the beneficiaries fulfilled the definition of an SME set out in the recommendation and the Community guidelines.

- (32) The issue at stake was in particular whether the legal companies to which the various aid measures were granted could be considered in isolation as the beneficiaries of the respective aid measures. The issue in particular was whether the companies form independent economic units or whether the beneficiary enterprise also included other companies belonging to the Pollmeier group, in which case a 'single economic unit' within the meaning of case-law would be concerned⁽¹⁰⁾. The doubts related in particular to the relations of the new sawmill companies to Inland Wood Specialties (United States of America) and the degree of their integration with this company. All of these companies are directly or indirectly related to each other through the person of Ralf Pollmeier and his companies. The extent of the enterprise which was the recipient of the granted aid has first to be defined before the Commission can assess whether the beneficiaries of the aid comply with the definition of an SME.
- (33) The still incomplete information provided by Germany concerning the companies belonging to the Pollmeier group did not allow the Commission to conclusively rule on the SME status of the beneficiaries and consequently on whether the aid granted to Pollmeier GmbH, Malchow, and to Pollmeier GmbH & Co. KG, Kässlitz, were covered by regional aid schemes previously approved by the Commission or whether it lay at least in part outside the approved schemes and was thus to be viewed as new aid. The Commission also had doubts on the compatibility of the entire aid package with the common market.

- (34) For this reason, the Commission decided to initiate proceedings under Article 88(2) of the EC Treaty and to order the provision of information pursuant to Article 10(3) of Regulation (EC) No 659/1999.

3. COMMENTS FROM INTERESTED PARTIES

- (35) After initiating the proceedings, the Commission received comments from one national association representing the sawmill and wood industry and from Pollmeier GmbH, Malchow (now Pollmeier Malchow GmbH & Co. KG).

⁽⁹⁾ Pursuant to Article 10(3) of Regulation (EC) No 659/1999 and the judgment in Case C-47/91, Italy v Commission [1994] ECR I-4635.

⁽¹⁰⁾ See Judgment of the Court of Justice of 14.11.1984 in Case 323/82 Intermills v Commission [1984] ECR 3809.

(36) The Association of the German Sawmill and Wood Industry informed the Commission that the building permit for the Kässlitz mill had been issued on 2 July 2001. It was further pointed out that the shareholders of the United States company Inland Wood Specialties LP, Spokane, included a sister and brother of Ralf Pollmeier. The Association stated that expansion investment of DEM 40 million had not been taken into account by the Commission and that additional aid measures might have been granted for this project. Finally, it was mentioned that, according to several forestry administrations, Pollmeier pays for beechwood purchases in all *Länder* with a guarantee from the *Land* of Thuringia.

(37) The beneficiary Pollmeier GmbH, Malchow, also sent the Commission comments. The firm referred to the grounds for constructing the Malchow sawmill, the aim of which was to revive the German sawmill industry.

(38) The comments may be summarised as follows: the Pollmeier sawmills have no effect on other sawmills in Europe. Pollmeier products compete almost exclusively with imports from the United States, and more than 55 % of Pollmeier sawmill production is exported to third countries. The investments carried out by the Pollmeier group have a substantial regional impact. The mills process exclusively deciduous trees, mainly beechwood. They are the only sawmills in Europe which work with the latest American computer-controlled cutting technology and are therefore able to compete with other sawmills outside Europe. Thanks to this technology, the Pollmeier sawmills are able to process various wood qualities in an optimal fashion and to cover the various segments of the quality spectrum with the consistent production quality of their products.

(39) Pollmeier GmbH, Malchow, also emphasised the positive effect of the firm's sawmills on the upstream raw material market. It sent the Commission statements from several suppliers in which they stated that the market for beechwood has developed significantly thanks to the Pollmeier sawmills, which constitute a steady buyer of large quantities of beechwood. In particular, the demand for C and D categories of beechwood has increased substantially. The Pollmeier sawmills are moreover prepared to purchase lower quality wood, while other buyers are always searching for higher quality wood. This has the consequence that the forestry administrations are increasingly able to finance themselves autonomously and are thus less dependent on public resources.

(40) The Pollmeier sawmills also have an impact on their buyer markets. As the only sawmills in Europe which are able to offer their buyers a wide selection of various wood qualities, they offer the European furniture industry an alternative to American products and thus the opportunity to save transport costs. This reinforces the competitiveness of the European furniture industry.

(41) Finally, Pollmeier GmbH, Malchow, emphasised that the Group's sawmills did not compete with other European sawmills and that their activity has therefore not limited the sales opportunities of other European sawmills.

4. COMMENTS FROM GERMANY

(42) Germany responded to the initiation of proceedings by letter dated 15 May 2001, providing the Commission with the requested information.

(43) In its response to the initiation of proceedings, Germany initially informed the Commission that only Pollmeier GmbH, Malchow, had received State aid. The decision to grant aid to Pollmeier GmbH & Co. KG, Kässlitz, had been revoked, and no decision had yet to be made on the aid for the expansion of the operations of Pollmeier GmbH, Malchow.

(44) Germany provided detailed explanations on the development of the Pollmeier group from the construction of the first wood processing plant (edge-glued wood) in Rietberg to the group's reorientation towards sawmills. Germany further provided detailed information on the German beechwood market and the heavy competition from United States plants, explaining the grounds for the reorientation towards sawmills. Germany further provided information on the economic relevance of the Creuzburg and Malchow sawmills and on the turnover of the Pollmeier sawmills. Germany argued that the Pollmeier sawmills do not compete with other European sawmills, but exclusively with sawmills in the United States; their production therefore is not at the expense of European competitors. Their creation has enabled regions with structural problems to develop positively.

(45) Germany also provided a description of the corporate structure of the Pollmeier group, including the relevant financial figures. Regarding the issue of the SME status of Pollmeier GmbH, Malchow, Germany again stated that the enterprise met the conditions set out in the definition of an SME. According to Germany's argumentation, to assess the SME status of Pollmeier GmbH, Malchow, it must be examined whether its parent company, Pollmeier GmbH, Holzverarbeitungsbetrieb, Rietberg, met the SME criteria. Given that Pollmeier GmbH, Holzverarbeitungsbetrieb, Rietberg, holds a majority share in Pollmeier GmbH, Malchow, and Pollmeier Massivholz GmbH & Co. KG, the relevant financial figures of these three companies must be cumulated. The figures show that Pollmeier GmbH Holzverarbeitungsbetrieb, Rietberg, met the SME criteria in the period from 1996 to 1998. Given that Pollmeier GmbH Holzverarbeitungsbetrieb, Rietberg, belongs to a natural person, it also meets the independence criterion specified in the definition of an SME.

- (46) Germany takes the view that the data for the American firm Inland Wood Specialties, Spokane, United States of America (IWS) should not be cumulated with those of the other Pollmeier companies. The only connection between the company granted the aid, i.e. Pollmeier GmbH, Malchow, and IWS consists in the natural person Ralf Pollmeier. Because the SME criteria are not applicable to natural persons, no connection within the meaning of Article 1(4) of the annex to the recommendation exists.
- (47) Germany adds that in any case, even if the IWS data were cumulated with those of the other branches, 1998 and not 1997 had to be taken as the reference year for consideration of the enterprise's SME status, given that the final decision of the *Land* (Mecklenburg-Western Pomerania) on the granting of the aid was made in 1999. On 1 June 1998, Ralf Pollmeier sold 51 % of the shares in IWS and now holds only 23,25 % of the IWS shares. Because this results in a holding of less than 25 %, the IWS data should not be cumulated.
- (48) Germany further argues that, even if 1997 were to be viewed as the reference year, the principle would have to apply that any sale of corporate shares made after the approval of the last accounting period, but prior to the decision granting the aid would have to be taken into consideration when applying Article 1(4) of the annex to the recommendation.
- (49) According to Germany's argumentation, this principle results from Article 5 of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings⁽¹¹⁾, as last amended by Regulation (EC) No 1310/97⁽¹²⁾, and from recital 27 of the Commission Notice on calculation of turnover under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings⁽¹³⁾. A confirmation of this interpretation of Article 5 of Regulation (EEC) No 4064/89 may be found in the judgment of the Court of First Instance of 24 March 1994 in Case T-3/93 *Air France v Commission* (*Air France judgment*)⁽¹⁴⁾.
- (50) Germany argues that this principle should be adopted when considering the data on turnover, the balance sheet total and the number of employees in the last approved accounting period. In the present case, the sale of the majority of shares in IWS by Ralf Pollmeier should be taken into consideration, given that it took place before the decision to grant the aid. Consequently, the IWS data should not be cumulated with those of the other Pollmeier companies.
- (51) The fact that the various shareholders of IWS all belong to the same family cannot, according to Germany, serve as proof that Ralf Pollmeier controls IWS. Such argumentation would contradict the meaning of the SME rules.
- (52) Germany concludes that Pollmeier GmbH, Malchow, is an SME and that the granted aid is thus covered by approved aid schemes.
- (53) Germany stated in response to the comments from third parties, particularly those of the Association of the German Sawmill and Wood Industry, that no aid had been granted for the project in Kässlitz. The guarantee mentioned by the Association represented a normal business practice where wood buyers provide bank guarantees in the amount of the purchase price — this was also stipulated in the general terms and conditions for sales and payment. The guarantee was granted by the buyer's company bank. Germany confirmed that no guarantee had been granted under the *Land* guarantee programme.

5. ASSESSMENT

- (54) After the proceedings had been initiated, Germany confirmed that Pollmeier GmbH & Co. KG, Kässlitz, was not granted any aid. The aid requested by Pollmeier GmbH, Malchow, to expand its product range, i.e. for wood processing and the refining of sawmill products, was not approved, according to the information provided by the German authorities, and therefore likewise does not constitute part of the subject of this Decision. The project was also not notified and thus not covered by this Decision.
- (55) According to Germany, the aid to Pollmeier GmbH, Malchow, was granted under approved aid schemes.
- (56) The aid granted to Pollmeier GmbH, Malchow, in 1998/1999 to construct a sawmill in Malchow, which corresponded to a total aid intensity of 48,18 % gross, was allegedly granted under regional schemes previously approved by the Commission⁽¹⁵⁾.

⁽¹¹⁾ OJ L 395, 30.12.1989, p. 1, revised version in OJ L 257, 21.9.1990, p. 13.

⁽¹²⁾ OJ L 180, 9.7.1997, p. 1.

⁽¹³⁾ OJ C 66, 2.3.1998 p. 25.

⁽¹⁴⁾ [1994] ECR II-121.

⁽¹⁵⁾ 27th framework plan, Investment Allowance Law, ERP resources.

- (57) Pursuant to Article 87(1) of the EC Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is incompatible with the common market insofar as it affects trade between Member States. The aid for Pollmeier GmbH, Malchow, was granted through State resources. The measures distort or threaten to distort competition because they were granted to an undertaking producing certain goods, thus granting this undertaking an advantage over its competitors. Trade between Member States is affected because the production sector in which Pollmeier is active extends across the Community.
- (58) Germany did not dispute that the measures granted to the undertaking were in the nature of aid. In its comments when the proceedings were initiated, Pollmeier GmbH, Malchow, argued that it does not compete with European sawmills. The Commission notes that even if Pollmeier's production largely competes with United States sawmills, this does not mean that the aid granted to Pollmeier GmbH, Malchow, does not distort or threaten to distort competition within the Community. Milling and initial treatment in the wood sector is engaged in across the Community, with significant production in Austria, Finland and Sweden. These countries are also highly active on Community and export markets and thus compete with Pollmeier GmbH, Malchow.
- (59) The Commission notes that the measures were granted in disadvantaged regions covered by Article 87(3)(a) of the EC Treaty. The Commission further notes that the maximum permissible gross aid intensity under the programmes applicable in these regions was 35 % and 50 % for large enterprises and SMEs respectively. These percentages are ceilings to be applied to the total aid granted if aid is granted concurrently under several regional schemes or from local, regional, national or Community resources.
- (60) In view of the gross intensity of the measures (48,18 %), the aid granted to Pollmeier GmbH, Malchow, presupposes that the recipient firm met the SME criteria defined in the applicable Community guidelines and the recommendation when the programme was approved.

5.1. The definition of an SME

- (61) Small and medium-sized enterprises (SMEs) are defined as enterprises which:
- have fewer than 250 employees,
 - have an annual turnover not exceeding EUR 40 million or an annual balance sheet total not exceeding EUR 27 million,
 - conform to the independence criterion⁽¹⁶⁾.
- (62) Pursuant to Article 1(3) of the annex to the recommendation, independent enterprises are enterprises which are not owned as to 25 % or more of the capital or the voting rights by one enterprise, or jointly by several enterprises, falling outside the definition of an SME or a small enterprise.
- (63) In this context, the Commission recalls its policy towards small and medium-sized enterprises which is aimed at aiding SMEs through targeted incentives to overcome a series of handicaps. As explained in point 1.2 of the Community guidelines, one of the main such handicaps is the difficulty in obtaining capital and credit and access to information, notably regarding new technology and potential markets, and the fact that the introduction of new regulatory arrangements often entails higher costs for SMEs.
- (64) Support for SMEs (e.g. by increasing the aid permissible for them) is therefore not only justified by the contribution which these enterprises make towards achieving the goals sought in the general interest, but also by the necessity of offering them, in the light of their positive role, compensation for the handicaps they must overcome. It must be ensured, however, that the benefit is in fact only granted to enterprises suffering from these handicaps. In particular, the SME definition used must circumscribe small and medium-sized enterprises so that only those enterprises which generate the desired positive externalities and which must overcome the abovementioned handicaps are encompassed by the term. The definition should therefore not include the many larger companies which do not necessarily produce such positive external effects or which do not have to contend with the handicaps typically faced by SMEs. Aid granted to such companies is liable to lead to further distortion of competition and intra-Community trade.

⁽¹⁶⁾ This is the definition of an SME given in Article 1(1) of the Annex to the recommendation.

- (65) This principle is stated in recital 22 of the recommendation, which reads as follows:

‘Whereas, therefore, fairly strict criteria must be laid down for defining SMEs if the measures aimed at them are genuinely to benefit the enterprises for which size represents a handicap.’

- (66) The Commission stresses in particular the need to ensure that circumvention of the independence criterion is avoided. In order to ensure that only genuine SMEs are included, the Community guidelines specify that legal arrangements in which SMEs form an economic group much stronger than an individual SME must be eliminated.

5.2. The status of the aid beneficiary

- (67) Article 87(1) of the EC Treaty refers to the concept of undertaking to define the beneficiary of aid. As confirmed by the Court of Justice⁽¹⁷⁾, the concept of undertaking may not be limited to one distinct legal entity, but may encompass a group of companies. For the purposes of competition law, undertakings are to be

equated with ‘economic units’. It is therefore necessary to examine various factors, such as the distribution of shares, the identity of the managing directors, and the degree of economic integration.

- (68) According to the recommendation, in determining whether the undertaking benefiting from aid is an SME, the reference year is that of the last approved accounting period. Article 1(6) of the annex to the recommendation states that an enterprise which exceeds or falls below the employee thresholds or financial ceilings at the final balance sheet date acquires or loses the status of an ‘SME’ only if the phenomenon is repeated over two consecutive financial years.

- (69) The original allocation decision on the investment aid was made in 1998. The Commission assumed when initiating the proceedings that 1998 should be viewed as the year in which the aid was granted and that 1997 should be viewed as a reference year for application of the definition of an SME. Germany argued that 1999 was the year of the grant, because the allocation decision was substantially amended. This position contradicts the principle asserted by Germany in other cases⁽¹⁸⁾, namely that amendment of an allocation decision does not legally constitute a new decision. The amendment serves only to adapt the amount of aid, since other aid granted in the same project is to be considered.

- (70) The Commission is of the opinion that 1998 is to be viewed as the year of the grant. Accordingly, the reference data for the beneficiary should be the number of employees and the financial data from 1997 and 1996. For the two financial years preceding the decision to grant the aid, the relevant data from the four companies of the Pollmeier group reveal the following picture:

Name	Number of employees		Annual turnover (in EUR million)		Balance sheet total (in EUR million)	
	1996	1997	1996	1997	1996	1997
Pollmeier GmbH, Rietberg	120	103	20,34	19,56	6,98	7,25
Pollmeier Massivholz GmbH & Co. KG Creuzburg	59	93	1,41	16,42	12,03	15,73
Inland Wood Specialties LP, Spokane, United States of America	236	260	23,05	30,75	4,25	6,21
Total	415	456	44,80	66,73	23,53	29,19

⁽¹⁷⁾ Judgment of 14.11.1984 in Case 323/82 Intermills v Commission [1984] ECR, 3809.

⁽¹⁸⁾ Position of Germany in Case 41/2001, State aid for Klausner Nordic Timber GmbH & Co KG.

- (71) The Commission is of the opinion that, contrary to Germany's comments, IWS, the United States-based company, must be considered when defining the beneficiary. In 1996 and 1997 the beneficiary enterprise consisted of Pollmeier GmbH Holzverarbeitungsbetrieb, Rietberg, Pollmeier Massivholz GmbH & Co. KG, Creuzburg, and IWS. All of these companies are directly or indirectly controlled by Ralf Pollmeier and are engaged in the same or parallel economic activities. One can therefore conclude that they are economically integrated. None of these companies can be said to form an independent economic unit. The degree of economic integration is sufficiently high to conclude that IWS forms an economic unit together with the two European Pollmeier sawmills.
- (72) If one considers 1996 and 1997, it is evident that the beneficiary was not an SME in 1998. In 1996 the cumulated number of employees was 416 and the cumulated annual turnover EUR 44,8 million, thus exceeding the SME thresholds. In 1997 the beneficiary had 465 employees, annual turnover of EUR 66,73 million and a balance sheet total of EUR 29,19 million. The data of the beneficiary exceeded the SME thresholds in 1997. Accordingly, the beneficiary exceeded the SME thresholds in two consecutive financial years.
- (73) If the Commission were to accept Germany's argument and take 1999 as the year of the grant, 1998 would be the reference year. For the two financial years preceding the decision to grant the aid, the relevant data from the companies of the Pollmeier Group reveal the following picture:

Name	Number of employees		Annual turnover (in EUR million)		Balance sheet total (in EUR million)	
	1997	1998	1997	1998	1997	1998
Pollmeier Holzverarbeitungsbetrieb, Rietberg As of 1999: Pollmeier Massivholz GmbH	103	79	19,56	15,16	7,25	6,48
Pollmeier Massivholz GmbH & Co. KG Creuzburg As of 1999: Pollmeier Creuzburg GmbH & Co. KG	93	160	16,42	29,91	15,73	15,95
Pollmeier GmbH, Malchow As of 1999: Pollmeier Malchow GmbH & Co. KG	—	0	—	0	n.a.	2,57
Inland Wood Specialties LP, Spokane	260	113	30,75	21,09	6,21	4,91
Total (without IWS)	196	239	35,98	45,07	22,98	25
Total (with IWS)	456	371	66,73	66,16	29,19	29,91

- (74) If one considers the number of employees and the financial data of the beneficiary, the data from the three companies of the Pollmeier Group must be cumulated for 1997. In 1997, the beneficiary had 456 employees, annual turnover of EUR 66,73 million and a balance sheet total of EUR 29,19 million. The data for the beneficiary thus exceed the thresholds stipulated in the definition of an SME.

we restrict ourselves to the European companies, including Pollmeier GmbH, Malchow, and do not add the employees and financial data of IWS, a total of 239 employees, turnover of EUR 45,07 million and a balance sheet total of EUR 25,1 million result for the beneficiary in 1998. The beneficiary would thereby have fallen below the thresholds in the definition of an SME in 1998.

- (75) Pollmeier GmbH, Malchow, was formed in 1998. On 1 June 1998, the structure of the group changed insofar as Ralf Pollmeier sold 51 % of the shares in IWS and has since then only held 23,25 % of the IWS shares. Even if

- (76) Article 1(6) of the annex to the recommendation expressly states, however:

'Where, at the final balance sheet date, an enterprise exceeds or falls below the employee thresholds or financial ceilings, this is to result in its acquiring or losing the status of SME only if the phenomenon is repeated over two consecutive financial years.'

(77) At the final balance sheet date, the beneficiary was below the thresholds for employees, turnover and the balance sheet total. However, this phenomenon was not repeated over two consecutive financial years, since in 1997 the enterprise's figures were still above the applicable employee thresholds and financial ceilings.

(78) In 1998, the beneficiary did not qualify as an SME, since the SME thresholds had been exceeded in the two preceding years. In 1996, the cumulated workforce amounted to 416 and the cumulated turnover to EUR 44,8 million. Consequently, the beneficiary did not possess SME status in 1998, nor did it acquire such status in 1999. The beneficiary was thus still a large company when the aid was granted in 1999.

(79) Germany has argued that the change in ownership of IWS which occurred on 1 June 1998 should be taken into account when applying the definition of an SME, since this change was made before the aid was granted. Germany invokes the *Air France* judgment as well as Article 5(4) of Regulation (EEC) No 4046/89, which lays down the principles of calculation of turnover for the purposes of merger control. The Commission deems the *Air France* judgment to be irrelevant to the assessment of the present aid. The judgment relates to the sale of a corporate division before an actual merger. The present case does not concern the sale of assets, but the change of the shareholder structure. Germany's argument is therefore not relevant if one considers the number of employees and the financial data of the beneficiary, defined as the sawmills of the Pollmeier group.

(80) The recommendation stipulates that a company acquires or loses the status of an SME only if the thresholds are exceeded or fallen below over two consecutive years. It is clear that the beneficiary was above the SME thresholds prior to 1 June 1998. This fact is to be taken into account when reviewing the SME status of the beneficiary as required in accordance with Article 1(6) of the annex to the recommendation. At the time the aid was granted (i.e. 1999), the data of the beneficiary enterprise had fallen below the SME thresholds for less than one

year. The Commission therefore concludes that the aid beneficiary does not formally comply with the SME definition and that it cannot be seen as suffering from the handicaps to SMEs.

(81) Moreover, the change of ownership of IWS occurred on 1 June 1998, three days after 27 May 1998, when the application for investment aid was submitted by Pollmeier GmbH, Malchow. A large portion of the shares of Ralf Pollmeier in IWS were sold to Ralf Pollmeier's sister and to John Gottwald, who is not a member of the Pollmeier family. Since then 89 % of the shares in IWS have been in the possession of Ralf Pollmeier and members of his family (his brother and his sister). Since 17 July 1999, Ralf Pollmeier's sister, Doris Tegelkamp, has also held 38 % of the newly formed Pollmeier Leimholz GmbH, Rietberg.

(82) The Commission doubts whether this change of ownership is motivated by any purposes other than the circumvention of the SME definition. According to recital 18 of the recommendation, 'there is also a need to rule out legal entities composed of SMEs which form a grouping whose actual economic power is greater than that of an SME'. It is one of the Commission's tasks to ensure that Community law, in the present case, the definition of an SME, is not circumvented, and it has done so in other cases ⁽¹⁹⁾.

(83) Neither Germany nor the beneficiary itself have presented any justification for the change in the ownership structure of the Pollmeier group. Apparently, the only purpose of this restructuring was to assure that Pollmeier GmbH, Malchow, would enjoy the advantages granted to SMEs to offset specific handicaps linked to their size. A look at the structure of the Pollmeier group, the links between the shareholders of the various Pollmeier companies and the economic links of the various entities of the group gives the impression that the group does not suffer from the typical handicaps of SMEs referred to by the Community guidelines. For example, Pollmeier GmbH, Malchow, benefits in particular from the market presence of the other companies of the Pollmeier group and from the technology of the existing sawmills and will not therefore have to overcome the (technological and distributive) obstacles otherwise associated with entry into the relevant market.

(84) The Commission is moreover of the opinion that, even if the beneficiary were structurally an SME, it appears that it does not suffer from the handicaps typical of SMEs. This reinforces the Commission in its conclusion that the aid beneficiary is not an SME as defined by the recommendation.

⁽¹⁹⁾ State aid C 17/2000 for Solar Tech SpA. Commission Decision of 15.11.2000.

5.3. The compatibility of the aid

- (85) The aid provided to Pollmeier GmbH, Malchow, with an aid intensity of 48,18 % was allegedly granted on the basis of approved aid schemes. For investments in Mecklenburg-Western Pomerania, the 27th framework plan provides for a maximum aid intensity for large companies of 35 % and for SMEs of 50 %. These aid intensities correspond to the thresholds for regional aid in the German regional aid map applicable at the time the aid was granted ⁽²⁰⁾.
- (86) Given that the aid beneficiary is a large company, only 35 % of the aid granted complies with the conditions of the scheme; therefore only aid up to this amount can be seen as existing aid. The remaining 13,18 % must be viewed as new aid. Since this new aid was granted without the Commission's approval, it is illegal.
- (87) The aid was granted for an investment in Mecklenburg-Western Pomerania. This region is an assisted area under Article 87(3)(a) of the EC Treaty. In accordance with point 2 of the guidelines on national regional aid ⁽²¹⁾ (hereinafter, the regional guidelines), the guidelines apply to regional aid granted in every sector of the economy apart from the sectors to which special rules apply. Since manufacturing of wood panels is not covered by any special rules, the aid in question is assessed in accordance with the provisions of the regional guidelines.
- (88) According to the regional guidelines, a derogation from the incompatibility principle established by Article 87(1) of the EC Treaty may be granted in respect of regional aid only if a reasonable equilibrium is guaranteed between the resulting distortions of competition and the advantages of the aid in terms of the development of less-favoured regions. The regional guidelines further state that an individual ad hoc payment made to a private firm may have a major impact on competition in the relevant market, and its effects on regional development are likely to be too limited. However, ad hoc aid can nonetheless be viewed as compatible, provided it does not exceed the regional aid thresholds approved by the Commission.
- (89) The aid in the amount of EUR 3 650 860 represents an additional aid intensity of 13,18 % above the ceiling for regional aid to large companies in the *Land* of Mecklenburg-Western Pomerania provided for in the German regional aid map. For the abovementioned reasons, the beneficiary is not an SME within the meaning of the Community guidelines and Commission Regulation (EC) No 70/2001 of 12 January 2001 concerning the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises ⁽²²⁾. The aid ceiling of 35 % authorised by the Commission was determined with due regard to the nature and intensity of the regional problems that are being addressed. The granting of an additional aid intensity of 13,8 % cannot therefore be justified by any regional problems.
- (90) Germany did not specify any other ground for the compatibility of the aid that might have applied in the present case. The exemptions in Articles 87(2) of the EC Treaty are not applicable in the present case, since the aid does not have a social character and is not granted to individual consumers, does not serve to make good the damage caused by natural disasters or other exceptional occurrences, and is not granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany. The exemption in Article 87(3)(b) of the EC Treaty is not applicable because the project obviously does not represent an important project of common European interest. The exemption in Article 87(3)(c) of the EC Treaty (insofar as the development of certain economic activities is concerned) is likewise not applicable since the aid is not intended to facilitate the development of certain economic activities. This provision further requires that the aid must 'not adversely affect trading conditions to an extent contrary to the common interest'. The Commission is of the opinion that this condition has not been met. The main effect of the aid is in fact to promote the competitiveness of the beneficiary in a production segment in which there is considerable international competition. The exemption in Article 87(3)(d) of the EC Treaty is likewise not applicable because the aid clearly does not serve to promote culture and heritage conservation.
- (91) The additional 13,18 % aid intensity thus does not fulfil the criteria required in order to be considered compatible with the common market and has to be recovered from the beneficiary.

⁽²⁰⁾ State aid N 613/96, approved by decision of the Commission on 18 December 1996, OJ C 288, 23.9.1997, p. 3.

⁽²¹⁾ OJ C 74, 10.3.1998, p. 9.

⁽²²⁾ OJ L 10, 13.1.2001, p. 33.

6. CONCLUSION

- (92) The Commission takes note of the revocation of the decision to grant aid to Pollmeier & Co. KG, Kässlitz.
- (93) The Commission finds that Germany has unlawfully implemented aid of EUR 3 650 860 to Pollmeier GmbH, Malchow, in breach of Article 88(3) of the EC Treaty. With due regard to the above considerations, the Commission further concludes that the aid in question does not fulfil the criteria required in order to be considered compatible with the common market,

HAS ADOPTED THIS DECISION:

Article 1

The State aid which Germany has implemented for Pollmeier GmbH, Malchow, amounting to EUR 3 650 860 is incompatible with the common market.

Article 2

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

2. Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of the decision. The aid to be recovered shall include interest from the date on which it was at the disposal of the beneficiary until the date of its recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant equivalent of regional aid.

Article 3

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

Article 4

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 15 January 2002.

For the Commission

Mario MONTI

Member of the Commission

COMMISSION DECISION

of 30 January 2002

on the State aid granted by Spain to a number of steel undertakings in the Basque Country

(notified under document number C(2002) 309)

(Only the Spanish text is authentic)

(Text with EEA relevance)

(2002/822/ECSC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

under Article 6(5) of the Steel Aid Code in respect of the aid.

Having regard to the Treaty establishing the European Coal and Steel Community, and in particular Article 4(c) thereof,

- (3) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities*. The Commission invited interested parties to submit their comments on the aid.

Having regard to Commission Decision No 2496/96/ECSC of 18 December 1996 establishing Community rules for State aid to the steel industry ⁽¹⁾, and in particular Article 6(5) thereof,

- (4) The Commission received comments from the United Kingdom authorities and from the United Kingdom Steel Association. It forwarded them to Spain, which was given the opportunity to react; its comments were received by letter dated 19 October 2001.

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,

II. DETAILED DESCRIPTION OF THE AID

Whereas:

I PROCEDURE

- (1) By letter dated 31 July 2000 the Commission requested the Spanish authorities to provide information on the aid which the Basque regional government granted in 1999 to ECSC undertakings for research and development and which had not been notified in accordance with the procedure laid down in Article 6(1) of Commission Decision No 2496/96/ECSC (hereinafter the Steel Aid Code). By letter dated 4 October 2000 the Spanish authorities provided some information. By letter dated 20 November 2000 the Commission requested additional information. By letter dated 16 January 2001 the Spanish authorities provided the additional information requested.
- (2) By letter dated 28 March 2001 the Commission informed Spain that it had decided to initiate proceedings

- (5) The aid consists of grants awarded under the scheme introduced by Decree 185/1997 of 29 July 1997 establishing support measures for research, development and technological innovation in the Autonomous Community of the Basque Country ⁽³⁾, which was authorised by the Commission under the EC Treaty ⁽⁴⁾.
- (6) The beneficiary ECSC undertakings, the details of the R&D projects and the amounts of aid are as follows:

**A. Acería de Álava SA. Project:
development of a new production line:
finishing of stainless steel bars**

- (7) The project consists in the installation of a new production line in order to increase the company's range of products and improve the steelworks' production

⁽¹⁾ OJ L 338, 28.12.1996, p. 42.

⁽²⁾ OJ C 185, 30.6.2001, p. 41.

⁽³⁾ BOPV (Official Gazette of the Basque Country) No 1997147, 4.8.1997, p. 13174.

⁽⁴⁾ Letter SG (97) D/6942 of 12 August 1997.

capacity. Following the results of a market study commissioned by the company, which concluded that there was increasing demand for large stainless steel bars, Acería de Álava decided to install a new production line for these products. Neither the application form nor the documentation provided afterwards describe any research activity; they mention only the steps followed for bringing the installations into service.

(8) The costs included in the application form refer to personnel (EUR 283 077), external services (EUR 841 017), current expenditure (EUR 12 020), equipment (EUR 39 065) and depreciation of installations (EUR 744 043). They total EUR 1 919 063. The entity charged by the Basque authorities with assessing the project noted that no description was provided of the activities of the external agent. The Basque Country granted EUR 101 407 to cover the costs of the company and EUR 27 464 to cover the costs of the external agent.

(9) The project was classed as precompetitive development by the Basque Country.

(10) The company's R&D expenditure declined from an average of EUR 267 000 in 1996 to 1998 to EUR 227 000 in 1999. As a percentage of turnover, it fell from 0,39 % in 1996 to 1998 to 0,33 % in 1999.

B. Acería Compacta de Bizcaia SA and Aceralia Corporación Siderúrgica SA. Project: development of carbon and micro-alloyed steels through thin slab casting

(11) The activities involved in the project include studying the influence of chemical composition (contents of nitrogen, residual and microalloying elements) in the hot-rolled product (mechanical properties, cleanliness) and their influence on the cold-rolled and galvanised final product. Through simulation in the laboratory, the project will examine the possibility of defining simplified conditions for industrial production as well as the influence of solidification speeds on the properties of the steel produced.

(12) The project is being carried out in cooperation with the CEIT (Guipúzcoa Research Centre), a member of the Basque technology network.

(13) The activities were classed by the Spanish authorities as precompetitive development.

(14) The costs considered eligible by the Spanish authorities amount to EUR 527 388 and relate to personnel, instruments and equipment and external services. The aid amounts to EUR 210 955.

(15) R&D expenditure by Aceralia Corporación Siderúrgica rose from an average of EUR 4 362 146 in 1996 to 1998 to 5 409 109 in 1999. The personnel assigned to R&D activities grew from an average of 37 in 1996 to 1998 to 43 in 1999.

(16) R&D expenditure by Acería Compacta de Bizcaia rose from an average of EUR 348 376 in 1997 to 1998 to 515 710 in 1999. As a percentage of turnover, it increased from 0,15 % in 1997 to 1998 to 0,22 % in 1999.

C. Aceros Inoxidables Olarra SA. Project: optimisation of the hot-forming of austenitic steels through thermomechanical simulation

(17) The project involves defining the composition of continuous cast duplex steels and their microstructural characterisation with continuous cast structure, after hot-forming and heat treatment.

(18) The project is being carried out in cooperation with the CEIT.

(19) The costs considered eligible by the Spanish authorities amount to EUR 77 062 and relate to personnel, instruments and equipment and external services. The aid amounts to EUR 30 177.

(20) The company's R&D expenditure over the period 1996 to 1998 represented on average 0,14 % of turnover. In 1999 it rose to 0,19 %.

D. Grupo Siderúrgico Vasco 'GSB Acero' SA. Project: optimisation of metallurgical parameters in the direct forging of micro-alloyed steels

(21) The project is aimed at obtaining vanadium micro-alloyed steels with the necessary microstructure to be directly forged (without intermediate treatment).

- (22) The costs considered eligible by the Spanish authorities amount to EUR 117 696 and relate to personnel, instruments and equipment and external services. The aid amounts to EUR 47 077.

- (23) Expenditure on R&D over the period 1996 to 1998 amounted to an average of EUR 582 000. In 1999, it rose to EUR 692 000. The personnel assigned to R&D activities was increased from 11 (average 1996 to 1998) to 14.

**E. Nervacero SA. Project:
recycling of dusts from the steel shop through
briquetting and use in the furnace**

- (24) Dust from steel shops is normally treated through two different processes: the so-called Waelz process, which involves burning the dust mixed with coke and sand at high temperatures and whose main disadvantage is the production of very low value slag and the emission of high quantities of combustion gases; and the chemical stabilisation/solidification process, which, by mixing the dusts with other elements, allows the resulting waste to be dumped in controlled sites since it can be classed as non-toxic and non-dangerous. The project is aimed at developing a self-reducing briquette which incorporates not only the dust and the agglomerating elements but also the coke necessary for the reduction process. The project would also reduce the treatment time in the furnace in comparison with the Waelz process.

- (25) The leader in this project is Oñeder SA, a company dedicated to the recycling of industrial waste. Nervacero's contribution relates to personnel costs (one researcher) as well as costs of materials and some of the costs of external agents.

- (26) The project is being carried out in cooperation with the Inasmet Foundation (Inasmet), a member of the Basque technology network.

- (27) The costs considered eligible by the Spanish authorities amount to EUR 50 034 and relate to personnel, instruments and equipment and external services. The aid amounts to EUR 20 014.

- (28) With this project, the company will be involved for the first time in R&D activities.

**F. Siderúrgica Aristrain Olaberriá SL. Project:
development of beam blanks technology
for obtaining carbon and micro-alloyed structural steels**

- (29) In order to overcome the problems identified in the use of traditional continuous casting for the production of beams, Siderúrgica Aristrain Olaberriá SL decided to adopt beam blanks technology. With this process, the shape of the semi-finished products obtained is closer to that of the finished products, which reduces the further deformation needed to reach the final product and improves the quality of the steel.

- (30) The project is being carried out in cooperation with the CEIT.

- (31) The costs considered eligible by the Spanish authorities amount to EUR 390 708 and relate to personnel, materials and equipment and external services. The aid amounts to EUR 23 526.

- (32) The company's R&D expenditure over the period 1996 to 1998 represented on average 0,38 % of total turnover. In 1999 it represented 0,42 %.

**G. Esteban Orbegoza SA. Project:
optimisation of the melting of steel scrap
in an electric arc furnace through
continuous control of the slag**

- (33) The project is aimed at incorporating into the control of the melting process a new variable, control of the slag, through an on-line analyser of slag and optimisation of the combustion processes for energy sources other than electricity.

- (34) The project is being carried out in cooperation with Inasmet.

- (35) The costs considered eligible by the Spanish authorities amount to EUR 168 283 and relate to personnel, instruments and equipment, depreciation and external services. The aid amounts to EUR 1 030.

- (36) No data have been provided as to R&D expenditure or personnel assigned to R&D activities.

instruments and equipment, depreciation and external services. The aid amounts to EUR 13 951.

**H. Esteban Orbegoza SA. Project:
process control for the reduction of defects
in the hot rolling of billets**

- (37) The activities involved include the collection in real time of details about defects, dimensional control and other variables that affect the quality of the product; the analysis of data and the establishment of a correlation between the defects and the rolling parameters; and optimisation of the rolling parameters.

- (38) The project is being carried out in cooperation with the CEIT.

- (39) The costs considered eligible by the Spanish authorities amount to EUR 317 839 and relate to personnel, instruments and equipment, depreciation and external services. The aid amounts to EUR 23 145.

- (40) No data have been provided as to R&D expenditure or personnel assigned to R&D activities.

**I. Marcial Ucín Siderúrgica SL. Project:
improvement of the fatigue behaviour of corrugated
steels with anti-seismic properties**

- (41) Following the new draft standard PNE 36065 EX/98 establishing new values for resistance to low-cycle fatigue, the company aims with this project to develop all the infrastructure necessary for carrying out the appropriate tests.

- (42) The project is being carried out in cooperation with Inasmet.

- (43) The costs considered eligible by the Spanish authorities amount to EUR 220 789 and relate to personnel,

- (44) No data have been provided as to R&D expenditure or personnel assigned to R&D activities.

**J. Tubos Reunidos SA. Project:
Optimisation and improvement of productivity
in the steelworks**

- (45) The project focuses on improving refining control in the furnace and the ladle as well as installing new ingot moulds and agitators in the continuous caster.

- (46) The entity charged by the Basque authorities with assessing the project acknowledges that it is not a concrete R&D project and that the bulk of the expenditure corresponds to investment.

- (47) The costs considered eligible by the Spanish authorities amount to EUR 531 012 and relate to personnel, instruments and equipment, depreciation and external services. The aid amounts to EUR 26 338. The report on implementation of the project reports the following costs: personnel, EUR 368 718; current expenditure, EUR 146 076; depreciation, EUR 125 461; external services, EUR 214 536.

- (48) No data have been provided as to R&D expenditure or personnel assigned to R&D activities.

III. GROUNDS FOR INITIATING PROCEEDINGS

- (49) In the decision-initiating proceedings, the Commission expressed doubts as to the incentive effect of the aid since it took the view that the indicators which the Basque regional government had when it notified the scheme undertaken to consider for the purpose of examining the incentive effect of the aid for large undertakings (evolution of R&D spending, evolution of the number of people assigned to R&D activities, evolution of R&D spending as a proportion of total turnover) had not been taken into account and would be relevant for the purpose of assessing the incentive effect in the present case.

- (50) The Commission also expressed its doubts as to the fulfilment of the other requirements established in the R&D framework since it lacked detailed information about the projects.

- (51) In these circumstances, the Commission requested Spain to provide all the information necessary for assessing the aid. If such information was not forthcoming, the Commission would have to adopt a decision on the basis of the information in its possession.

IV. COMMENTS FROM INTERESTED PARTIES

- (52) The United Kingdom authorities agreed with the Commission's reasoning for initiating proceedings. They also stressed the need for the Member States to establish the incentive effect of the aid.

- (53) The United Kingdom Steel Association considered that none of the undertakings could be regarded as SMEs; they also submitted that, on the basis of the limited information published, some of the projects could be seen as applying existing technologies.

- (54) The information transmitted by the Spanish authorities included the comments that some of the companies had made further to the initiation of proceedings. These comments stressed the incentive effect of the aid along the same lines as the comments made by Spain (see recital 56 below).

V. COMMENTS FROM SPAIN

- (55) By letter dated 8 June 2001, the Spanish authorities transmitted a copy of their entire documentation concerning these aid measures.

- (56) As to the incentive effect of the aid, although the Commission had already indicated that quantifiable factors would be relevant (see recital 49 above) the Spanish authorities did not mention ⁽⁵⁾ them and maintained in that letter that:

- (a) the aid was a decisive factor in carrying out the research because the risk involved in R&D activities was high;
- (b) the technical assistance provided in the process of assessing the aid was important for the undertakings;

- (c) the participation of external agents contributed to the improvement of research methods;
- (d) the mere fact of applying for aid required the companies to examine more closely the different options and the most effective solutions;
- (e) the implementation of an R&D project contributed to an improvement in internal coordination within the company.

VI. ASSESSMENT OF THE AID

- (57) The abovementioned companies manufacture products included in Annex I to the ECSC Treaty. They are therefore undertakings within the meaning of Article 80 of the ECSC Treaty and are therefore subject to that Treaty and to the Steel Aid Code.

- (58) Pursuant to Article 2 of the Steel Aid Code, aid granted to defray expenditure by steel undertakings on research and development projects may be deemed compatible with the common market if it is in compliance with the rules laid down in the Community framework for State aid for research and development ⁽⁶⁾ (hereinafter 'the R&D framework').

- (59) In accordance with the R&D framework, in order to assess whether aid is compatible with the common market the Commission must verify the nature of the activities, the stage of the research, the aid intensity and the eligible costs and make sure that the aid has an incentive effect.

- (60) As to the nature of the activities, the Commission considers that all the projects except two (the projects referred to in recitals 7 to 10 and 45 to 48 above) consist of R&D.

- (61) The Acería de Álava project in fact involves the installation of a new production line. Even the entity charged by the Basque authorities with assessing the project acknowledges this fact. This is also confirmed by the type of personnel involved (maintenance, assembly) and the third parties' contribution (engineering companies supplying equipment). The aid for this project therefore does not comply with the R&D framework.

- (62) The Tubos Reunidos project relates to the improvement of processes with a view to increasing productivity. This constitutes a routine activity that every company is

⁽⁵⁾ It can be seen from the documentation transmitted that the application form requires the companies to provide, among other things, the following information for the period 1996 to 1999: turnover; personnel assigned to R&D; total R&D expenditure. This is therefore in line with the commitment of the Basque regional government to take these factors into account in determining the incentive effect.

⁽⁶⁾ As published in OJ C 45, 17.2.1996, p. 5.

bound to undertake on a regular basis in order to maintain its competitiveness and does not constitute R&D. Even the entity charged by the Basque authorities with assessing the project acknowledges that it is not a concrete R&D project and that the bulk of the expenditure corresponds to investment. The aid for this project therefore does not comply with the R&D framework.

(63) As to the stage of research, except for the abovementioned two projects, all the others constitute at least precompetitive development.

(64) As to the eligible costs, except for the abovementioned two projects, all the others comply with the definitions given in the R&D framework (personnel, instruments and equipment, materials, external services).

(65) As regards the intensity of the aid, according to point 5.5 of the R&D framework the permissible gross aid intensity is 25 % of the eligible costs for precompetitive activities. This intensity can be increased by 15 percentage points where the research project is in accordance with the objectives of a specific project or programme undertaken as part of the Community framework programme for R&D ⁽⁷⁾ and by 5 percentage points where the research project is carried out in an Article 87(3)(c) region (point 5.10.2 of the framework).

(66) The Commission notes that for the projects where the 25 % intensity is exceeded, the abovementioned bonuses apply.

(67) As for the incentive effect of the aid, the Commission took the view in the decision initiating proceedings (see recital 49 above) that the quantifiable factors which the Basque regional government had undertaken to consider when the Commission approved the scheme were also relevant in this case (in addition to being the quantifiable factors included in the R&D framework). The Basque government did not, however, take them into account. It did take into account other factors (see recital 56 above) that relate to some beneficial effects of R&D activities in general but do not in any way address the

issue of the incentive effect of the aid on a specific company, i.e. whether the planned aid would induce that firm to pursue research that it would not otherwise have pursued. In these circumstances, since quantifiable data of the type mentioned above had been included in some of the applications for aid filed by the companies with the Spanish authorities, the Commission is entitled to take them into account for the purpose of assessing the incentive effect of the aid.

(68) On the basis of the evolution of R&D spending, of the number of people assigned to R&D activities and of R&D spending as a proportion of total turnover, the incentive effect can be considered to be demonstrated for the companies involved in the projects referred to in recitals 11 to 32 above.

(69) As for the other companies, the Commission considers that the incentive effect has not been demonstrated on the basis of those indicators and that no other relevant factor for this purpose has been indicated by the Member State or by the companies. Consequently the aid for these projects is not in compliance with the R&D framework.

VII. CONCLUSION

(70) The Commission finds that Spain has unlawfully granted the aid in question in breach of Article 6(4) of the Steel Aid Code.

(71) The Commission concludes, however, that the aid granted in respect of the projects referred to in recitals 11 to 32 above is compatible with the common market.

(72) The Commission concludes that aid for the projects referred to in recitals 7 to 10 and 33 to 48 above is incompatible with the common market.

(73) Where the Commission finds that State aid incompatible with the common market has been illegally granted, it must require the Member State to take all the necessary measures to recover the aid from the beneficiary. The

⁽⁷⁾ In the present case the 'Medium-term guidelines of the ECSC steel R&D programme for research and pilot/demonstration projects, improved materials and production technology in the steel field' undertaken as part of the Community's fifth framework programme.

aid to be recovered shall include interest at the reference rate used in the assessment of regional aid schemes. Interest shall be payable from the date on which the unlawful aid was at the disposal of the beneficiary until the date of its recovery,

HAS ADOPTED THIS DECISION:

Article 1

The State aid which Spain has granted to Acería Compacta de Bizcaia SA and Aceralia Corporación Siderúrgica SA (EUR 210 955), Aceros Inoxidables Olarra SA (EUR 30 177), Grupo Siderúrgico Vasco 'GSB Acero' SA (EUR 47 077), Nervacero SA (EUR 20 014) and Siderúrgica Aristrain Olaberria SL (EUR 23 526) is compatible with the common market.

Article 2

The State aid which Spain has granted to Acería de Álava SA (EUR 128 871), Esteban Orbegozo SA (EUR 34 175), Marcial Ucin Siderúrgica SL (EUR 13 951) and Tubos Reunidos SA (EUR 26 338) is incompatible with the common market.

Article 3

1. Spain shall take all necessary measures to recover from the beneficiaries the aid referred to in Article 2 and unlawfully made available to the beneficiaries.

2. Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of the decision. The aid to be recovered shall include interest from the date on which it was at the disposal of the beneficiaries until the date of its recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant-equivalent of regional aid.

Article 4

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

Article 5

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 30 January 2002.

For the Commission

Mario MONTI

Member of the Commission

COMMISSION DECISION

of 3 April 2002

on the State aid granted by the Federal Republic of Germany for ILKA MAFA Kältemaschinenbau GmbH

(notified under document number C(2002) 1190)

(Only the German text is authentic)

(Text with EEA relevance)

(2002/823/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

Having called on interested parties to submit their comments pursuant to the provisions cited above ⁽¹⁾,

Whereas:

I. PROCEDURE

- (1) By letter dated 27 March 1998 Germany informed the Commission of restructuring aid for the privatisation of ILKA MAFA Kältemaschinenbau GmbH (ILKA MAFA) and its sale to Carrier. However, Carrier withdrew from the privatisation contract on 31 December 1998.
- (2) On 30 December 1999, Germany again notified restructuring aid for the privatisation of ILKA MAFA; the purchasing company this time was GEA AG. By letter dated 3 April 2000 Germany provided the Commission with further information.
- (3) By letter dated 1 August 2000, the Commission informed Germany that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid to ILKA MAFA.
- (4) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* ⁽²⁾. The Commission invited interested parties to submit their comments on the aid.
- (5) The Commission received no comments from interested parties.

- (6) ILKA MAFA is a successor company ⁽³⁾ to the former ILKA MAFA Kältetechnik GmbH (Ilka-old). Ilka-old belonged to a group of eight companies from the former GDR which were first privatised in 1994 as the EFBE Verwaltungs GmbH & Co. Management KG, now Lintra Beteiligungsholding GmbH. Since the original privatisation concept failed in December 1996, it was decided in January 1997 by the Bundesanstalt für vereinigungsbedingte Sonderaufgaben (BvS) to continue the restructuring of potentially viable Lintra-subsidaries with the aim of preparing these companies for resale. Since Ilka-old had received aid that was to be assessed in the context of the other notified restructuring aid, the case was registered as non-notified aid. The aid paid to Ilka-old via Lintra Beteiligungsholding GmbH was the subject of Commission Decision 2001/673/EC on aid to EFBE Verwaltungs GmbH & Co. Management KG/Lintra Beteiligungsholding GmbH ⁽⁴⁾.

II. DETAILED DESCRIPTION OF THE AID

- (7) ILKA MAFA was set up at the end of 1997 by Ilka-old in preparation for the second privatisation after it had become evident that the privatisation concept under Lintra Beteiligungsholding GmbH had failed. From 11 December 1997 onwards, Ilka-old was named Dipa-Industrie- und Vermögensverwaltungsgesellschaft (Dipa). Insolvency proceedings were started against Dipa on 1 January 2000.
- (8) A privatisation contract was concluded in 1997 with Carrier. Carrier, however, withdrew its interest on 31 December 1998. Following this, BvS started looking for another investor, contacting ten domestic and foreign manufacturers of refrigeration plant and machinery. GEA AG was the only company which was interested in taking over ILKA MAFA.

⁽¹⁾ OJ C 278, 30.9.2000, p. 9.

⁽²⁾ See footnote 1.

⁽³⁾ A separate hive-off vehicle (Auffanggesellschaft).

⁽⁴⁾ OJ L 236, 5.9.2001, p. 3.

- (9) The privatisation agreement was concluded on 27 September 1999 between BvS, Dipa and GEA AG on the takeover of ILKA MAFA. The purchase price paid to Dipa was DEM 500 000.
- (10) ILKA MAFA is located in Döllnitz bei Halle, Saxony-Anhalt. Its activities are the production, distribution, assembly, installation and maintenance of refrigerating systems (water-cooled chillers) for environmentally compatible, ammonia-based refrigeration. Water-cooled chillers are used in the food and chemicals industries, industrial production, the air conditioning of buildings and in sports facilities.
- (11) The investor for the second restructuring project is GEA AG, the management holding company of the GEA Group, which has some 150 operational companies worldwide. The group has a total of 14 000 workers and its turnover in 1999/2000 was EUR 2,3 billion.
- (12) The restructuring plan provides mainly for cost savings through the synergy effects of belonging to a large group, e.g. joint purchasing. Distribution will be through the group's worldwide sales network. To save costs, the administration functions will be taken over by a sister company, Grasso RT Berlin.
- (13) The company will focus in future on the core business, which is the production and assembly of water-cooled chillers. It will in particular manufacture chillers of different sizes and performance categories to meet individual customers' specifications. Replacement and modernisation investment is also provided for, and joint R&D activities will be stepped up.
- (14) The investor will employ on average 45 full-time workers for a three-year period starting in November 1999. The activities of the company will be carried on until at least 31 December 2004.
- (15) As explained in recital 7, ILKA MAFA was set up in December 1997 to prepare for privatisation and for takeover by Carrier. The restructuring period was to last from 1 December 1997 to 31 December 2001. As explained above, Carrier withdrew its interest in late 1998. The restructuring period of the present investor GEA AG began on 1 October 1999 and ended on 31 December 2001. The whole period since end 1997 was notified as the restructuring period for Ilka-old, since the restructuring process had begun before the withdrawal of Carrier, and it continued also in 1998 and 1999 before the privatisation to GEA AG.
- (16) According to the forecasts in the restructuring plan, the company will make a slight profit of DEM 14 000 in 2002 from a turnover of DEM 16,2 million. For 2003 the profit forecast was DEM 670 000 with a turnover of DEM 17,4 million, and, for 2004, DEM 1,1 million with a turnover of DEM 18,2 million.
- (17) The restructuring plan as assessed by the Commission in its decision to initiate the procedure was to be financed as follows:

(DEM thousand)

Financing	BvS/Land	Investor/ILKA MAFA
Financing of Dipa until liquidation – 6 450	6 450	
1.12.1997-30.9.1999	12 800 grant	
Operating losses – 8 232		
Investments – 333		
Integration-/restructuring costs Carrier – 1 842		
Increase of liquidity – 2 393		
Total – 19 250	19 250	

Financing	BvS/Land	Investor/ILKA MAFA
1.10.1999-31.12.2001 Social plan and related costs 2 029	1 748 grant	281 ILKA MAFA
Operating losses – 3 881	3 500 grant	381 — Shareholder's loan
Investments and other restructuring costs – 9 800	3 700 grant	Increase of equity 2 000 Shareholder's loan 4 100
Working capital – 1 150		Shareholder's loan 1 150
Purchase price 500		GEA 500
TOTAL: 36 610	28 198	8 412
	77 %	23 %

(18) In addition to the financing shown in the table, Germany announced a contribution of DEM 2,760 million to the labour costs. The contribution would be made by the workforce of ILKA MAFA, who would waive 12,5 % of their annual wages/salaries during the restructuring.

(19) In its decision opening the procedure the Commission noted that the share of the public financing would be DEM 28,198 million, representing 77 % of the total costs. The investor contribution would be DEM 8,381 million representing 23 % of the total costs. Therefore, the Commission had doubts whether the investor contribution to the restructuring could be considered significant as provided in the Community guidelines on State aid for rescuing and restructuring firms in difficulty⁽⁵⁾ (guidelines).

(20) In addition, the Commission noted that of the DEM 9,8 million allocated by the investor in the restructuring plan for investment and reorganisation, a total of DEM 1,1 million was to be used for setting up sales offices in Scandinavia and Japan and for expanding the sales network in South America. Since ILKA MAFA's sales operations are to be taken over by the parent group, the Commission doubted whether the part of the aid linked to these investments will really be granted to ILKA MAFA, whether these investments were essential for restoring the viability of the company and whether the aid was thereby limited to the strictly necessary.

(21) The Commission also pointed out that as a result of the final decision in case C-41/99 Lintra Beteiligungsholding GmbH some additional claims against the former Ilka-old might arise that would have to be added to the costs

of the present restructuring plan. The exact amount of these was not established at the time of the decision to initiate the procedure but would be made clear in the final decision. These additional liabilities should be taken into account in the assessment of the proportionality of the aid.

III. COMMENTS FROM GERMANY

(22) As regards the Commission's doubts about the insufficient investor contribution, Germany explains that the calculation should also take account of the fact that the restructuring period with the present investor began on 1 October 1999, whereas the overall restructuring period started in December 1997. Consequently, the total volume of funding was initially higher than the amount provided by the new investor.

(23) If the costs of the restructuring are assessed on the sole basis of the period from 1 October 1999 to 31 December 2001, the contribution by the investor and ILKA MAFA amounts to 52 %, which must be regarded as a significant contribution to the restructuring plan.

(24) As regards the Commission's doubts about the necessity for the DEM 1,1 million investment earmarked for the establishment of sales offices, Germany explains that one of the most glaring weaknesses of most companies from the new *Länder* has been, and still remains, their inadequate distribution structure. Particularly in globalised sectors of activity such as the refrigeration and air-conditioning industry, a well-developed and efficient global distribution network is one of the cornerstones of a company's long-term success.

⁽⁵⁾ OJ C 288, 9.10.1999, p. 2.

- (25) Germany stresses that through its close cooperation with the other companies in the GEA refrigeration division, ILKA MAFA has free access to a well-developed distribution network and the means of expanding this network at low cost. The amount of DEM 1,1 million represents only a small part of the GEA refrigeration division's total investment in new distribution organisations. Besides, ILKA MAFA will only contribute to the establishment of those new channels if they are of particular interest for the marketing of its products.
- (26) As regards the potential additional liabilities incurred by the former Ilka-old in the framework of the present procedure, Germany refers to its opinion delivered in case C-41/99 Lintra Beteiligungsholding GmbH. The opinion relates to Lintra's claim against Ilka-old, amounting to DEM 1 787 586. This claim was being settled from the assets remaining after the liquidation of Dipa.

IV. ASSESSMENT OF THE AID

- (27) According to Article 87(1) of the EC Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market. Pursuant to the established case-law of the European Courts, the criterion of trade being affected is met if the recipient firm carries out an economic activity involving trade between Member States.
- (28) The Commission notes that the notified aid was granted from State resources to a particular company, which benefited from a reduction of the costs it would normally have to bear in carrying out the notified restructuring project. Moreover, the recipient of the aid, ILKA MAFA, develops, produces and assembles chillers, which activities involve trade between Member States. Therefore, the aid in question falls within the scope of Article 87(1) of the EC Treaty.
- (29) The notified project concerns restructuring of the company in accordance with the restructuring plan submitted by the investor. The Commission was originally informed about the restructuring on 27 March 1998. The Commission notes that the restructuring aid for firms in difficulty is assessed pursuant to the guidelines. According to these a rescue and restructuring may within the meaning of Article 87(3)(c) of the Treaty contribute to the development of certain economic activities where it does not adversely affect trading conditions to an extent contrary to the common interest, if the conditions laid down in the guidelines are met.
- (30) The Commission notes that the present guidelines entered into force on 9 October 1999. According to point 7.5., the guidelines apply if some or all of the aid is granted after their entry into force. Since part of the aid to the notified restructuring is, according to the notification, to be granted after this date, the 1999 guidelines apply to the notified restructuring.
- (31) According to point 2.1. of the guidelines, typical symptoms of a firm in difficulty are deteriorating profitability or increasing size of losses, diminishing turnover, declining cash flow and low net asset value. The Commission notes that both Ilka-old and ILKA MAFA have been loss-making since 1994. The losses when the original notification was submitted were DEM 6,687 million and when the present restructuring plan was submitted DEM 1,8 million. Therefore, the company is regarded as a firm in difficulty, and aid for its restructuring is assessed according to the guidelines.
- (32) Under the guidelines, newly created firms are not eligible for rescue and restructuring aid, even if their initial financial position is insecure. This is the case in particular where a new firm emerges from the liquidation or takeover of a previous firm. Footnote 10 of the guidelines states that 'the only exceptions to this rule are cases dealt with by the Bundesanstalt für vereinigungsbedingte Sonderaufgaben in the context of its privatisation remit and other similar cases in the new *Länder*, involving companies emerging from a liquidation or a take-over of assets occurring up to 31 December 1999'. The Commission notes that ILKA MAFA used to be a BvS-owned company and it is situated in the new *Länder*. It was set up in 1997 with a view to the future privatisation and it took over the relevant assets of Ilka-old before the deadline of 31 December 1999. For these reasons ILKA MAFA is eligible for rescue and restructuring aid.
- (33) According to point 3.2.3 of the guidelines, restructuring aid should be granted once only. However, footnote 25 of the guidelines states that the section does not apply to cases of aid granted to enterprises in the former German Democratic Republic which were notified before 31 December 2000. Since the aid to ILKA MAFA was notified before the deadline laid down in the guidelines, the company can be granted restructuring aid for the second time.

- (34) According to the guidelines, the aid should be in proportion to the restructuring costs and benefits. Section 3.2.2(d) stipulates that the aid needs to be limited to the strict minimum necessary to enable restructuring to be undertaken and must be related to the benefits anticipated from the Community's point of view. Aid beneficiaries should make a significant contribution to the restructuring plan from their own resources. No aid should go to finance new investment that is not essential for restoring the firm's viability.
- (35) In its decision opening the procedure the Commission doubted whether the investor contribution of 23 % could be considered significant in the meaning of the Guidelines. In addition, it doubted whether the aid linked with the foreseen DEM 1,1 million investment in distribution network was essential for restoring the company's viability.
- (36) Germany communicated changes to the original restructuring plan by letter dated 20 July 2001. The changes relate to the three following points: the extension of the restructuring period, the increased investor contribution and the deletion of the sales network investments from the restructuring plan.
- (37) The period for implementing the GEA restructuring plan now extends from 1999 to 2003. Germany explained that in 1999 the financial result was better than foreseen mainly due to booking proceeds in the financial accounts which would be subject to costs the following year. The year 2000 consists only of nine months, since the financial year needed to be synchronised with that of the other companies of the GEA-group. The target result and turnover were not achieved, since there were virtually no orders at the beginning of the year. In 2001 the turnover target was nearly achieved, but the operating result was worse than predicted. The reason for this was a one-year delay in development of semi-hermetic compressors. The proposed savings in material costs could therefore not be achieved. The financial situation is not expected to improve until 2002/2003 and the operating result until 2004, instead of 2002.
- (38) When asked by the Commission to explain the reasons for the delays and why these were not foreseen in the original restructuring plan, Germany explained in its letter of 14 November 2001 that the delays occurred for technical reasons. They were not foreseen in the original plan, since at the time of taking over ILKA MAFA the investor, GEA was not fully aware of all the technical details of the latter's product range. After the takeover a working group consisting of employees of ILKA MAFA and the GEA group was set up to analyse certain products manufactured by both of them. It was concluded that the compressors used by ILKA MAFA were technically outdated and needed to be replaced in order to have a competitive product. In particular, it was also concluded that the material costs of the old product were much too high.
- (39) According to Germany, in view of this unforeseen need for adaptation and reconstruction of the compressors, it was decided to replace the two production lines by the end of 2001. Due, however, to technical problems, replacement was delayed by almost a year and will only be completed by end September 2002. Without these delays, the planned cost savings would have been achieved earlier, since the new products have much lower material costs. This means in practice that the company had to bear the higher production costs one year longer than planned, which is reflected in the financial results of the company.
- (40) As regards the increased investor contribution, Germany explains that the investor is making available to ILKA MAFA a DEM 3,2 million credit line⁽⁶⁾ for covering the potential liability and other guarantee claims of the clients. Since the investments in PC systems and networks are DEM 0,5 million higher than forecast, the investor is also increasing its own contribution to the investments by that amount. The increased investor contribution therefore totals DEM 3,7 million.
- (41) The Commission notes that the foreseen DM 1,1 million investment in sales networks has been deleted from the investment plan. Instead the amount will be used as follows:
- test stands for chillers were DEM 0,7 million more expensive than forecast,
 - office renovation and construction was DEM 150 000 more expensive,
 - production equipment was DEM 150 000 more expensive,
 - storage and logistics costs: DEM 100 000.
- (42) Also in the revised restructuring plan, the financing for the period before the sale to the GEA group, from 1 December 1997 to 30 September 1999, remains unchanged. The total cost for the period, DEM 12,8 million, is borne by the State (BvS and Saxony-Anhalt). The restructuring aid for the GEA group from 1 October 1999 onwards remains unchanged at DEM 8,948 million. The total amount of public financing and, hence, aid is therefore DEM 28,198 million. This is the same as in the original plan. No increase in aid is associated therefore with the revised restructuring plan.

⁽⁶⁾ 'Avalrahmen'.

- (43) As explained in recital 40, according to the new plan the investor's contribution has been increased by DEM 3,7 million. This is the result of a higher direct investment contribution of DEM 500 000 and a DEM 3,2 million credit line for covering potential guarantee claims from clients. The financing of the revised plan breaks down as follows:

(DEM thousand)		
Financing	BvS/Land	Investor/ILKA MAFA/(workforce)
Financing of DIPA until liquidation – 6 450	6 450	
1.12.1997 to 30.9.1999 Operating losses – 8 232	12 800 grant	
Investments – 333		
Integration/restructuring costs, Carrier – 1 842		
Increased liquidity – 2 393		
Total –19 250	19 250	
1.10.1999 to 31.12.2004 Social plan and related costs – 2 029	1 748 grant	281 ILKA MAFA
Operating losses – 3 881	3 500 grant	381 — Shareholder's loan
Investments and other restructuring costs – 10 300	3 700 grant	Increase of equity 2 000 Shareholder's loan 4 600
Credit line for guarantee claims – 3 200		3 200 GEA
Working capital – 1 150		Shareholder's loan 1 150
Purchase price 500		GEA 500
Workforce's contribution to labour costs 2 760		Workforce 2 760
TOTAL: 43 070	28 198	12 112
	65 %	28 %

- (44) As regards the workforce's restructuring contribution of DEM 2,760 million, the Commission notes that this amount has been included in the restructuring costs, because it is an actual contribution to those costs. This should not be seen as a contribution from the investor, however, since it will be funded neither from the investor's financial resources nor from ILKA MAFA's (7).
- (45) As regards its doubts expressed in the opening of the procedure concerning the amount of the investor's contribution to the restructuring, the Commission notes that this was increased by a total of DM 3,7 million in the revised restructuring plan and now amounts to 28 %. In accordance with the Commission's previous practice in the eastern German restructuring aid cases (8), this can be considered as a significant contribution within the meaning of the guidelines.
- (46) As regards the doubts concerning the investment in the sales network, the Commission notes that this investment has been replaced by direct investments in the production facilities of ILKA MAFA. For this reason the doubts about whether ILKA MAFA was the real and/or the only beneficiary of the aid relating to those investments have been allayed.
- (47) The Commission notes, however, that the restructuring period has been extended by two years. Germany explains that this is due to the unforeseen need to replace some additional production facilities and the resultant technical difficulties.
- (48) An essential element of the restructuring plan communicated by Germany in 1999 was the replacement and modernisation of the production facilities and development of new products. In its decision opening the procedure, the Commission stated that it had no doubts as regards the ability of the restructuring plan to restore the long term viability of the company.
- (49) The decision to replace an additional production facility after an in-depth examination of ILKA MAFA's production range is in line with the original restructuring plan and does not involve changes of substance or the introduction of new strategies or measures not already provided for in the original plan. Had it been possible to carry out the additional replacement of a production facility as planned without the delay, the timetable for achieving an operating profit would have been kept, according to the information provided. The delays caused by the technical difficulties affect the operating result accordingly and postpone the date for achieving profitability. The restructuring plan, however, is carried out as planned. The Commission therefore considers that, despite the extension of the restructuring period on account of the technical difficulties, the ability of the plan to restore viability to the company is unaffected.
- (50) According to the guidelines, the restructuring plan must restore the long-term viability of the company within a reasonable timeframe. The delay defers for two years the moment when the company will achieve profitability. As the original restructuring period for the present investor was only two years (1999 to 2001), the deadline for restoring profitability is still, despite the two-year delay, within a reasonable timeframe, as stipulated in the guidelines.
- (51) In accordance with the 'one time, last time' condition laid down in point 3.2.3 of the guidelines, restructuring aid can be granted only once. Further restructuring aid can only be allowed in exceptional and unforeseeable circumstances for which the company is not responsible. The extension of the original restructuring period, however, does not lead in the present case to any increase of aid. On the contrary, the investor contribution has been increased, and to a degree that is significant within the meaning of the guidelines.
- (52) So that the Commission can monitor the implementation of the revised restructuring plan, Germany is requested to provide an annual report on the progress of the restructuring from 2001 to 2004. The report is to be submitted by the end of March of the following year and should contain all relevant information to enable the Commission to check the implementation of the authorised restructuring programme, the payment of aid to the company and its financial position. Further changes to the restructuring plan will be examined in accordance with point 3.2.4 of the guidelines.
- (53) In its decision opening the procedure the Commission reserved its position on the possible additional claims against Ilka-old resulting from Case C-41/99 Lintra Beteiligungsholding GmbH.

(7) See Commission Decision 2002/186/EC, Case C-66/00-ZEMAG, (OJ L 62, 5.3.2002, p. 44).

(8) See *inter alia* Commission Decision 1999/339/EC, Case C-24/97 Chemienlagenbau Stassfurt AG (OJ L 130, 26.5.1999, p. 20) (25 %) and the Decisions in Cases NN 49/98 Hydraulik Seehausen (26 %) and NN 100/97 KAB Kraftwerks (25 %).

- (54) The Commission took its final decision 2001/673/EC in case C-41/99 on 28 March 2001⁽⁹⁾. By letter dated 17 September 2001, Germany informed the Commission that the aid of DEM 1 787 586 granted to the former ILKA MAFA Kältetechnik GmbH, which had been declared unlawful by the decision, had been recovered with interest, giving a total of DEM 2 235 114. Evidence of payment dated 6 September 2001 has been submitted to the Commission. The unlawful aid was paid back by Dipa Industrie und Vermögensverwaltung GmbH⁽¹⁰⁾ in liquidation.

V. CONCLUSION

- (55) Germany has unlawfully granted aid amounting to EUR 14,417 million to ILKA MAFA Kältemaschinenbau GmbH in breach of Article 88(3) of the Treaty. However, since this aid complies with the 1999 Community guidelines on State aid for rescuing and restructuring firms in difficulty, it is compatible with Article 87(3)(c) of the Treaty,

HAS ADOPTED THIS DECISION:

Article 1

The State aid which Germany has implemented for ILKA MAFA Kältemaschinenbau GmbH, amounting to EUR 14 417 000 (DEM 28 198 000) is compatible with the common market within the meaning of Article 87(3)(c) of the EC Treaty.

Article 2

Germany shall provide an annual report to the Commission on the progress of the restructuring for the period 2001 to 2004. The report shall be provided by the end of March of the following year. It shall contain all the relevant information that the Commission needs to monitor the implementation of the authorised restructuring plan, the receipt of the aid by the company and its financial position.

Article 3

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 3 April 2002.

For the Commission

Mario MONTI

Member of the Commission

⁽⁹⁾ See footnote 4.

⁽¹⁰⁾ Formerly ILKA MAFA Kältemaschinenbau GmbH.

COMMISSION DECISION**of 9 April 2002****on State aid C 72/2001 (ex N 361/2001) which Germany plans to grant to Hamburger AG***(notified under document number C(2002) 1340)***(Only the German text is authentic)****(Text with EEA relevance)**

(2002/824/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

Having called on interested parties to submit their comments pursuant to the provisions cited above ⁽¹⁾,

Whereas:

I. PROCEDURE

(1) By letter dated 31 May 2001, registered as received on 12 June 2001, Germany notified its intention to grant investment aid under the multisectoral framework on regional aid for large investment projects ⁽²⁾ (hereinafter called the multisectoral framework) to Hamburger AG. The proposed aid was registered under the number N 361/01.

(2) The Commission acknowledged receipt, informed Germany that the notification was considered incomplete and asked additional questions by letter dated 22 June 2001 (D/52559). Germany replied by letter dated 17 July 2001, registered as received on 20 July 2001, and by letter dated 30 July 2001, registered as received on 31 July 2001. The notification was still considered incomplete and further questions were sent by letter dated 2 August 2001. Germany replied by letter dated 15 August 2001, registered as received on 17 August 2001. By letter dated 21 August 2001, the Commission informed Germany that the notification was now considered complete and that a final position would be adopted within two months from the date of registration of the letter containing the complete information.

(3) By letter dated 4 October 2001, the Commission informed Germany that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid.

(4) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* ⁽³⁾. The Commission invited interested parties to submit their comments on the aid.

(5) By letter dated 21 December 2001, registered as received on the same day, Germany responded to the initiation of the procedure.

(6) The Commission received comments from seven interested parties. It forwarded them to Germany, which was given the opportunity to react. Germany's observations were sent by letter dated 31 January 2001, registered as received on the same day.

II. DETAILED DESCRIPTION OF THE AID**2.1. The recipient**

(7) The recipient of the aid will be Hamburger AG, Pitten, Austria. Hamburger AG is part of the Hamburger group, which is owned by Prinzhorn Holding. Hamburger AG is active in the industrial production of paper.

2.2. The project

(8) The new investment project will be located in Schwarze Pumpe, Brandenburg, an assisted area under Article 87(3)(a) of the EC Treaty in which the maximum allowable aid intensity for large undertakings is 35 % gross.

⁽¹⁾ OJ C 342, 5.12.2001, p. 9.

⁽²⁾ OJ C 107, 7.4.1998, p. 7.

⁽³⁾ See footnote 1.

(9) The project comprises the construction of a new plant for the production of white and brown corrugated base paper. The construction of the plant reportedly [...] (*). The start of production is planned for [...] at the earliest, and [...] at the latest.

(10) The new plant will mainly produce testliner [...]. Hamburger AG already produces brown grade in its plants in Austria and Hungary and white grades of very high quality in its plant in Rieger, Bavaria.

(11) The purpose of the construction of the new plant is firstly to fill the gap between brown grades and high grades, and secondly to be close to the east European markets. These markets, in particular Poland, the Czech Republic and the Baltic countries, are thought to have good growth potential.

(12) The planned production capacity of the new plant is [...] tonnes of testliner a year, beginning with [...] tonnes in the first year, [...] tonnes in the second year and achieving full capacity in the third year. For the first five years it is planned to produce [...] of brown grades and [...] of white grades. However, switching from the production of one to the other can be done very quickly. Both types will be recycled fibre based.

(13) The new plant will also be equipped with a corrugator of [...] tonnes a year capacity. [...] of the plant's total production of [...] tonnes of corrugated base paper together with [...] tonnes obtained from outside sources will undergo processing into corrugated paperboard there. In addition, [...] tonnes of the plant's production of corrugated base paper will be delivered to another converting plant owned by the Hamburger group in Poland, so that [...] tonnes of the plant's total production will be used within the group.

(14) Most of the production of corrugated base paper ([...] tonnes) will go to independent corrugators and converters. The target market for the brown testliner consists of Germany, Poland, the Czech Republic and the Baltic and Benelux countries. The target market for the white testliner will extend across the whole of Europe. The [...] tonnes of corrugated paperboard will be sold within a radius of 200 km around the production plant.

(15) The costs of the project can be broken down as follows:

(EUR '000)

Item	Total	Eligible
Land	[...]	[...]
Buildings	[...]	[...]
Plant, machinery	[...]	[...]
Tools	[...]	[...]
Intangibles	[...]	[...]
Total	153 388	153 388

(16) The construction of the new plant will increase the corrugated base paper production capacity of the Hamburger group from [...] tonnes in 2000 to [...] tonnes in 2005. The Hamburger group had a share of [...] in the market for corrugated base paper in the European Economic Area in 2000.

(17) According to the notification, the project will lead to the creation of 277 permanent jobs (194 in the corrugated paper producing factory, 57 in the corrugated paperboard producing factory and 26 for transport and other activities). Germany has notified the creation of 356 indirect jobs in an assisted area, mainly in the fields of raw materials supply and transport services.

2.3. Aid measures

(18) The proposed aid consists of investment aid in the form of a non-reimbursable grant amounting to EUR 31 582 500 awarded under the 29th framework plan of the joint Federal Government/Länder programme for improving regional economic structures, approved by the Commission⁽⁴⁾. Furthermore, an investment premium amounting to EUR 22 103 148 is to be granted on the basis of the 1999 Investment Premium Law, approved by the Commission⁽⁵⁾.

⁽⁴⁾ 29. Rahmenplan der Gemeinschaftsaufgabe 'Verbesserung der regionalen Wirtschaftsstruktur'.

⁽⁵⁾ Investitionszulagengesetz 1999, C 72/98 (ex N 702/97), SG (98) D/12438 of 30.12.1998 and SG (2001) D/286551 of 2.3.2001.

(*) Business secret.

2.4. Reasons for initiating the formal investigation procedure

- (19) The Commission considered that the relevant product market was the market for corrugated base paper. On the evidence available the Commission moreover at that stage considered the relevant market to be in relative decline as the average annual growth of apparent consumption in this market was significantly below the average annual growth of manufacturing industry as a whole. The competition factor was thus provisionally set at 0,75. Moreover the Commission provisionally set the capital-labour factor at 0,8.
- (20) The Commission had doubts in particular regarding the creation of 356 indirect jobs as announced by Germany. It doubted whether the total number could be taken into account as they might not all be created in adjacent assisted regions. In all, 139 of the indirect jobs claimed by Germany were expected to be located in Poland and the Czech Republic. The Commission questioned whether these jobs could be taken into account as the Czech Republic and Poland are not Member States of the European Union. Moreover, the Czech Republic has no border with the *Land of Brandenburg* and is thus not an adjacent region.
- (21) Germany had claimed that 40 indirect jobs would be created by a new company making recycled paper that Hamburger AG would establish at Schwarze Pumpe. The Commission proceeded on the basis that this project should be considered part of the main project and that the jobs should therefore be included in the calculation of the direct jobs and not of the indirect jobs. It therefore provisionally considered that the project at issue would lead to the creation of 177 indirect jobs. The regional impact factor was therefore provisionally set at 1,25. However doubts also existed as to whether all the jobs created in the transport field could be taken into account, as they might not all be created in adjacent assisted regions. This might lead to the regional impact factor being lowered to 1,0.
- (22) In its decision to initiate the procedure the Commission calculated the formula for the project as follows: either $35 \times 0,75 \times 0,8 \times 1,25 = 26,25 \%$ or $35 \times 0,75 \times 0,8 \times 1,0 = 21 \%$ depending on the regional impact factor. The Commission thus had doubts whether the amount of EUR 53,7 million (DEM 105 million), equivalent to an aid intensity of 35 %, which Germany intended to grant to Hamburger AG for its investment in Schwarze Pumpe, Brandenburg, was in conformity with the maximum allowable aid intensity calculated on the basis of the multisectoral framework.

III. COMMENTS FROM INTERESTED PARTIES

- (23) After the procedure was initiated, the Commission received comments from seven interested parties. The comments were made by competitors as well as by an association of the Spanish paper industry, an association of the American forest and paper industry and the French Government. The comments were forwarded to Germany by letters dated 20 December 2001 and 11 and 16 January 2002 to give it the opportunity to react. An answer from Germany was received on 1 February 2002.
- (24) All interested parties express their concern about the capacity situation in the relevant market. The sector for corrugated base paper is already faced with structural overcapacities. According to one competitor, overcapacities are particularly high in Germany. In the years 2000 to 2002, capacities are expected to increase further owing to new plants and extensions of already existing plants, and as market growth is slowing down this situation will worsen.
- (25) Even if the percentage growth in eastern Europe is relatively high, the increase in volume will be low as the overall level of paper consumption is modest. According to one competitor, the future growth rates of the market presented by Germany are overestimated. The American Forest and Paper Association points out that the projected capacity expansions in the next two years are significantly out of proportion to demand projections.
- (26) One competitor has misgivings because the market is characterised by medium-sized companies and family businesses. The new project of Hamburger AG will lead to significant excess capacity and will thus have a detrimental effect on the market and lead to serious distortions.
- (27) Two competitors maintain that the sector is highly capital intensive and that value added is low. The planned aid for the project will help Hamburger AG to significantly reduce its production costs and consequently to lower its prices (by around 10 % according to one competitor).
- (28) As regards the supply of recycled paper, one competitor points out that already this year there has been a shortage of recycled paper over a longish period. In particular, east European countries such as Poland and the Czech Republic from which Hamburger wishes to obtain most of its raw materials are already net importers of recycled paper. The competitor therefore expects not enough raw material to be available for the new plant.

- (29) Two competitors consider that the creation of direct jobs is exaggerated. One competitor points to the figure of 17 plus 14 jobs for sales and 22 jobs for finance and management control, which in its opinion is far too high. Another competitor indicates that in particular the number of jobs related to the corrugator is too high.
- (30) Two competitors addressed the issue of indirect job creation. In their opinion the number is significantly overestimated. No new jobs will be created in the field of recycled paper as this already accounts for a large proportion of total production. Moreover, a large part of the transport will be done by rail and not by road, thus creating fewer jobs than claimed by the German Government. In any event, the number of jobs created in the field of transport seems too high. One of the competitors also points to the high number of jobs allegedly created in the field of maintenance and energy, arguing that most of the jobs will probably not be created in an adjacent assisted area.
- (33) Regarding the evolution of the market and the assessment of the competition factor, Germany argues that the multisectoral framework provides for a period of five years for the calculation of average annual growth. The relevant period for the project at issue is therefore 1996 to 2000. Over this period, average annual growth amounted to 10,04 %. Germany stresses that the investment is taking place in the sub-sector of waste-based papers, i.e. corrugated base paper made of recycled fibre, in which, in recent years, the average annual growth was higher than for corrugated base paper as a whole. Moreover, Germany points out that the below-average growth rate is due, not to the evolution of the market, but to political intervention. Because of political intervention, prices for recycled paper had dropped significantly from 1995 to 1996, which resulted in lower prices for corrugated base paper. According to Germany the market took three years to recover from this intervention.
- (34) Germany confirms that all indirect jobs created by road transport will be located in the assisted region. Concerning the indirect jobs related to rail transport, Germany admits that not all of the indicated 33 jobs may be located in an assisted region, but at least 10 jobs will.

IV. COMMENTS FROM GERMANY

- (31) In its comments on the initiation of the procedure, Germany explains that the establishment of the new company making recycled paper is an independent project carried out by H&H Recycling GmbH. H&H Recycling GmbH used to be 75 % owned by Hamburger AG. For strategic reasons, Hamburger AG decided to end its involvement in activities related to the recycling of paper and on 4 October 2001 sold its share in H&H Recycling GmbH to RWE Umwelt Services Deutschland GmbH. In the notification, the collection of waste paper by this new company had been estimated at around [...] tonnes a year, leading to the creation of 40 new jobs. However, not all this amount will be purchased by Hamburger AG as the various types of recycled paper produced by the plant are not all needed by it. The new company will also supply other companies and was therefore never regarded as part of Hamburger AG's project.
- (32) As regards the jobs created by H&H Recycling GmbH, Germany explains that the expected supply of [...] tonnes of recycled paper to Hamburger AG will lead to the creation of 10 jobs. This is confirmed by a letter of intent provided by the company.
- (35) As regards the question whether the alleged indirect job creation in the Czech Republic can be taken into account for the assessment of the regional impact of the project, Germany argues that the five new German *Länder* should be regarded as a single assisted area pursuant to Article 87(3)(a) of the EC Treaty so that a common border exists with the Czech Republic. As to the indirect jobs created in Poland, Germany points out that a regional map at the NUTS II level has been drawn for this country and encourages the Commission to reconsider its position as to whether the indirect jobs created there can be taken into account for the regional impact factor.
- (36) According to Germany at least 164 indirect jobs will be created in the assisted region and adjacent assisted regions, not counting the jobs created in Poland and the Czech Republic.
- (37) Germany also submitted comments on the third-party observations. As regards the calculation of the competition factor, it points out that the future development of apparent consumption only plays a minor role in this context. The relevant period for determining the evolution of the market comprises the last five years. Germany stresses that in 2000 apparent consumption grew by 6,1 % in volume terms.

- (38) As regards the capacity situation in the market, Germany explains that large projects like the investment at issue normally take one to three years until they reach the production stage. According to calculations submitted by Germany based on the assumption of an average annual growth rate of 2,8 % in the years to come, there will be no overcapacity in the market until 2003 even after production in the new plant has started. The same holds true for the year 2004.
- (39) Germany recalls that the new plant will produce white and brown testliner depending on the market conditions. The white testliner produced in the new plant will be of [...] quality, which is a quickly growing market segment.
- (40) Germany draws attention to the fact that two competitors complaining about overcapacities are themselves planning to increase their production capacities significantly between now and 2004.
- (41) As regards the situation on the market for recycled paper, Germany points out that it is a net exporter of recycled paper (2,6 million tonnes). This surplus will probably be reduced to 1,7 million tonnes by 2010 because demand will outstrip supply, the proportion of total sales accounted for by recycled paper being already high (more than 60 %). However, Germany will remain the biggest net exporter of recycled paper in the EU. In other European countries supply will grow faster than demand so that there is no detrimental effect on the market for recycled paper and prices will remain stable. These findings are confirmed by Jaakko Pöyry.
- (42) As regards the direct job creation, Germany explains that the higher number of jobs in relation to total capacity of the project at issue compared with a project of a competitor may be due to the fact that the installations of Hamburger AG will have a smaller width. Thus capacity will be lower although the same number of employees are needed to operate the installations. Another reason may be that a plant has close links with the parent company so that fewer staff are needed in the field of sales, management control, etc.
- (43) Concerning the regional impact of the project, Germany points out that it has provided the Commission with calculations and confirmations by future partner companies. As regards the jobs related to transport, Germany indicates that not only the final product but also the raw materials have to be transported.

V. ASSESSMENT OF THE AID

3.1. Notification requirement

- (44) Total project costs amount to EUR 153 million, the cumulative aid intensity is 35 % of the eligible investment costs and the aid per job created is EUR 193 881. Therefore, according to point 2.1 of the multisectoral framework, the aid is notifiable individually and has to be assessed accordingly.
- (45) Prior to any assessment of proposed aid, the multisectoral framework requires that the relevant market first be defined.

3.2. The relevant market

- (46) The relevant product market for determining the market share comprises the product envisaged by the investment project and, where appropriate, its substitutes.
- (47) In the present case, the investment concerns the production of brown and white testliner on the basis of recycled paper. Testliner belongs to the product group of corrugated base paper. Corrugated base paper can be classified into the following three categories: waste-based papers, semi-chemicals and kraftliner. The testliner produced in the plant in question is 100 % recycled fibre based and thus falls into the category of waste-based papers. Semi-chemicals are special products, while kraftliner is made from cellulose (e.g. wood).
- (48) In 1999 the share of waste-based papers in total consumption of corrugated base paper amounted to 74 %. Semi-chemicals had a share of 6 % and kraftliner a share of 20 %.
- (49) Corrugated base paper comes under NACE code 21.12, which covers the whole range of manufacture of paper and paperboard. Corrugated base paper is an intermediate product used in the manufacture of corrugated paperboard and paper. White and brown corrugated paperboard is used as packaging material and as raw material for packages in several fields.
- (50) Some of the testliner produced in the plant in question is processed on site into corrugated paperboard, but most is sold on the market to independent converters and corrugators. The main activity of the new plant is therefore the production of testliner.
- (51) In the light of the above, the Commission considers the market for corrugated base paper to be the relevant product market. No separate NACE classification exists for this market.

- (52) According to the multisectoral framework, the relevant geographic market comprises usually the EEA or, alternatively, any significant part of it if the conditions of competition in that area can be sufficiently distinguished from other areas in the EEA.
- (53) Germany considers that the relevant geographic market comprises at least the EEA. In its view, owing to the

location of the new plant on Germany's eastern border, eastern Europe should be considered part of the relevant market as well. Inasmuch as reliable data on the east European market are difficult to obtain and the east European market is tiny compared with the EEA market, the Commission bases its analysis on the EEA market and considers the EEA to be the relevant geographic market.

3.3. Evolution of the market

- (54) Germany submitted the following data on apparent consumption of corrugated base paper in the EEA based on statistics provided by the European Association of Makers of Corrugated Base Papers ⁽⁶⁾:

	1994	1995	1996	1997	1998	1999	2000	Average annual change 1994 to 1999	Average annual change 1995 to 2000
Volume (million tonnes)	16 873	16 928	17 121	18 307	18 915	19 022	20 193	2,43	1,36 %
Value (EUR million)	5 886	7 740	5 465	5 679	6 178	6 295	8 104	1,35	0,70 %

- (55) According to Germany, consumption of corrugated base paper is expected to grow by an annual average of 2,8 % in volume terms in the EEA over the next ten years ⁽⁷⁾.
- (56) Data on apparent consumption of corrugated base paper in eastern Europe are difficult to obtain. The market is estimated at around 1,5 million tonnes in 1999 (excluding Russia and the CIS). The average annual growth rate of consumption in volume terms is expected to be around 5,2 % over the next ten years ⁽⁸⁾.

intensity of 35 % gross corresponds to the admissible aid ceiling for a large undertaking in the region where the project is located.

- (59) A range of adjustment factors then have to be applied to that percentage figure in accordance with three specific assessment factors in order to calculate a maximum allowable aid intensity for the project in question, namely the competition factor (T), the capital-labour factor (I) and the regional impact factor (M).

3.4. Multisectoral framework assessment

- (57) Under the multisectoral framework, the Commission, in order to determine the maximum allowable aid intensity for the proposal to award aid, has to identify the maximum aid intensity (regional aid ceiling) which a company could obtain in the assisted area concerned within the context of the authorised regional aid system valid at the moment of notification.
- (58) Owing to the fact that Hamburger AG is to be considered a large undertaking, the maximum allowable aid intensity (R) in the present case is 35 % gross ⁽⁹⁾. The Commission accordingly notes that the proposed aid

Competition factor (T)

- (60) The Commission notes that the market share of Hamburger AG does not exceed 40 % in the relevant market and will not exceed this percentage as a result of the new investment.
- (61) The authorisation of aid to companies operating in sectors that are in structural overcapacity poses particular risks of a distortion of competition. Any capacity expansion not offset by capacity reductions elsewhere will exacerbate the problem of structural overcapacity. The sector or subsector will be established at the lowest available segmentation of the NACE classification.
- (62) The NACE code corresponding to the production of corrugated base paper is 21.12, which comprises the whole range of manufacture of paper and paperboard. In the light of the above considerations, the Commission finds that the relevant sector is the corrugated base paper subsector.

⁽⁶⁾ Groupement Ondulé Statistique 1991-2000.

⁽⁷⁾ Study by Jaakko Pöyry Consulting.

⁽⁸⁾ Study by Jaakko Pöyry Consulting.

⁽⁹⁾ OJ C 340, 27.11.1999, p. 8.

- (63) No separate NACE classification exists for the sub-sector of corrugated base paper. Corrugated base paper accounts for only a small part of the relevant NACE code. The Commission therefore considers that capacity data concerning NACE code 21.12 are not representative for the purpose of appraising the capacity situation for corrugated base paper. Pursuant to point 3.4 of the multisectoral framework, the Commission bases its assessment of the competition factor on the data for apparent consumption and considers whether the investment is taking place in a declining market.
- (64) For this purpose the Commission compares apparent consumption of the products in question with the growth rate of EEA manufacturing industry as a whole. A market is deemed to be declining if, over the last five years, the average annual growth rate of apparent consumption of the product is more than 10 % below the annual average of EEA manufacturing industry as a whole, unless there is a strong upward trend in the relative growth rate of demand for the product. The market is deemed to be absolutely declining if the average annual growth rate of apparent consumption over the last five years is negative.
- (65) As pointed out above, Germany argues that the Commission should consider a period of five years, i.e. 1996 to 2000, for the assessment of the development of apparent consumption and not a six-year period. The multisectoral framework refers to the average annual growth rate of the last five years. Therefore it is the practice of the Commission to look at apparent consumption over a period of six years in order to calculate five growth rates ⁽¹⁰⁾.
- (66) Germany provided figures on apparent consumption of the products in question for the EEA from 1994 to 2000. According to these data, the average annual growth rate of apparent consumption of corrugated base paper was 1,35 % for the period 1994 to 1999 and 0,70 % for the period 1995 to 2000. The average annual growth rate of EEA manufacturing industry as a whole came to 5,81 % and 6,16 % for the years 1994 to 1999 and 1995 to 2000 respectively. Consequently, in accordance with point 7.8 of the multisectoral framework, the market for corrugated base paper is considered to be in relative decline as the average annual growth rate is significantly (more than 10 %) below that of manufacturing industry as a whole.
- (67) As regards Germany's argument that the average annual growth of corrugated base paper made from recycled fibres is above the average annual growth of corrugated base paper as a whole, it should be noted that the Commission defined the relevant market as being that for corrugated base paper, and pursuant to the multisectoral framework it is the evolution of this market that has to be taken into account for the purpose of assessing the competition factor.

- (68) In the light of the above considerations, the Commission applies a competition factor of 0,75.

Capital-labour factor (I)

- (69) The capital-labour factor aims at adjusting the maximum aid intensity with a view to favouring those projects which effectively and better contribute to the reduction of unemployment through the creation of a relatively large number of new jobs.
- (70) According to Germany the project will lead to the creation of 277 permanent jobs, broken down as follows:

Field	Direct jobs
Factory for the production of corrugated base paper	194
— Factory management	4
— Production	97
— Mechanics/energy/construction	30
— Buying department	3
— Sales department	17
— Finance/management control	22
— Electrical engineering, measuring and regulating technology	17
— Energy	4
Corrugator	57
— Factory management	9
— Production	33
— Buying department	1
— Sales department	14
Transport etc.	26
Total	277

⁽¹⁰⁾ See Commission decision of 8.5.2001, Wacker Chemie; Commission decision of 3.7.2001, Kronoply; Commission decision of 2.10.2001.

- (71) In its decision to initiate the procedure, the Commission took the view that the project concerning the establishment of a company making recycled paper should be regarded as a satellite project and that it should be included in the calculation of the capital-labour factor. On the basis of the information submitted by Germany in response to the decision to initiate the procedure, the Commission considers that the establishment of the company making recycled paper can be regarded as an independent project.
- (72) Germany submitted data on capacities and the number of employees of comparable projects to justify the number of direct jobs created by the project at issue. The Commission considers that this number is reasonable. The adjustment factor for an investment of EUR 153,4 million which results in the creation of 277 jobs is one corresponding to the ratio of EUR 553 790 per job. In accordance with point 3.10.2 of the multisectoral framework, the capital-labour factor (I) for the adjustment of the maximum aid intensity for the project at issue is calculated at 0,8.

Regional impact factor (M)

- (73) The regional impact factor takes into account the beneficial effects of a new aided investment on the economies of the assisted regions. The Commission considers that job creation can be used as an indicator of a project's contribution to the development of a region. A capital-intensive investment may create a significant number of indirect jobs in the assisted region concerned and any adjacent assisted region. Job creation in this context refers to jobs created directly by the project together with jobs created by first-tier suppliers and customers in response to the aided investment.
- (74) According to the notification, the project will lead to the creation of 356 indirect jobs. They are expected to be created in the following fields:

Field	Indirect jobs
Supply of raw materials	161
Transport	107
Maintenance	26
Energy	15
Training and temporary staff	9
Services etc.	8
Customer	30
Total	356

- (75) According to Germany the most important source of indirect job creation is the supply of raw materials, i.e. the supply of recycled paper and starch. The total demand for recycled paper by the new plant is expected to amount to [...] tonnes a year.
- (76) Germany claimed 109 indirect jobs in the supply of recycled paper created by companies located in Poland and the Czech Republic. Hamburger AG expects to obtain [...] tonnes of recycled paper a year from sources located in these two countries within a radius of 200 km around the new plant. According to Germany and based on calculations provided by a recycling company, an additional demand for [...] tonnes of recycled paper will lead to the creation of 109 jobs in Poland and the Czech Republic. In this context Germany provided a list of five recycling companies located in the Czech Republic and of seven recycling companies located in Poland.
- (77) Around one third of the alleged 109 jobs, i.e. around 36 jobs, are expected to be created by suppliers located in the Czech Republic, and around two thirds, i.e. 73 jobs, by suppliers located in Poland.
- (78) In addition, the project at issue is expected to lead to the creation of 30 new jobs by a customer of Hamburger AG located in Poland producing corrugated paper products. Owing to the increased security of supply of raw materials and reduced freight charges resulting from the construction of the new plant, the company is expected to expand its production. This is confirmed by a letter of intent provided by the company.
- (79) As regards the approximately 36 jobs allegedly created in the Czech Republic, it has to be noted that the Czech Republic has no common border with the *Land of Brandenburg* and is therefore not an adjacent assisted region within the meaning of the provisions. Indirect jobs created with first-tier suppliers in this country are therefore not taken into account for the calculation of the regional impact factor.
- (80) In addition, Germany points to the creation of indirect jobs by suppliers of recycled paper and by a customer of the new plant located in Poland. It has to be noted that Poland is not a Member State of the European Union. In Article 63 of the Europe Agreement, which entered into force in February 1994, it is stated that, during the first five years after the entry into force of the Agreement, any public aid granted by Poland must be assessed taking into account the fact that Poland must be regarded as an area identical to those areas of the Community described in Article 87(3)(a) of the EC Treaty. This provision has

just been prolonged ⁽¹¹⁾. When it initiated the procedure, the Commission doubted whether the jobs created by first-tier suppliers and customers located in Poland could be taken into account for the calculation of the regional impact factor.

(81) In its notification Germany stated that the establishment of a new company making recycled paper at Schwarze Pumpe which will supply [...] tonnes of recycled paper to the new plant would lead to the creation of 40 indirect jobs. According to the latest information submitted and as stated above, this company will now supply at least [...] tonnes of recycled paper, which will lead to the creation of 10 indirect jobs. Therefore 10 indirect jobs related to this project are taken into account.

(82) Twelve jobs are supposed to be created by a company supplying starch.

(83) The second important source of indirect job creation is the field of transport services (107 indirect jobs). According to Germany an amount of [...] tonnes (raw materials, final products, waste disposal) has to be transported every year. The transport of [...] tonnes will be done by the plant's own transport services. The transport of [...] tonnes is expected to be carried out by a private haulage company. Germany provided a letter of intent and estimates by this company pointing out that the transport of [...] tonnes will lead to the creation of 70 new jobs (51 permanent full-time drivers and 19 office workers and mechanics). The remaining [...] tonnes are expected to be transported by railway. According to estimates by Germany, which have been confirmed by a private railway company, this will lead to the creation of 33 jobs. Moreover, Germany presented estimates by a private company that it will create four jobs in shunting activities related to the operation of the new plant.

(84) The Commission considers that the presented estimates of indirect jobs created in the field of transport services are reasonable. However, when it initiated the procedure it doubted whether they would all be created in adjacent assisted regions. Germany admits that in the field of rail transport not all jobs may be created in adjacent assisted regions, but at least 10 will. Therefore in the field of transport 84 indirect jobs are taken into account for the calculation of the regional impact factor.

(85) A further 26 jobs originate from the permanent maintenance of the facilities, 15 from the supply of energy, nine from training and temporary staff in case of a production standstill and eight from services related to the activities of the new plant (cleaning, catering, offices supplies, etc.).

(86) If the jobs created by suppliers and customers in Poland (73 for the supply of recycled paper and 30 by a customer) are not taken into account, indirect job creation amounts to 164 jobs. If these jobs are taken into account, a total of 267 indirect jobs will be created. In accordance with point 3.10.3 of the multisectoral framework and compared with the 277 direct jobs created by the project, these figures correspond to a medium degree of indirect job creation (between 50 % and 100 %) for each job created by the aid recipient in both cases. The regional impact factor is consequently set at 1,25.

Maximum allowable aid intensity

(87) In view of the foregoing, the maximum allowable aid intensity is calculated as follows: $35 \% \times 0,75 \times 0,8 \times 1,25 = 26,25 \%$ gross. The proposed aid of EUR 53,7 million, equivalent to an aid intensity of 35 % gross, that Germany intends to grant to Hamburger AG for its investment in Schwarze Pumpe, Brandenburg, is therefore not in conformity with the maximum allowable aid intensity calculated on the basis of the multisectoral framework.

3.5. Ex post monitoring

(88) In view of the sensitive nature of the large mobile investments involved, it is essential that a mechanism exists which helps to ensure that the level of aid actually disbursed to the recipient conforms to the Commission decision.

(89) For each aided project approved by the Commission under the multisectoral framework, the Commission requires either that any aid contract between the relevant authority of the Member State and the aid recipient contains a reimbursement provision in the event of non-compliance with the contract or that the final significant payment of the aid (e.g. 25 %) will be made only when the aid recipient has satisfied the Member State that the execution of the project is in compliance with the Commission decision and on condition that the Commission, on the basis of information provided by the Member State concerning implementation of the project, has, within 60 working days, indicated its agreement or raised no objections to the final payment of the aid.

(90) The Commission notes that the proposed decision to grant aid to Hamburger AG contains a reimbursement provision in the event of non-compliance by the aid recipient with the decision granting the aid.

⁽¹¹⁾ Decision No 2/2001 of the EU-Poland Association Council of 7 May 2001, OJ L 215, 9.8.2001, p. 38.

(91) The Commission notes that the final significant payment of the aid will be made only when Hamburger AG has satisfied the Member State that the execution of the project is in compliance with the Commission decision.

The aid may accordingly not be granted above an intensity ceiling of 26,25 %.

(92) The Commission further notes that the undertaking concerning *ex post* monitoring given by Germany complies with the obligations laid down in point 6 of the multisectoral framework, in particular as regards the obligation to communicate to the Commission a copy of the decision granting the aid as well as an annual report on the project and the other information and documents to which point 6.4 of the multisectoral framework refers.

Article 2

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

VI. CONCLUSION

(93) In the light of the above considerations the Commission concludes that the part of the notified aid exceeding the maximum allowable aid intensity calculated for this project in accordance with the provisions of the multisectoral framework does not fulfil the conditions to be considered compatible with the common market,

Article 3

This Decision is addressed to the Federal Republic of Germany.

HAS ADOPTED THIS DECISION:

Done at Brussels, 9 April 2002.

Article 1

The State aid which Germany plans to grant to Hamburger AG, amounting to EUR 53 685 648, is incompatible with the common market to the extent to which it exceeds the maximum allowable aid intensity for the project at issue of 26,25 %.

For the Commission

Mario MONTI

Member of the Commission

COMMISSION DECISION**of 24 April 2002****on the State aid implemented by Belgium for the Beaulieu Group (Ter Lembeek International)***(notified under document number C(2002) 1341)***(Only the French and Dutch versions are authentic)****(Text with EEA relevance)**

(2002/825/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

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

Whereas:

I. PROCEDURE

(1) By Decision of 4 October 2000, notified to Belgium on 16 October 2000 (SG(D)2000/107549), the Commission terminated the Article 88(2) procedure in respect of some of the aid granted by Belgium to the Verlipack Group ⁽²⁾. By that same Decision, it revoked its Decision of 16 September 1998 (ref. SG(D)98/8769) ⁽³⁾ not to raise any objections to part of the aid. This was prompted by the fact that the Decision of 16 September 1998 was based on incorrect information provided in the course of the procedure which was of decisive importance in the decision.

(2) During its examination of the aid, the Commission was informed of other measures that might contain elements of state aid for the Verlipack Group and/or the Beaulieu Group. Since the case concerned new support from the Walloon Region, the Commission called on the Belgian State on 5 July 2000 to provide it with information that would enable it to assess the measures in the light of the rules applicable.

(3) After several reminders, the Commission decided to issue, by letter of 19 January 2001, a formal injunction to Belgium to supply the information that would enable it to assess the compatibility of the measures in favour of Verlipack and/or the Beaulieu Group with Article 87 of the Treaty. Only a few days before this injunction was notified, Belgium submitted its reply to the letter of 5 July 2000 by letter registered as received on 15 January 2001.

(4) On 6 June 2001 the Commission decided to initiate the Article 88(2) procedure with regard to the aid. Belgium was informed by letter of 8 June 2001. After having requested additional time to reply, Belgium responded by letter received by the Commission on 26 July 2001.

(5) The publication of this letter in the *Official Journal of the European Communities* ⁽⁴⁾ prompted a reaction from the Collectif de Défense des Travailleurs Licenciés de Verlipack à Jumet et à Ghlin, an association of workers laid off at Verlipack's Jumet and Ghlin plants, by letter of 3 December 2001 and from the United Kingdom Permanent Representation by letter of 7 December 2001. Belgium replied to the letter of 3 December 2001 by letter received by the Commission on 16 January 2002.

II. BACKGROUND**II.1. Developments within the Verlipack Group**

(6) Until it was declared bankrupt on 18 January 1999, the Verlipack Group had been Belgium's largest producer of hollow container glass (white or brown glass bottles or jars for the agri-foodstuffs industry), with a market share of 20 % in Belgium and 2 % in the Community. It employed 735 people at its plants at Ghlin, Jumet and Mol in 1996.

⁽¹⁾ OJ C 313, 8.11.2001, p. 2.

⁽²⁾ OJ L 320, 5.12.2001, p. 28.

⁽³⁾ OJ C 29, 4.2.1999, p. 13.

⁽⁴⁾ See footnote 1.

- (7) In 1985 the Belgian public authorities acquired a 49 % holding in the Verlipack Group, with the remaining shares being held by a private operator, the Beaulieu Group. This holding, which had been acquired by Société Nationale pour la Restructuration des Secteurs nationaux (SNRSN), was approved by the Commission (aid N123/85). In accordance with the Special Law of 15 January 1989, the Walloon Region acquired the non-voting shares for the Ghlin and Jumet plants, while the shares for the Mol plant were transferred to the Flemish Region.
- (8) In 1992 the Verlipack Group received two investment grants totalling BEF 502 122 500 under a regional aid scheme (Law of 30 December 1970) approved by the Commission⁽⁵⁾. The decision by Société Régionale d'Investissement (set up by the Law of 2 April 1962) to grant a BEF 500 million convertible equity loan (prêt participatif) was also the subject of a Commission Decision of 8 December 1992 not to raise any objection⁽⁶⁾. The Walloon authorities subsequently revealed that, for various internal reasons, this loan had not been released. They also indicated that a decree had been adopted on 15 July 1993 repealing their initial decision to grant this aid to Verlipack.
- (9) In the course of the procedure resulting in the adoption of the decision of 4 October 2000, Belgium revealed that the Verlipack Group was experiencing problems, mainly due to the quality of its management and, above all, its production (inadequate equipment and technology); while investment was needed to improve equipment, the Beaulieu Group could not fully assume the burden and management of its BEF 5 500 million investment programme. This would explain, among other things, why the Walloon Region did not pay the aid that had been authorised.
- (10) Following a number of capital increases by the private shareholders (SA Imcopack Wallonie, owner of the Ghlin and Jumet sites, and NV Imcopack Vlaanderen, owner of the Mol site, both belonging to the Beaulieu Group), the public holding was gradually reduced. By 1996 the Walloon Region had shareholdings of 6,2 % in SA Verlipack Jumet and 11,1 % in SA Verlipack Ghlin, the operating companies situated on Walloon territory. At the end of this gradual disengagement, the public authorities held no more than 20,7 % of the capital of the Verlipack Group.
- (11) The two companies located in Wallonia were making losses at that time (SA Verlipack Ghlin suffered an operational loss of 8 % in 1995 and 16 % in 1996; SA Verlipack Jumet recorded a loss of 55 % in 1995 and 60 % in 1996).
- (12) The Verlipack Group would not have been able to honour the end-of-1996 repayment deadlines for bank loans of more than BEF 362,8 million and would have been subjected to the banks' recovery procedures.
- (13) On 1 September 1996 the Verlipack Group and the German Heye-Glas Group signed a technical cooperation agreement.
- (14) This scope of this agreement was extended on 11 April 1997 to cover managerial and financial assistance, with the German group becoming directly involved in the management and running of the Verlipack Group. At the end of this operation, the shares held by the Walloon Region in SA Verlipack Ghlin and SA Verlipack Jumet were bought by the Beaulieu Group⁽⁷⁾. The latter and the Heye-Glas Group set up an umbrella holding, Verlipack Holding I, controlled by the latter subject to a majority vote.
- (15) Verlipack Holding I has equity capital of BEF 1 030 million, of which BEF 515 million was contributed by the Heye-Glas Group, with the rest comprising all of the equipment of the three operating sites contributed by the Beaulieu Group and valued at BEF 515 million. Out of this umbrella holding a second holding company, Verlipack Holding II, was formed with a capital of BEF 1 230 million to oversee the three production sites. The management bodies for the whole of the new industrial group are concentrated at the level of Verlipack Holding II, in which Heye holds a majority, and there is single management of the group's various departments (commercial, technical, accounting, financial and administrative).

⁽⁵⁾ OJ L 312, 9.11.1982, p. 18.

⁽⁶⁾ OJ C 83, 24.3.1993, p. 3.

⁽⁷⁾ By agreement of 18 December 1996, SA Ter Lembeek International bought the following holdings from Sowagep (the management company for the holdings of the Walloon Region in commercial firms): Verlipack Ghlin SA: 5 087 non-voting preferential shares and 3 937 Category I profit shares; Verlipack Jumet SA: 2 923 non-voting preferential shares and 2 267 Category I profit shares. The agreement stipulated that the price of BEF 113 712 000 was payable 'on 31 December 2001, net-net, without interest'.

- (16) However, the results announced by the Heye-Glas Group and Verlipack worsened significantly in 1997. On 30 November of that year, the provisional and unaudited consolidated position revealed a net loss for the year of BEF 828 592 044. On 2 April 1998 the Walloon authorities estimated the loss as at 31 December 1997 to be some BEF 825 million, whereas the Heye-Glas/Verlipack business plan had forecast a loss of only BEF 368 million, i.e. BEF 457 million less than the estimate.
- (17) On 8 January 1999 Verlipack sought a court-approved arrangement with creditors for the Jumet and Ghlin plants and announced the closure of the Mol plant. According to media reports, the company justified these measures 'in part at least, by the difficult situation on the container glass market' and by 'mounting losses and unfavourable forecasts given the overcapacity in glass production on the market in central Europe'.
- (18) On 11 January 1999 the Turnhout Commercial Court declared Verlipack Mol bankrupt and on 18 January 1999 the Mons Commercial Court declared bankrupt the six companies in the glassmaking Verlipack Group (the Ghlin and Jumet plants, Verlipack Belgium, Verlipack Engineering, Verlimo and Imcourlease).
- (19) Recognising that it no longer had enough liquidity or assets to meet its debts, Verlipack Holding II filed for bankruptcy before the Mons Commercial Court on 11 February 1999. Sowagep announced to the Court that it did not intend to pursue recovery of its claim (and thus granted a credit to its debtor). As a consequence, the Court found on 31 May 1999 that the conditions for bankruptcy on the part of Verlipack Holding II were not met even though, now that its object no longer existed, the company was destined merely to be put into liquidation.
- (22) The Group is controlled by the holding company Ter Lembeek International, known until 1994 as Beaulieu Wielsbeke ⁽⁸⁾.
- (23) Beaulieu Wielsbeke NV, which took over the activities of Ter Lembeek International before the latter changed its name, recorded a turnover of BEF 5 182 220 000 in 1998 and BEF 4 821 857 000 in 1999, with losses of BEF 39 035 000 and BEF 309 520 000 respectively.
- (24) In 1999 Beaulieu Wielsbeke employed 553 persons, and 98 % of its sales were exported.

III. INJUNCTION ADDRESSED TO BELGIUM

II.2. Beaulieu Group

- (20) The Beaulieu Group is the name of a Belgian holding company active in the carpeting and synthetic fibres sector.
- (21) It is the world's second-largest carpet manufacturer and by far the largest carpet manufacturer in Europe. It also produces nylon fibres for its own use and, as a result, is one of the carpet manufacturers which have become involved upstream in the production of nylon fibres.
- (25) In the context of the procedure resulting in the decision of 4 October 2000, Belgium described the situation at Verlipack in the months preceding and following the Commission's decision of 16 September 1998.
- (26) The Commission notes that, in view of the deterioration in Verlipack's position at the end of May 1998, fresh efforts had to be made by the partners (banks, Beaulieu Group and Heye) under a relaunch agreement concluded on 5 June 1998. In this context, and in addition to converting its BEF 150 million loan into capital, Sowagep undertook to find a new private investor willing to make a cash injection of BEF 100 million. However, according to the information supplied by Belgium, it became clear fairly quickly that this new relaunch plan was not producing the anticipated results in that Sowagep was no longer able to find a new private investor.
- (27) It was decided on 26 June 1998 to increase Verlipack's capital further with a contribution from Heye ⁽⁹⁾ of BEF 200 million for 19 408 new shares and a BEF 100 million injection by the Luxembourg company Worldwide Investors, the investor found by Beaulieu, in exchange for 9 704 new shares.

⁽⁸⁾ This holding company owns the following subsidiaries Beaulieu Wielsbeke NV, Goed Ter Lembeek NV, Cefima NV, Verlico NV, Der Grüne Teppich GmbH, Beja Textil Lda, Beaulieu Service Centre Moskau, Datex NV, Beaulieu Kunststoffen NV, Chemical Finance Company, De Steenhout NV and Verlipack Holding NV.

⁽⁹⁾ In 'full knowledge of the statutes and financial situation of Verlipack Holding II'.

- (28) In the autumn of 1998 the undertaking given by Worldwide Investors was terminated by the transfer of its shares to the Beaulieu Group, which in turn transferred them to the Walloon Region. This transfer was in lieu of payment ⁽¹⁰⁾ of the amount owed by Beaulieu to the Walloon Region for the Verlipack shares valued at BEF 113 712 000, held by the latter and acquired by the Group in December 1996, repayment of which, without interest, was not to begin until 31 December 2001.
- (29) The Commission notes that the transfer in lieu of payment of a debt, which was not to start being repaid until 31 December 2001, took place several weeks before Verlipack filed for bankruptcy.
- (30) In its letter of 28 September 1999 ⁽¹¹⁾, Belgium had indicated that the transfer in lieu of payment that took place in December 1998 to clear the Beaulieu Group's debts to the Walloon Region could be regarded as a 'further increase in Verlipack's capital financed by Beaulieu, which has been repaid by having its debt to the Walloon Region cleared'.
- (31) In its letter of 10 April 1998 ⁽¹²⁾, Belgium announced its intention to grant BEF 100 million to Verlipack in the form of either a capital contribution or a long-term loan ⁽¹³⁾. It also specified that it would not 'implement the project without prior notification to the Commission and without authorisation'.
- (32) In its letter to Belgium of 14 December 1998 in the procedure resulting in the decision of 4 October 2000, the Commission reserved 'its position concerning any further intervention by the Walloon authorities in Verlipack's favour'. This was repeated in its letter of 13 January 1999 in the same case. Moreover, Belgium stated on 4 February 1999, also in the same case, that it had 'never considered financing the composition period in view, in particular, of the terms of the recent Commission decision [of 16 September 1998]'.
- (33) Nevertheless, it was only indirectly that the Commission learned of further intervention by Walloon Region linked to the repayment of its amount owed to it by the Beaulieu Group for the transfer of its shares in the Ghlin and Jumet plants in 1996.
- (34) The Commission informed Belgium by letter of 5 July 2000 that it had entered the new measure in the register of non-notified aid under number NN 73/2000 with a view to determining its compatibility with the common market.
- (35) In this letter, the Commission observed that the BEF 100 million contribution from either Sowagep or the Walloon Region had come from state resources but that, since this was a new public measure, it did not at the time have all the information it required to assess the measure's compatibility with Article 87 of the Treaty.
- (36) In the same letter, the Commission expressed doubts concerning possible aid granted to the Beaulieu Group by the Walloon Region on the ground that the Group had secured payment terms when buying the shares in the Ghlin and Jumet plants which would not have been acceptable to a private financial institution. Moreover, it wondered whether the transfer in lieu of payment which had taken place in December 1998, a few weeks before Verlipack had filed for bankruptcy, did not constitute aid to the Beaulieu Group within the meaning of Article 87(1) of the Treaty.
- (37) In its letter of 5 July 2000, the Commission requested information on the following aspects: the activities of Worldwide Investors; the steps taken by Sowagep to find a private investor; the use made of the BEF 100 million subscribed by Worldwide Investors in June 1998; an explanation of the difference in the value of the 14 214 shares acquired by the Beaulieu Group in 1996; an explanation of the Heye Group's ignorance of these

⁽¹⁰⁾ Supplementary agreement of 20 November 1998 to the transfer agreement of 18 December 1996 between the Walloon Region and the Beaulieu Group on the acquisition of 14 214 shares.

⁽¹¹⁾ Response to the initiation of the formal investigation procedure resulted in the decision of 4 October 2000 (page 24).

⁽¹²⁾ In the context of the procedure resulting in the decision of 16 September 1998, subsequently revoked.

⁽¹³⁾ 'Given the firm's difficulties and the desire on the part of its private shareholders and bankers to provide Verlipack with new finance, the Walloon Region had agreed in principle to participate on certain conditions in a BEF 100 million capital increase. [...] The Walloon Region would point out that it will not implement the project without prior notification to the Commission and without authorisation. At present, the project is tending towards the granting of a BEF 100 million long-term loan on the same terms as applied to Verlipack by the banks. The Walloon Region will ensure that it contacts the Commission again once the conditions in finalising such a project have been met. [...] Finally, Verlipack's management has announced that the initial results for 1998 point to the start of an improvement.'

transactions involving intervention by the Walloon authorities; an explanation of the four-year grace period granted by the Walloon Region to the Beaulieu Group for payment for the 14 214 shares and of the circumstances which, several weeks before Verlipack filed for bankruptcy and therefore at a time when it was fully aware of the fact that Verlipack was making losses, prompted the Walloon Region to accept early repayment of this debt.

- (38) In the same letter, the Commission wondered who was the real beneficiary of the increase in Verlipack's capital subscribed in June 1998 by Worldwide Investors.
- (39) By letter of 4 September 2000, Belgium asked for more time to reply to these questions; the Commission acceded to the request by letter of 6 September 2000.
- (40) By letter of 29 September 2000, the Commission issued a second reminder.
- (41) Belgium failed to submit the information requested by the deadline set.
- (42) Since Belgium had therefore not provided it with all the information it required to examine the measures in question, and in accordance with Article 10(3) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty⁽¹⁴⁾, the Commission issued an injunction requiring Belgium to supply the documents, information and data necessary for it to examine the compatibility with the common market of the relevant measures in favour of Verlipack and/or the Beaulieu Group. This decision, which reproduced the wording of the letter of 5 July 2000 regarding the information which was being requested, was notified to Belgium by letter of 19 January 2001 (ref. SGD(2001)285235).

IV. REPLY FROM BELGIUM AND INITIATION OF THE PROCEDURE

- (43) By letter registered as received on 15 January 2001, Belgium replied to the Commission's letter of 5 July 2000 in the following terms:
- (44) Despite the Verlipack Group's poor results during 1997, a reduction in the scale of losses was observed after March 1998 as a result of a marked increase in productivity. A new relaunch plan was thus adopted by the private and public partners which entered into an agreement (Heads of Agreement) on 5 June 1998. This plan can be summarised as follows:

Partner	Undertaking
Heye	Injection into Verlipack of BEF 200 million
Beaulieu Group	Waiver of a debt of BEF 600 million owed to it by the Verlipack (unless the latter's fortunes improved after 1 January 2002)
Walloon Region	— Search for an investor to put up BEF 100 million in order to increase Verlipack's capital — Conversion into capital of the BEF 150 million subordinated loan granted to Verlipack by the Walloon Region in 1997
Private banks (Kredietbank, Crédit Lyonnais)	Release of the remaining BEF 73 million of an overdraft facility granted in 1997, plus rescheduling of debts and conditional reduction in interest rates

- (45) As regards the Walloon Region's involvement, the following should be stressed:
- (46) The conversion into capital of the BEF 150 million subordinated loan was covered by the negative final decision of 4 October 2000.
- (47) As for the capital increase of BEF 100 million, the Walloon Region was supposed to find a private investor. However, according to the Walloon authorities, in order to ensure that the relaunch plan could be implemented immediately, the Beaulieu Group offered to put up the necessary funds 'provided that this was only a temporary measure and that the funds would be repaid to it by the new investor which (the Walloon Region) was to find'. According to Belgium, the Beaulieu Group, which had waived a debt of BEF 600 million, had every interest in ensuring that the relaunch plan would produce the anticipated results.
- (48) As it happened, it was Worldwide Investors SA, a Luxembourg investment company, which on 26 June 1998 put up the BEF 100 million to increase Verlipack's capital. According to Belgium, this was done on the Beaulieu Group's behalf.

⁽¹⁴⁾ OJL 83, 27.3.1999, p. 1.

(49) However, again according to the Belgian authorities, since the new relaunch plan did not succeed in curbing Verlipack's mounting losses, the Walloon Region was unable to find a new private investor.

(50) Consequently, the Walloon region and the Beaulieu Group jointly decided to amend the terms of the agreement under which the Beaulieu Group had purchased the shares held by the Walloon Region in Verlipack Ghlin and Verlipack Jumet in 1996. Under the terms of the supplementary agreement of 20 November 1998 amending the agreement of 1996 between Beaulieu and the Walloon Region, the payment of BEF 113 712 000 for the shares acquired by Beaulieu in 1996 could be made 'either by bank transfer to the account (of the Walloon Region) or by the transfer in lieu of payment of 9 704 shares in the capital of SA Verlipack Holding II'.

(51) On 21 December 1999 Worldwide Investors transferred 9 704 shares in Verlipack Holding II to the Beaulieu Group. In return, the Beaulieu Group transferred 9 704 shares in Verlipack Holding I to Worldwide Investors. Belgium has also confirmed that, on an unspecified date between 21 and 31 December 1998, the Beaulieu Group transferred 9 704 shares in Verlipack Holding II to the Walloon Region 'in exchange for the waiver of the Beaulieu's debt to the Region (Annex 5)' ⁽¹⁵⁾.

(52) In their letter registered as received on 15 January 2001, the Belgian authorities themselves indicated that their reply was incomplete since the Beaulieu Group had not cooperated. Since then, they have not submitted any other communication to the Commission, not even to confirm that their letter covered the questions contained in the information injunction.

(53) In the light of the information available, the Commission concluded on 6 June 2001 that this debt waiver involved a transfer of public resources on the part of the Belgian State that constituted *prima facie* State aid within the meaning of Article 87 of the EC Treaty. It also took the view that doubts existed as to the compatibility with Article 87 of the Treaty and Article 61 of the EEA Agreement of the aid received by the Verlipack and/or Beaulieu Group and, consequently, initiated the Article 88(2) procedure in that regard. This decision was communicated to Belgium by letter of 8 June 2001.

⁽¹⁵⁾ It should be noted that the Annex 5 in question does not relate to the transfer of shares held by the Beaulieu Group to the Walloon Region but rather to an exchange of shares between Worldwide Investors and the Beaulieu group.

V. COMMENTS FROM BELGIUM

(54) By letter received by the Commission on 27 July 2001, Belgium repeated the comments which it had made in the context of the injunction and which can be summarised as follows.

(55) Despite the Verlipack Group's poor results during 1997, a reduction in the scale of losses was observed after March 1998 as a result of a marked increase in productivity. A new relaunch plan was thus adopted by the private and public partners, which entered into an agreement (Heads of Agreement) on 5 June 1998. Under this plan, the Walloon Region undertook (i) to convert the BEF 150 million subordinated loan into capital and (ii) to find a private investor willing to contribute BEF 100 million to Verlipack's capital.

(56) The conversion into capital of the BEF 150 million subordinated loan was covered by the negative final decision of 4 October 2000. It is therefore not covered by the new procedure.

(57) As regards the search for a private investor, the Walloon authorities indicate that this undertaking 'could not be met by Sowagep in the short term'. They go on to state that 'Beaulieu thus proposed to Sowagep that it would put up the funds itself, provided that this was only a temporary measure and that the funds would be repaid to it by the new investor which Sowagep was to find. This intervention by Beaulieu is the result of verbal negotiations and has not been formalised by an agreement'.

(58) As it happened, it was Worldwide Investors SA which on 26 June 1998 put up the BEF 100 million to increase Verlipack's capital. According to Belgium, this was done on the Beaulieu Group's behalf.

(59) However, again according to the Belgian authorities, since the new relaunch plan did not succeed in curbing Verlipack's mounting losses, the Walloon Region was unable to find a new private investor. Consequently, the Walloon region and the Beaulieu Group jointly decided, by means of a supplementary agreement of 20 November 1998, to amend the terms of the agreement which enabled the Beaulieu Group in 1996 to acquire the shares held by the Walloon Region in Verlipack Ghlin and Verlipack Jumet. Under the terms of the supplementary agreement, the payment of BEF 113 712 000 for the shares acquired by Beaulieu in 1996 could be made 'either by bank transfer to the account (of the Walloon Region) or by the transfer in lieu of payment of 9 704 shares in the capital of SA Verlipack Holding II'.

(60) According to the Walloon authorities, this supplementary agreement 'is a clear indication of the temporary nature of Beaulieu's intervention in favour of the Verlipack Group and of the existence of a nominee transaction on the Walloon Region's behalf' (page 7 of the letter of 26 July 2001).

(61) Finally, on 21 December 1999 Worldwide Investors transferred 9 704 shares in Verlipack Holding II to the Beaulieu Group. In return, the Beaulieu Group transferred 9 704 shares in Verlipack Holding I to Worldwide Investors.

(62) Belgium has also confirmed that, on an unspecified date between 21 and 31 December 1998, the Beaulieu Group transferred 9 704 shares in Verlipack Holding II to the Walloon Region 'in exchange for the waiver of the Beaulieu's debt to the Region'.

(63) With regard to the value of these 9 704 shares, they were worthless in real terms given that the assets of the company had, according to the Mons Commercial Court, been 'reduced to one franc, it is unable to obtain a bank loan to meet its liabilities and [...], consequently, the conditions for bankruptcy are met' ⁽¹⁶⁾.

VI. COMMENTS FROM INTERESTED PARTIES

(64) The Collectif de Défense des Travailleurs Licenciés de Verlipack à Jumet et à Ghlin presented comments on the facts established by the Commission, referring to the social consequences of the crisis within the Verlipack Group. It also supplied copies of the minutes of meetings of the Verlipack board and a copy of a letter signed by a union representative at Verlipack (Ghlin plant).

(65) The United Kingdom Permanent Representation presented the following comments on behalf of the association of the leading United Kingdom carpet manufacturers, the Carpet Foundation (formerly the British Carpet Manufacturers Association):

(a) The United Kingdom was Europe's largest market for fitted carpets (97 % of homes use this type of floor covering). For obvious reasons, the United

Kingdom market was a target for outside competition, and imports had increased to such an extent that imported fitted carpets now accounted for 64 % of the total volume fitted in the United Kingdom (47 % in value terms).

(b) This dramatic growth had threatened the continued existence of the United Kingdom fitted-carpet industry. In 1970, when imports were almost insignificant, the industry employed 45 000 people. Now, with imports accounting for 64 % of the market, only 8 000 people were directly employed in the industry.

(c) The Carpet Foundation considered the main beneficiaries of this major market penetration to be manufacturers in Belgium, who now accounted for 55 % of the fitted carpets imported into the United Kingdom. In the last twenty years, imports from Belgium had increased tenfold (from 8 million m² in 1980 to 85 millions m² in 2000).

(d) The average price of fitted carpets imported into the United Kingdom was GBP 3,83/m² while that of exported fitted carpets was GBP 6,43/m². The most recent figures supplied by the United Kingdom Department of Trade and Industry (DTI) for 1997 revealed a deficit vis-à-vis the rest of the Community of GBP 273 million.

(e) The Commission had been informed that Beaulieu had, in recent years, been implicated in dubious financial transactions. In the present case, in which Beaulieu had cleared a debt of BEF 113,7 million by transferring 9 704 shares in Verlipack Holding II to the Walloon Region, the Carpet Foundation took the view that the Walloon Region had effectively waived a debt equivalent to GBP 1,5 million in state aid. It thus considered that this debt waiver constituted operating aid to Beaulieu/Verlipack, which was incompatible with the common market.

⁽¹⁶⁾ As it happened, bankruptcy was not declared even though, since its purpose had lapsed, the company was destined merely to be put into liquidation. The Walloon Region indicated that it did not intend to pursue recovery of the amounts owed to it (and, in so doing, granted a credit to its debtor). When questioned on this point at the time the procedure was initiated, the Walloon Region confirmed that, as a result of the adoption of the negative decision of 4 October 2000, it had instructed Verlipack Holding II to repay the state aid. Following this, the Mons Commercial Court, by judgment of 19 February 2001, declared Verlipack Holding II bankrupt after the latter had, on the same date, filed for a suspension of payments.

(66) In its reply to the comments from third parties, Belgium asked that the Commission disregard those from the Collectif des Travailleurs Licenciés since this was an insufficiently representative body.

(67) Belgium failed to submit by the deadline set comments on the points raised by the United Kingdom.

VII. ASSESSMENT OF THE AID

VII.1. Existence of State aid within the meaning of Article 87(1) of the Treaty

- (68) Article 87(1) of the Treaty stipulates 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 is, in so far as it affects trade between Member States, incompatible with the common market.
- (69) The concept of aid is wider than that of a grant and extends to measures which, in various forms, reduce the charges usually borne by a firm's budget and have identical effects to grants. It follows that, while not involving any direct transfer of state resources, a measure by which the public authorities renounce a claim places the beneficiaries in a more favourable position than other taxpayers and thus constitutes state aid within the meaning of Article 87(1) of the Treaty.
- (70) The following tables provide statistics for carpets and other textile floor coverings and reveal the existence of trade between Belgium and the other Member States:

(EUR 1 000)

1998	Imports into Belgium	Exports from Belgium
World	211 659,19	2 009 560,84
France	44 502,03	204 232,6
Netherlands	47 711,61	201 575,12
Germany	32 177,89	482 395,03
Italy	3 363,12	25 131,73
United Kingdom	21 083,57	438 580,14
Ireland	317,46	19 756,55
Denmark	1 147,49	17 893,69
Greece	573,09	31 398,44
Portugal	3 844,57	14 468,5
Spain	2 875,73	23 844,69
Sweden	1 396,42	26 411,19
Finland	220,4	9 460,45
Austria	385,45	22 268,92

(Source: Eurostat)

(EUR 1 000)

2000	Imports into Belgium	Exports from Belgium
World	234 803,67	2 185 284,43
France	39 851,55	186 007,02
Netherlands	72 424,95	192 991,38
Germany	31 533,12	459 466,56
Italy	2 695,96	27 042,16
United Kingdom	23 711,69	557 366,43
Ireland	191,31	25 054,58
Denmark	569,55	15 657,08
Greece	730,35	28 670,43
Portugal	1 212,05	18 410,99
Spain	1 297,43	24 813,28
Luxembourg	286,95	2 417,64
Sweden	606,83	21 062,8
Finland	415,04	10 837,97
Austria	527,53	21 444,46

(Source: Eurostat)

- (71) Moreover, in view of the aid recipient's market position⁽¹⁷⁾, any aid granted to this group is liable to affect such trade and distort competition⁽¹⁸⁾. The sales of Beaulieu Wielsbeke NV (a subsidiary of Ter Lembeek International active on the carpeting market) in 1997, 1998 and 1999 amounted to BEF 4 379 764 000, BEF 5 182 220 000 and BEF 4 821 857 000 respectively.

⁽¹⁷⁾ The Beaulieu in 2000 group is the leading European carpet manufacturer and exports 98 % of its production.

⁽¹⁸⁾ For example, in 2000 Associated Weavers, a manufacturer established in Belgium, sold 48,7 million m² of carpeting for a total turnover of EUR 212,89 million, which makes it one of the largest European manufacturers in the sector. According to the data published on its website (<http://www.awe.be/> (14 march 2002)), it exports its products throughout the world, but predominantly to Europe.

- (72) These data, along with those supplied by the United Kingdom Permanent Representation, demonstrate the existence of a significant level of trade within the Community.

VII.2. Contribution of BEF 100 million to Verlipack Holding II

- (73) Leaving aside the complexity of the legal and financial arrangements behind the intervention in June 1998 of Worldwide Investors, which injected BEF 100 million into Verlipack Holding II, one indisputable fact stands out: in December 1998 the Beaulieu Group settled a debt of BEF 113 712 000 towards the Walloon Region by transferring, in lieu of payment, 9 704 shares in Verlipack Holding II, the nominal value of which was BEF 100 million but the real value of which was to prove significantly lower given the assets position of the company.

- (74) With regard to the value of these 9 704 shares, the following should be borne in mind:

- (75) On 11 February 1999 Verlipack Holding II filed for a suspension of payments before the Mons Commercial Court, which granted a suspension with effect from June 1998. The ruling states, *inter alia*, that:

'Whereas the company Verlipack Holding II, with assets reduced to ONE FRANC, is unable to obtain a bank loan to meet its liabilities and, consequently, the conditions for its bankruptcy are met.'

- (76) In the event, bankruptcy was not declared. This was because the Walloon Region indicated that it did not intend to pursue recovery of the amounts owed to it (and, in so doing, granted a credit to its debtor) and proposed that it would meet the cost of voluntary liquidation. As a consequence, the Court found on 31 May 1999 that the conditions of bankruptcy on the part of Verlipack Holding II were not met even though, now that its object no longer existed, it was destined merely to be put into liquidation.

- (77) Belgium claims that the price of BEF 113 712 000 determined in December 1996 for the non-voting shares and the profit shares transferred by Sowagep to the Beaulieu Group did not correspond to their value. According to

Belgium, it was a 'price imposed by the Royal Decree of 7 May 1985' ⁽¹⁹⁾. Under Article 3 of this Royal Decree, the purchase price of non-voting preferential shares 'may not be lower than 80 % of the issue price'. According to Belgium, the price of BEF 113 712 000 for the non-voting and profit shares purchased by the Beaulieu Group in December 1996 was equivalent to 80 % of their issue price.

- (78) The requirement to set a price equivalent to 80 % of the issue price is a statutory one imposed without distinction on anyone wishing to purchase such preferential shares.

- (79) Regardless of the fact that the purchase price was set on the basis of national rules applicable without distinction, as Belgium acknowledged in its letter of 26 July 2001, to anyone wishing to purchase such preferential shares, it has to be concluded that the price thus set had to be paid by the Beaulieu Group. This was confirmed by the Belgian authorities when they stated in their letter of 15 January 2001 ⁽²⁰⁾ that 'the debt of BEF 113 712 000 of the Beaulieu group to the Walloon Region was a definite debt the repayment of which was in no way linked to the financial situation of the Verlipack group'.

- (80) Since, according to the above ruling by the Mons Commercial Court of 31 May 1999, the assets of Verlipack Holding II, which had filed for a suspension of payments on 11 February 1999, had been reduced to a value of one franc, with the Court stipulating that 'the suspension of payments was effective from June 1998' ⁽²¹⁾, the shares received in payment were of no value. In accepting them in clearance of a definite debt of BEF 113 712 000, the Walloon Region effectively waived a debt of that amount vis-à-vis the Beaulieu Group.

⁽¹⁹⁾ Royal Decree concerning the issuing of non-voting preferential shares by limited companies in national sectors (Moniteur Belge of 11 May 1985). The shares in question were non-voting shares which could be subscribed to in companies undergoing restructuring by: (1) Société nationale d'investissement; (2) Société nationale pour la Restructuration des Secteurs nationaux; (3) Fonds voor de herstructurering van de nationalen sectoren in het Vlaamse Gewest; (4) Fonds pour la restructuration des secteurs nationaux en Région wallonne; (5) limited liability companies ('sociétés anonymes') in which Société nationale d'investissement holds at least 50 % of the capital, provided that they are authorised to do so by decree of the Minister for Economic Affairs.

⁽²⁰⁾ This letter was in reply to the Commission's letter of 5 July 2000 (p. 5).

⁽²¹⁾ See the first recital of the ruling by the Mons Commercial Court of 31 May 1999.

- (81) Consequently, the Commission considers that this operation constitutes a 'debt waiver', as Belgium confirmed in its letter of 15 January 2001⁽²²⁾. Belgium argues, however, that the Beaulieu Group did not draw any economic benefit from that operation since, by waiving the debt, Belgium was compensating the Beaulieu Group for the 'capital contribution made in June 1998'. The difference between the BEF 113 712 000 (amount of the debt) and the BEF 100 million (nominal amount of the capital contribution) was said to be justified 'by the early repayment of the debt⁽²³⁾ [...] and remuneration of the nominee transaction'.
- (82) With regard to the latter aspect, reference should be made to the terms of the Heads of Agreement of 5 June 1998. Point 2 states: 'Capital increase (cash) of BEF 100 promoted by Sowagep in Verlipack Holding II (to be used for corresponding capital increases in the Verlipack group companies). A new shareholder must be accepted by all shareholders of Verlipack Holding II.' In its letter of 15 January 2001, Belgium indicated that it was in this context that 'Sowagep undertook to find a new private investor willing to make a BEF 100 million cash injection'. (Page 2). In its letter of 26 July 2001, Belgium stated that the measures provided for in the Heads of Agreement included a 'capital increase of BEF 100 million by a private investor introduced by Sowagep (since renamed Sogepa)' (page 6).
- (83) Accordingly, the Walloon authorities undertook under the Heads of Agreement to introduce an investor and not to contribute BEF 100 million to the capital of Verlipack Holding II.
- (84) Despite the formal injunction, and even after the initiation of the procedure, Belgium failed to provide proof of the existence of an agreement between the Beaulieu Group and the Walloon Region under which Beaulieu would take over the Walloon Region's undertaking (under the Heads of Agreement of 5 June 1998) to find an investor who would put up BEF 100 million.
- (85) In the event, Belgium has not even provided proof of the existence of a nominee agreement between the Beaulieu Group and Worldwide Investors.
- (86) Belgium also confirmed in its response to the initiation of the procedure that there had not been any formal agreement but rather 'verbal negotiations which were not formalised by an agreement'⁽²⁴⁾.
- (87) If it were accepted, in the light of the comments presented by Belgium, that the Beaulieu Group decided to take over the Walloon Region's undertaking under the Heads of Agreement of 5 June 1998, it would have to be concluded that the Beaulieu Group undertook to introduce an investor and not to contribute BEF 100 million to Verlipack II's capital. A private investor, World Investors, was found that was willing to run the risk of investing in a firm like Verlipack Holding II.
- (88) The response to the initiation of procedure suggests, although there is nothing substantial to bear this out, that the supposed verbal agreement between the Beaulieu Group and the Walloon Region according to which the former would take over the latter's undertaking (under the Heads of Agreement of 5 June 1998) to find an investor that would put up BEF 100 million went well beyond the Walloon Region's undertaking under the Heads of Agreement (to find an investor that would put up BEF 100 million).
- (89) The suggestion is that the Beaulieu Group did not merely take over the Walloon Region's undertaking under the Heads of Agreement (to find an investor that would put up BEF 100 million) but, going beyond that undertaking, intended to ensure in any event that BEF 100 million would be contributed to Verlipack Holding II's capital without its having to put up that amount itself, something which Sowagep supposedly guaranteed to it.
- (90) On the basis of the information supplied by Belgium, the Commission considers that the Member State has not demonstrated: (i) that an agreement under which the Beaulieu Group is said to have taken over the undertaking to find an investor that would put up BEF 100 million actually existed; (ii) that there was also a second, separate and more extensive, agreement under which the Walloon Region allegedly guaranteed to the Beaulieu Group repayment of the BEF 100 million that a private investor should have contributed.

⁽²²⁾ See footnote 21 (p. 5).

⁽²³⁾ The agreement of December 1996 stipulated that the price of BEF 113 712 000 was payable 'on 31 December 2001, net-net, without interest'.

⁽²⁴⁾ Moreover, in the context of the injunction issued to Belgium, the Walloon authorities' legal counsel approached the legal counsel of the Beaulieu Group in order to obtain information for a reply to the injunction. Belgium did not pass on any reply from the Beaulieu Group or its legal counsel. In addition, neither the Beaulieu Group nor its legal counsel has come forward in the context of this procedure.

- (91) The only incontrovertible aspect is still the fact that on 20 November 1998 the Walloon Region waived a definite debt of BEF 113 712 000 owed to it by the Beaulieu Group in exchange for 9 704 shares in a company (Verlipack Holding II) whose situation had worsened to the extent that in June 1998 it had required a new refinancing plan in the context of which it had not been possible to find a private investor willing to contribute BEF 100 million to its capital. The company's assets were valued on 11 February 1999 at one franc.
- (92) In the light of these various circumstances, the Commission concludes that this debt waiver involves a transfer of public resources on the part of the Belgian State that constitutes state aid within the meaning of Article 87 of the Treaty.

VII.3. Debt waiver in favour of Verlipack Holding II

- (93) On 8 January 1999 Verlipack sought a court-approved arrangement with creditors concerning the plants at Jumet and Ghlin and announced the closure of the plant at Mol. On 11 January 1999 the Commercial Court of Turnhout declared Verlipack Mol bankrupt, while on 18 January 1999 the Commercial Court of Mons declared the six companies of the glassmaking group Verlipack bankrupt (the plants at Ghlin and Jumet, Verlipack Belgium, Verlipack Engineering, Verlimo and Imcourlease).
- (94) Recognising that it no longer had enough liquidity or assets to meet its debts, Verlipack Holding II filed for bankruptcy before the Mons Commercial Court on 11 February 1999. Before the Court, Sowagep, 'acting on behalf of the Walloon Region, a minority shareholder in the company' ⁽²⁵⁾, indicated that it did not intend to pursue recovery of the amount owing to it (and, accordingly, granted a credit to its debtor) and that it was meeting the cost of a voluntary liquidation. As a consequence, the Court found on 31 May 1999 that the conditions for bankruptcy on the part of Verlipack Holding II were not met, stressing however that, now that its purpose had lapsed, it was destined merely to be put into liquidation.

- (95) Questioned on this point when the procedure was initiated, the Walloon Region confirmed that, following the adoption of the negative decision of 4 October 2000, it had given notice to Verlipack Holding II to repay the aid. Subsequently, on 19 February 2001, the Mons Commercial Court declared Verlipack Holding II bankrupt.
- (96) The Commission notes that the purpose of Verlipack Holding II was to hold and manage the shares of a series of companies which had been declared bankrupt and that, as a result, its object no longer existed. Accordingly, the only step it could take was to go into liquidation. Given that its assets had been rendered worthless, none of its creditors could reasonably hope to recover even part of what was owing to them. In these circumstances, and in view of the closure of all production installations and the fact that the holding was itself in liquidation, the Commission finds that the debt waiver granted to Verlipack Holding II did not involve a transfer of public resources conferring an economic advantage on Verlipack Holding II or other creditors which is liable to distort competition or affect trade.

VII.4. Compatibility of the aid

- (97) The Commission notes that Belgium has not invoked any of the derogations provided for by the Treaty, its position being that this case does not involve the granting of State aid.
- (98) It thus considers that none of the derogations provided for in Article 87(2) of the Treaty apply to the measure under review since it does not constitute aid having a social character granted to individual consumers, aid to make good the damage caused by natural disasters or aid to compensate for the economic disadvantages caused by the division of Germany.
- (99) The derogations provided for in Article 87(3)(a), (b) and (d) do not apply either since the aid is not designed to compensate for the economic disadvantages of certain areas, to promote the execution of an important project of common European interest or to promote cultural and heritage conservation.

⁽²⁵⁾ Second recital to the ruling by the Mons Commercial Court of 31 May 1999.

(100) It remains to be examined, therefore, whether or not the aid in question qualifies for the derogation provided for in Article 87(3)(c) as aid to facilitate the development of certain economic activities where such aid does not adversely affect trading conditions to an extent contrary to the common interest.

(101) The production units of some of the companies belonging to the Beaulieu group are indeed located in an assisted region under Article 87(3)(c). Such regions qualify for regional aid schemes authorised by the Commission and with a maximum ceiling of 25 % net. However, Belgium, in its response to the initiation of the procedure, has not supplied any information enabling the aid in question to be classified as investment aid, the eligibility of the investment to be verified or the intensity of such aid to be calculated.

(102) Consequently, the Commission takes the view that, as far as the aid in question is concerned, the conditions for applying the derogation provided for in Article 87(3)(c) in connection with the development of certain economic areas are not met.

(103) The information at the Commission's disposal concerning the intervention of the Walloon authorities leads it to believe that the measures in question should be regarded as operating aid to the Beaulieu Group, which is incompatible with the common market.

(104) This is because they are designed to relieve the Beaulieu Group of the costs it would have had to bear on its own under the normal conditions of its day-to-day operation or activities.

(105) As the Commission stated in points 4.15 to 4.17 of its guidelines on national regional aid⁽²⁶⁾, regional aid aimed at reducing a firm's current expenses (operating aid) is normally incompatible with the common market.

(106) Exceptionally, however, such aid may be granted in regions eligible under the derogation in Article 87(3)(a) provided that it is justified in terms of its contribution to regional development and its nature and that its level is proportional to the handicaps it seeks to alleviate. However, the Commission notes that the Beaulieu Group's production plants are not situated in one of the regions referred to in Article 87(3)(a) of the Treaty.

(107) In view of the above, the Commission finds that the aid is not compatible with the common market.

VIII. CONCLUSIONS

(108) The State aid implemented by Belgium for the Beaulieu Group (Ter Lembeek International) in the form of the waiver of a debt of BEF 113 712 000 is incompatible with the common market.

(109) The Commission finds that Belgium has illegally implemented the aid in question in violation of Article 88(3).

(110) Article 14 of Council Regulation (EC) No 659/1999 stipulates that any unlawful aid which the Commission has deemed to be incompatible with the common market must be the subject of a decision requiring that it be recovered from the beneficiary.

(111) In order to restore the economic conditions with which the company would have had to contend if it had not been granted incompatible aid, the Belgian authorities must take all the necessary steps to withdraw the benefits deriving from the aid and to recover it from the beneficiary.

(112) The aid must be recovered in accordance with the procedures laid down in national law and must include interest from the date on which the aid was at the beneficiary's disposal until the date of its effective recovery, calculated on the basis of the reference rate used to calculate the net grant equivalent of regional aid in Belgium⁽²⁷⁾,

HAS ADOPTED THIS DECISION:

Article 1

The State aid which Belgium has implemented for the Beaulieu Group (Ter Lembeek International) in the form of the waiver of a debt of BEF 113 712 000 is incompatible with the common market.

Article 2

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

⁽²⁷⁾ Letter from the Commission to the Member States (SG (91) D/4577 of 4 March 1991). See also the judgment of the Court of Justice of 21 March 1990 in Case C-142/87 Belgium v Commission ECR [1990] I-959.

⁽²⁶⁾ OJ C 74, 10.3.1998, p. 9.

2. Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of the Decision. The aid to be recovered shall include interest from the date on which it was at the disposal of the beneficiary until the date of its recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant equivalent of regional aid.

Article 3

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

Article 4

This Decision is addressed to the Kingdom of Belgium.

Done at Brussels, 24 April 2002.

For the Commission

Mario MONTI

Member of the Commission

COMMISSION DECISION**of 2 July 2002****on financial measures by Spain in respect of the coal industry in 2001 and in the period 1 January 2002 to 23 July 2002***(notified under document number C(2002) 2438)***(Only the Spanish text is authentic)****(Text with EEA relevance)**

(2002/826/ECSC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Coal and Steel Community,

Having regard to Commission Decision No 3632/93/ECSC of 28 December 1993 establishing Community rules for State aid to the coal industry ⁽¹⁾, and in particular Article 9(4) thereof,

Whereas:

I

(1) By letter of 7 November 2001, Spain notified the Commission, pursuant to Article 9(1) of Decision No 3632/93/ECSC, of the financial measures which it intended to take in respect of the coal industry in 2002.

(2) Decision No 3632/93/ECSC expires on 23 July 2002; the Commission may therefore authorise, under that Decision, only aid to the coal industry for a period extending not beyond that date. By letter of 10 December 2001, the Commission therefore requested the Spanish authorities to indicate the amounts of aid of each type for the period 1 January 2002 to 23 July 2002.

(3) By letters of 13 May 2002 and 10 June 2002, Spain sent the Commission the information requested. The Spanish authorities calculated the amounts of aid for the period 1 January 2002 to 23 July 2002 on the basis of a theoretical model taking account of the number of days of production during the abovementioned period in relation to the number of days of production in the whole of 2002.

(4) By letter of 15 May 2002, the Commission requested information from Spain on repayment by the undertaking Minas de la Camocha SA of part of the aid not authorised by the Commission by Decision 98/635/ECSC ⁽²⁾. Spain replied to the Commission by two letters of 28 May 2002.

(5) Spain also notified the Commission, by letter of 25 September 2001, of the production costs per undertaking for 2000.

(6) In a further letter of 13 May 2002, Spain notified the Commission, pursuant to Article 9(2) of Decision No 3632/93/ECSC, of the amount of aid actually paid during the 2001 coal production year.

(7) Pursuant to Decision No 3632/93/ECSC, the Commission must take a decision on the following financial measures relating to the period 1 January 2002 to 23 July 2002:

(a) aid of EUR 374 631 976 to cover operating losses by coal undertakings;

(b) aid of EUR 268 196 000 to cover exceptional welfare aid paid to workers who lose their jobs as a result of the measures to modernise, rationalise, restructure and reduce the activity of the coal industry;

(c) aid of EUR 8 950 000 to cover the technical costs of closing down mining installations as a result of the measures to modernise, rationalise, restructure and reduce the activity of the coal industry.

⁽¹⁾ OJ L 329, 30.12.1993, p. 12.

⁽²⁾ OJ L 303, 13.11.1998, p. 47.

- (8) The Commission must also take a decision on aid of EUR 1 724 904,74 (ESP 287 million) which Spain plans to grant to Minas de la Camocha SA for 2001 and which was not authorised by the Commission in Decision 2002/241/ECSC⁽³⁾.
- (9) The financial measures proposed by Spain for the coal industry fall within the provisions of Article 1 of Decision No 3632/93/ECSC. The Commission must therefore take a decision on such measures in accordance with Article 9(4) of the Decision. The Commission's assessment will depend on the compliance of the measures with the general criteria and objectives laid down in Article 2 and the specific criteria established by Articles 3 and 4 of the Decision, and on their compatibility with the proper functioning of the common market. Additionally, in accordance with Article 9(6) of the Decision, the Commission when conducting its assessment must check whether the measures conform with the modernisation, rationalisation, restructuring and activity-reduction plan which the Commission approved in its Decision 98/637/ECSC⁽⁴⁾.
- (10) By Decision 98/637/ECSC, the Commission recognised the conformity of the 1998 to 2002 phase of the plan notified by Spain for modernisation, rationalisation, restructuring and activity-reduction in the coal industry with the general and specific objectives of Decision No 3632/93/ECSC.
- (11) In Decision 2002/241/ECSC, the Commission withheld authorisation for aid of EUR 1 724 904,74 (ESP 287 million) for Minas de la Camocha SA for 2001, due to the failure to repay a sum equivalent to the amount not authorised by the Commission in Decision 98/635/ECSC plus interest at the market rate. By letter of 28 May 2002, Spain notified the Commission that Minas de la Camocha SA had not repaid the aid of EUR 1 724 904,74 not authorised by Decision 98/635/ECSC and that Spain had paid the undertaking an advance equivalent to the amount not authorised by the Commission for 2001.
- (12) The Commission has analysed the measures taken to modernise, rationalise, restructure and reduce activity in other Spanish coal undertakings during 2001 and the measures notified for the period 1 January 2002 to 23 July 2002 and has found that, except for the analysis which has to be made of the measure referred to in recital 11, they correspond to the plans which it declared, by Decision 98/637/ECSC, to be in conformity with Decision No 3632/93/ECSC.
- (13) Coal production in Spain in 2001 totalled 13 821 227 tonnes (8 720 603 tonnes coal equivalent or tce), 20,60 % lower than in 1997. The production forecast for 2002 is 12 955 508 tonnes (8 174 371 tce), i.e. 6,62 % lower than in 2001.
- (14) The number of workers in the undertakings fell from 22 840 at the end of 1997 to 14 159 at the end of 2001. A net reduction of 1 000 workers is forecast for 2002.
- (15) Installations with a total production capacity of 4 million tonnes per year closed down or reduced their activity during the 1998 to 2002 phase of Spain's modernisation, rationalisation, restructuring and activity-reduction plan.
- (16) These reductions, which are larger than those initially envisaged, are due to the inclusion in activity-reduction plans, in conformity with Article 4 of Decision No 3632/93/ECSC, of undertakings which were unable to meet the conditions which would entitle them to operating aid under Article 3 of the Decision.
- (17) By letter of 25 September 2001, Spain notified the Commission of the undertakings' production costs in 2000. The Commission's analysis of the trend in the production costs of the undertakings or production units in receipt of operating aid in 2000 (Article 3 of Decision No 3632/93/ECSC) revealed a mean reduction in the cost of production, at 1992 prices, from ECU 92,62/tce in 1994 to EUR 72,30/tce in 2000. This mean reduction of 21,94 % between 1994 and 2000 breaks down into a reduction of more than 30 % for 27,60 % of production, between 20 % and 30 % for 28,30 % of production, between 10 % and 20 % for 22,80 % of production and between 0 % and 10 % for 21,30 % of production.

⁽³⁾ OJ L 82, 26.3.2002, p. 11.

⁽⁴⁾ OJ L 303, 13.11.1998, p. 57.

- (18) The production units in the María Group of Minero Siderúrgica de Ponferrada SA, the Escandal Group of Coto Minero del Sil SA, the Tres Amigos and Samuño pits and the opencast mines of Hunosa closed down in 2001. The undertakings Antracitas de Gillón SA, Coto Minero Jove SA (Jovesa), Industrial y Comercial Minera SA (Incomisa), Minas de la Camocha SA, González y Díez SA, Hulleras del Norte SA, Minas de Escucha SA, Promotora de Minas de Carbón SA, Mina Escobal SL, Minas de Valdeloso SL and Virgilio Riesco SA plus the underground production units of Endesa and Encasur are included in closure/activity-reduction plans which provide for the closure, by 2005 at the latest, of production capacity of 1 660 000 tonnes per year. The Commission has checked that the conditions laid down in Article 3(2) of Decision No 3632/93/ECSC cannot be achieved by these undertakings or production units, which do, however, qualify for activity-reduction aid in accordance with Article 4 of the Decision. Following expiry of the Treaty, Spain will meet the undertakings to close production units, given when Decision No 3632/93/ECSC was in force.
- (19) The aid notified by Spain to cover operating losses for the period 1 January 2002 to 23 July 2002 provides for a reduction in production aid, compared with the same period in 2001, of 4 % at current currency values, in line with the objective of degression of aid. The aid under Articles 3 and 4 of Decision No 3632/93/ECSC is intended to cover all or part of the difference between the production costs and the selling price freely agreed between the contracting parties in the light of the conditions prevailing on the world market.
- (20) In accordance with Article 2(2) of Decision No 3632/93/ECSC, all the aid which Spain plans to grant to the coal industry for the period 1 January 2002 to 23 July 2002 has been entered in national, regional or local public budgets. Part of this aid to Hunosa could be channelled via SEPI (Sociedad Estatal de Participaciones Industriales), a public group of which Hunosa is part.
- (21) In view of the above, the Commission must examine whether the failure by Minas de la Camocha SA to comply with the conditions laid down in Decisions 98/635/ECSC and 2002/241/ECSC implies that the Commission cannot authorise the aid not authorised in Decision 2002/241/ECSC or the aid to this undertaking notified by Spain for the period 1 January 2002 to 23 July 2002. The other measures notified by Spain for the period from 1 January 2002 to 23 July 2002 are deemed to be in line with the general objectives of the modernisation, rationalisation, restructuring and activity-reduction plans approved by the Commission in Decision 98/637/ECSC.
- III**
- (22) The aid of EUR 374 631 976 which Spain plans to grant the coal industry for the period 1 January 2002 to 23 July 2002 is intended to compensate in full or in part for operating losses sustained by coal undertakings.
- (23) It is intended to cover the difference between the production costs and the selling price freely agreed between the contracting parties in the light of the conditions prevailing on the world market.
- (24) The sum notified subdivides into operating aid of EUR 162 840 571 under Article 3 of Decision No 3632/93/ECSC and activity-reduction aid of EUR 211 791 406 under Article 4 of the same Decision.
- (25) The operating aid of EUR 162 840 571 is intended to cover the operating losses of 37 undertakings with a combined forecast production of 6 004 365 tonnes in the period 1 January 2002 to 23 July 2002.
- (26) The Commission notes, after verifying the production costs of the undertakings receiving operating aid, that the downward trend of production costs at 1992 prices observed in the period 1994 to 2000 will continue in 2002. A reduction of 3,40 % is forecast for 2002, compared with 2001.
- (27) The mean production cost in 2000, at 1992 prices, of the undertakings receiving aid under Article 3 of Decision No 3632/93/ECSC is EUR 72,30/tce, equivalent to EUR 102,50 at current prices. This production cost, at 1992 prices, breaks down as follows:
- 25,70 % of production at costs below EUR 60/tce,
 - 29,60 % of production at costs between EUR 60 and 79/tce,
 - 43,10 % of production at costs between EUR 80 and 99/tce,
 - 1,60 % of production at costs between EUR 100 and 119/tce.

(28) The mean selling price to thermal power stations of the 6 004 365 tonnes (3 757 853 tce) of production forecast in the period 1 January 2002 to 23 July 2002 by the undertakings receiving operating aid (Article 3 of Decision No 3632/93/ECSC) is EUR 58/tce. Given that the forecast mean production cost in 2002 is EUR 99,21/tce, the Commission notes that the aid notified corresponds to the difference between the cost of production and the selling price freely agreed between the contracting parties in the light of the conditions prevailing on the world market.

(29) The aid of EUR 211 791 406 to reduce activity is intended to cover the operating losses of the following undertakings which have been included in closure and/or activity-reduction plans in conformity with Article 4 of Decision No 3632/93/ECSC:

- Hunosa (EUR 186 609 403),
- Minas de la Camocha SA (EUR 9 561 097),
- the underground workings of Endesa (EUR 2 397 850),
- the underground workings of Encasur (EUR 1 175 001),
- Antracitas de Guillón (EUR 2 307 971),
- Coto Minero Jove SA (EUR 2 385 577),
- Industrial y Comercial Minera SA (Incomisa) (EUR 516 506),
- Mina Escobal SL (EUR 177 154),
- Minas de Escucha SA (EUR 1 034 911),
- Minas de Valdeloso SL (EUR 339 383),
- Promotora de Minas de Carbón SA (EUR 1 001 670), and
- Virgilio Riesco SA (EUR 658 577).

The total annual production capacity of these production units is 1 553 015 tonnes.

(30) Part (EUR 128 024 167) of the aid of EUR 186 609 403 to Hunosa will be granted via SEPI. However, following the consolidation of the balance

sheets of the undertakings which form part of SEPI, Hunosa could be compensated by that group through any tax credit it might receive as a result of lower company tax. In such a case, the aid authorised for Hunosa for the period 1 January 2002 to 23 July 2002 under this Decision will be reduced by any compensation Hunosa may receive as a tax credit on company tax following the consolidation of the balance sheets of the undertakings which are part of SEPI.

(31) By letter of 14 August 2001, Spain informed the Commission that Minas de la Camocha SA had not repaid ESP 226 million out of the total of ESP 665 million which had not been authorised by the Commission for that undertaking in Decision 98/635/ECSC but had been paid in anticipation of authorisation from the Commission. In its letter dated 14 August 2001, Spain informed the Commission that it was still taking action to obtain repayment of the aid. On the basis of this information, in Decision 2002/241/ECSC the Commission withheld authorisation for EUR 1 724 904,74 (ESP 287 million) of the aid notified by Spain for 2001, equivalent to the amount not repaid by Minas de la Camocha SA. This sum of EUR 1 724 904,74 (ESP 287 million) represents the original amount to be repaid (ESP 226 million), plus interest at the market rate from 1996 to 2001. By letter of 15 May 2002, the Commission requested Spain for information about repayment of this sum of EUR 1 724 904,74. By letter of 28 May 2002, Spain replied that Minas de la Camocha SA had not repaid it and that Spain had decided to reduce the aid intended for this undertaking in 2002, to bring the aid into line with actual production. Spain also notified the Commission that Minas de la Camocha SA had initiated proceedings before the competent courts in Spain against the decision by the Spanish authorities to reduce the aid granted to it in 2002. By letter of 28 May 2002, Spain notified the Commission that it had paid a cash advance of EUR 1 724 904,74 (ESP 287 million) for 2001 which had not been authorised by the Commission in Decision 2002/241/ECSC.

(32) Minas de la Camocha SA has failed to comply with Decision 98/635/ECSC. The Commission has repeatedly asked Spain to submit its comments. The reason given by Spain for its plans to reduce the aid for 2002 is the need to bring the aid into line with actual production at the mine. The Commission considers that this adjustment by no means exempts Minas de la Camocha SA from its obligation to repay the unauthorised aid. The Commission cannot authorise the aid of EUR 1 724 904,74 for Minas de la Camocha SA in

2001, for which it withheld authorisation in Decision 2002/241/ECSC, nor the aid of EUR 9 561 097 which Spain plans to grant to the undertaking for the period 1 January 2002 to 23 July 2002. Spain must adopt all the measures necessary in order to recover from Minas de la Camocha SA the EUR 1 724 904,74 (ESP 287 million) not authorised by the Commission by Decision 98/635/ECSC.

for the period 1 January 2002 to 23 July 2002 is compatible with Articles 3 and 4 of Decision No 3632/93/ECSC and with the proper functioning of the common market.

IV

- (33) The mean selling price to thermal power stations of the 1 553 015 tonnes (997 923 tce) of production forecast in the period 1 January 2002 to 23 July 2002 by undertakings in receipt of aid to reduce activity pursuant to Article 4 of Decision No 3632/93/ECSC is EUR 54/tce. Given that the forecast mean cost of this production in 2002 is EUR 265,46/tce, the Commission notes that the aid notified corresponds to the difference between the cost of production and the selling price freely agreed between the contracting parties in the light of the conditions prevailing on the world market.
- (34) The aid to cover the operating losses sustained by coal undertakings has been entered in the general State budget for 2002. It is 4 % lower than the aid authorised by the Commission for the equivalent period of 2001. Spain notified the Commission of Resolution 9567 of 11 April 2002 containing the agreement by the Spanish Council of Ministers on the company-by-company allocation of this aid. This Resolution has been published in Spain's *Boletín Oficial del Estado* ⁽⁵⁾.
- (35) The inclusion of this measure in the modernisation, rationalisation, restructuring and activity-reduction plan notified by Spain, and the reduction in the aid and quantities envisaged for 2002, are in line with the objectives of the first and second indents of Article 2(1) of Decision No 3632/93/ECSC, and in particular the objective of solving the social and regional problems created by developments in the coal industry.
- (36) Except for aid to Minas de la Camocha SA of EUR 1 724 904,74 for 2001 and of EUR 9 561 097 for the period 1 January 2002 to 23 July 2002, on the basis of the information provided by Spain the aid proposed
- (37) The aid of EUR 268 196 000 which Spain proposes to grant is intended to cover, with the exception of the costs for the payment of social welfare benefits borne by the State as a special contribution pursuant to Article 56 of the Treaty, compensation paid to workers in Spanish coal undertakings who have lost their jobs or have had or will have to take early retirement under the modernisation, rationalisation, restructuring and activity-reduction plan for the Spanish coal industry.
- (38) Part of this aid, totalling EUR 190 666 000, will be granted to Hunosa to cover the cost of the 475 workers who will take early retirement in the period 1 January 2002 to 23 July 2002. This amount corresponds to payment of an insurance premium to cover the cost of early retirement until the recipients reach statutory retirement age. Part of the aid will be granted to Hunosa via SEPI.
- (39) The remaining EUR 77 530 000 is intended to cover compensation for some 7 000 workers from other undertakings in early retirement by 23 July 2002 as a result of the modernisation, rationalisation, restructuring and activity-reduction measures for the Spanish coal industry.
- (40) This aid, designed to cover exceptional costs arising from modernisation, rationalisation, restructuring and activity-reduction measures in the Spanish coal industry, has been entered in the general State budgets for 2002.
- (41) These financial measures relate to action made necessary by the modernisation, rationalisation and restructuring of the Spanish coal industry and cannot therefore be considered to be related to current production (inherited liabilities).
- (42) Pursuant to Article 5 of Decision No 3632/93/ECSC, the aid mentioned explicitly in the Annex to the Decision, namely the cost of paying social-welfare benefits resulting from the pensioning-off of workers before they reach statutory retirement age and other exceptional

⁽⁵⁾ BOE No 118, 17.5.2002, p. 17878.

expenditure on workers who lose their jobs as a result of restructuring and rationalisation, may be considered compatible with the common market provided that the amount paid does not exceed the costs.

- (43) In view of the above and on the basis of the information provided by Spain, the Commission considers that this aid is compatible with Article 5 of Decision No 3632/93/ECSC and with the proper functioning of the common market.

V

- (44) The aid of EUR 8 950 000 which Spain proposes to grant to Hunosa is intended to cover exceptional costs that have arisen from the progressive closures connected with the restructuring of the Spanish coal industry. This aid is granted via SEPI.
- (45) These financial measures relate to action made necessary by the modernisation, rationalisation and restructuring of the Spanish coal industry and cannot therefore be considered to be related to current production (inherited liabilities).
- (46) Pursuant to Article 5 of Decision No 3632/93/ECSC, the aid mentioned explicitly in the Annex to the Decision, namely exceptional intrinsic depreciation provided that it results from the restructuring of the industry (without taking account of any revaluation which has occurred since 1 January 1986 and which exceeds the rate of inflation) and other additional work and residual costs arising from closures of installations, can be considered compatible with the common market provided that the amount paid does not exceed the costs.
- (47) Spain must ensure that the aid granted to Hunosa to cover exceptional costs is in line with the categories of costs specified in the Annex to Decision No 3632/93/ECSC.
- (48) On the basis of the information provided by Spain, this aid is compatible with Article 5 of Decision No 3632/93/ECSC and with the proper functioning of the common market.

VI

- (49) The aid granted by Spain to the coal industry is restricted to coal production destined to be used for electricity production. Spain undertakes to ensure that coal sold to the industrial and domestic sectors is sold at prices (without compensation) that cover the costs of production.
- (50) Spain must ensure that the aid granted to current production under this Decision does not give rise to any discrimination between coal producers, between purchasers or between users on the Community coal market.
- (51) Spain must ensure that, in accordance with the third indent of Article 3(1) of Decision No 3632/93/ECSC, aid to cover the difference between the cost of production and the selling price per tonne does not cause selling prices for Community coal to be lower than those for coal of a similar quality from non-member countries.
- (52) Spain must ensure that, within the framework of the provisions of Article 86 of the Treaty, the aid is limited to that which is strictly necessary in the light of the social and regional considerations which characterise the decline of the Community's coal industry. The aid may not give any economic advantage, whether directly or indirectly, to production for which no aid is authorised or to other activities distinct from coal production. In particular, Spain must ensure that aid granted to undertakings under Article 5 of Decision No 3632/93/ECSC to cover the technical costs of closure is not used by the undertakings as aid for current production (Articles 3 and 4 of the Decision) and that the closure of capacity for which the aid is intended is definitive and that it is carried out in optimum conditions of safety and environmental protection.
- (53) In accordance with the second indent of Article 3(1) and with Article 9(2) and (3) of Decision No 3632/93/ECSC the Commission must verify that the aid authorised for current production responds exclusively to the objectives stated in Articles 3 and 4 of the Decision. Spain must notify the Commission, no later than 30 September 2003, of the amount of aid actually paid for the period 1 January 2002 to 23 July 2002 and declare any corrections made to the amounts originally notified. When submitting this statement, Spain must also supply all the information necessary for verification of compliance with the criteria set out in the Articles in question.

(54) In approving the aid, the Commission has recognised the need to soften, as far as possible, the social and regional impact of the restructuring of the coal industry, given the economic and social situation in the regions surrounding the mines affected.

(55) In view of the above, and on the basis of the information provided by Spain, the aid and the measures proposed for the coal industry are compatible with the objectives of Decision No 3632/93/ECSC and with the proper functioning of the common market,

HAS ADOPTED THIS DECISION:

Article 1

Spain is hereby authorised to pay the following aid in respect of the period from 1 January 2002 to 23 July 2002:

- (a) operating aid of EUR 162 840 571 under Article 3 of Decision No 3632/93/ECSC;
- (b) aid for the reduction of activity of EUR 202 230 309 under Article 4 of Decision No 3632/93/ECSC; this amount will be deducted from any compensation that Hunosa may receive as tax credit on company tax following the consolidation of the balance sheets of the undertakings incorporated in SEPI;
- (c) aid of EUR 268 196 000 under Article 5 of Decision No 3632/93/ECSC to cover exceptional welfare aid for workers who lose their jobs as a result of the measures to modernise, rationalise, restructure and reduce the activity of the Spanish coal industry;
- (d) aid of EUR 8 950 000 under Article 5 of Decision No 3632/93/ECSC to cover the technical costs of closing down mining installations as a result of the measures to modernise, rationalise, restructure and reduce the activity of the Spanish coal industry.

Article 2

The Commission cannot authorise the State aid notified by Spain for Minas de la Camocha SA of EUR 1 724 904,74 for

2001 and EUR 9 561 097 for the period 1 January 2002 to 23 July 2002, under Article 4 of Decision No 3632/93/ECSC.

Article 3

1. Spain shall adopt all necessary measures to recover from Minas de la Camocha SA the amount of EUR 1 364 267,11, which was not authorised by the Commission in its Decision 98/635/ECSC.

2. Recovery shall take place without delay, in accordance with the procedures laid down by national law, provided they allow immediate, effective implementation of this Decision. The aid to be recovered shall be liable to interest payable at the market rates from the date on which it was placed at the disposal of the recipient to the date of recovery thereof.

Article 4

Spain shall ensure that the aid authorised is used exclusively for the purposes intended and that any unspent, overestimated or incorrectly used aid for any item covered by this Decision is repaid to it.

Article 5

Spain shall notify the Commission, by 30 September 2003 at the latest, of the amount of aid actually paid in respect of the period 1 January 2002 to 23 July 2002.

Article 6

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 2 July 2002.

For the Commission

Loyola DE PALACIO

Vice-president

COMMISSION DECISION

of 2 July 2002

on the granting by Spain of aid to the undertaking González y Díez SA in 1998, 2000 and 2001

(notified under document number C(2002) 2441)

(Only the Spanish text is authentic)

(Text with EEA relevance)

(2002/827/ECSC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Coal and Steel Community,

Having regard to Commission Decision No 3632/93/ECSC of 28 December 1993 establishing Community rules for State aid to the coal industry ⁽¹⁾, and in particular Articles 2(1) and 9 thereof,

Whereas:

Commission. Furthermore, in conformity with Decision No 3632/93/ECSC, the Commission must decide on the following aid granted to González y Díez SA in respect of 2001:

- (a) operating aid of EUR 6 704 295,70 (ESP 1 115 500 944) for 2001 under Article 3 of Decision No 3632/93/ECSC;
- (b) aid of EUR 2 367 817,00 (ESP 393 971 600) for 2001 to cover exceptional costs under Article 3 of Decision No 3632/93/ECSC.

I

- (1) By Decision 2002/241/ECSC of 11 December 2001 on the granting by Spain of aid to the coal industry in 2001 ⁽²⁾, the Commission authorised part of the proposed aid to González y Díez SA and announced that it would decide on the balance once it received the additional information requested from Spain.
- (2) By letter of 13 December 2001 the Commission invited Spain, pursuant to Article 88 of the Treaty, to submit its comments on the use of the aid granted to González y Díez SA in 1998, 2000 and 2001 to cover exceptional costs of restructuring in conformity with Article 5 of Decision No 3632/93/ECSC. Spain replied to the Commission by letters of 28 February 2002 and 24 April 2002.

- (3) The Commission must analyse whether the aid of EUR 3 918 049,35 (ESP 651 908 560) and EUR 2 786 246,34 (ESP 463 592 384) granted by Spain to González y Díez SA in 1998 and 2000 respectively under Article 5 of Decision No 3632/93/ECSC was used by that undertaking for the purposes authorised by the

- (4) The financial measures proposed by Spain for González y Díez SA fall within the scope of Article 1 of Decision No 3632/93/ECSC. The Commission must therefore decide on these measures in accordance with Article 9(4) of the Decision. The Commission's assessment will be based on the compliance of the measures with the general criteria and objectives laid down in Article 2 and with the specific criteria established by Articles 3, 4 and 5 of the Decision, and on their compatibility with the proper functioning of the common market. In addition, in accordance with Article 9(6) of the Decision, the Commission must check whether the measures notified conform with Spain's modernisation, rationalisation, restructuring and activity-reduction plan which the Commission approved in Decision 98/637/ECSC ⁽³⁾.

II

- (5) On 11 June 1999, Minas la Camocha SA published its annual report for 1998. As reported in the press on 12 June 1999, the company board referred to 'the purchase in 1998 of a 100 % stake in González y Díez SA for a total of ESP 784 million, financed by a bank

⁽¹⁾ OJ L 329, 30.12.1993, p. 12.

⁽²⁾ OJ L 82, 26.3.2002, p. 11.

⁽³⁾ OJ L 303, 13.11.1998, p. 57.

loan'. The press also reported that, in 1998, González y Díez SA achieved profits of ESP 700 million through cutting coal production by 48 000 tonnes, for which the company had received aid totalling ESP 652 million. Moreover, at the end of December 1998, González y Díez SA transferred funds amounting to ESP 700 million to Minas la Camocha SA.

- (6) By letter of 15 July 1999, the Commission asked Minas la Camocha SA and González y Díez SA to forward their annual reports for 1998. The Commission received the reports on 26 July 1999. It examined Minas la Camocha SA's annual report for 1998 and concluded that the undertaking had acquired 100 % of the shares in González y Díez SA on 23 July 1998 at a cost of ESP 784 439 000 pesetas. The balance sheet of Minas la Camocha SA showed financial assets on 31 December 1998 amounting to ESP 784 439 000 in the form of 'holdings in associated companies'. Its liabilities include ESP 700 million in 'debts with associated companies'. Note 15 in the report states that González y Díez SA transferred funds totalling ESP 600 million and ESP 100 million on 29 December 1998 and 30 December 1998 respectively to Minas la Camocha SA.
- (7) The annual report of González y Díez SA for 1998 shows that the company received State aid of ESP 651 908 560 as compensation for reducing coal production by 48 000 tonnes per annum. The operating account for 1998 shows exceptional operating profits of ESP 700 015 591. The report also shows that, on 29 December 1998 and 30 December 1998, funds totalling ESP 600 million and ESP 100 million respectively were transferred to Minas la Camocha SA.
- (8) According to its annual report, on 11 November 1998 González y Díez SA signed a rider to the contract of 13 March 1998 with Unión Eléctrica Fenosa SA reducing by 48 000 tonnes the quantity of coal it had to supply to Térmica de Soto de la Barca, which thus amounts to 238 000 tonnes per annum for the period 1999–2000. The report makes no reference to closure of installations as a consequence of this cut in production and mentions changes made to the exploitation systems which had resulted in a reduction in the activities of open-cast subcontractors, with González y Díez SA itself having carried out virtually all the coal extraction activities.
- (9) Having examined the accounts of González y Díez SA for 1998, the Commission considers that the aid totalling ESP 651 908 560 granted to the company to cover the technical costs of closing down extraction installations corresponding to an annual production capacity of 48 000 tonnes was not used to cover the costs that have resulted or result from the restructuring of the coal industry, defined in the Annex to Decision No 3632/93/ECSC.
- (10) The Commission considers that the gross profits from González y Díez SA's current operations in 1998 amounting to ESP 932 911 952 and the net profits for the year amounting to ESP 700 015 591 are the result of using aid destined to cover exceptional restructuring costs (Article 5 of Decision No 3632/93/ECSC) as operating aid (Article 3 of Decision No 3632/93/ECSC). The use of this aid as operating aid is incompatible with the first indent of Article 3(1) of Decision No 3632/93/ECSC, which provides that the aid per tonne may not exceed, for each undertaking or production unit, the difference between the production cost and the selling price. The company generated abnormally high profits of ESP 700 015 591. The profits for 1998 are much higher than those for the preceding years, which amounted to ESP 141 084 825 in 1997 and ESP 65 722 182 in 1996. The profits for 1998 amounted to ESP 50 420 961 on 30 June 1998, i.e. before the acquisition by Minas la Camocha SA of 100 % of the shares of González y Díez SA. Moreover, account must be taken of the fact that these operating profits result from the grant of operating aid authorised by the Commission under Article 3 of Decision No 3632/93/ECSC totalling ESP 1 366 000 000 in 1998.
- (11) The Commission considers that the transfer of ESP 600 million and ESP 100 million by González y Díez SA to Minas la Camocha SA on 29 and 30 December 1998 respectively was made possible by the profits González y Díez SA earned in 1998 from the aid to cover exceptional costs of closure. Consequently, the Commission considers that the aid of ESP 651 908 560 was used for the purchase of González y Díez SA by Minas la Camocha SA.
- (12) The Commission considers that the acquisition by Minas la Camocha SA of González y Díez SA would not have taken place on 23 July 1998 if there had not been the prospect of receiving extraordinary income. According to the annual reports, the value of the company acquired (González y Díez SA) is twice that of the purchasing

company (Minas la Camocha SA). Furthermore, Minas la Camocha SA's financial structure is very weak: its assets totalling ESP 22 443 136 000 on 31 December 1998 are 46 times greater than its equity on the same date totalling ESP 481 403 000. Moreover, Minas la Camocha SA is covered by a closure plan and receives aid for the reduction of activity under Article 4 of Decision No 3632/93/ECSC.

- (13) By letter of 25 October 1999, the Commission asked Spain to provide additional information on the measures taken by González y Díez SA in 1998 to close down installations together with a justification of the costs of such measures. It also requested information on the utilisation of aid totalling ESP 651 908 560 to cover exceptional costs of closure and on the possible utilisation of such aid for the acquisition by Minas la Camocha SA of González y Díez SA. The information in question had to be audited by an external firm.
- (14) By letter of 2 December 1999, Spain forwarded to the Commission the information provided by González y Díez SA and stated that it would examine the issues raised by the Commission. González y Díez SA, for its part, acknowledges the accuracy of the Commission's information and accepts that the operating profits for 1998 included aid of ESP 651 908 560 destined to cover exceptional costs of closure. However, González y Díez SA stresses that it does not share the Commission's interpretation as to the use of the aid. With regard to the transfer of ESP 600 million and ESP 100 million to Minas la Camocha SA at the end of 1998, González y Díez SA explained that this concerned two loans which were repaid with interest before 2 August 1999. As to the exceptional costs of closure, the company report does not provide an explanation of the exceptional costs resulting from the restructuring of González y Díez SA. On the contrary, it refers to expenditure of ESP 319 896 354 for the repayment of loans and subsidies not related to restructuring, expenditure of ESP 232 589 000 by way of investment in equipment for open-cast working, and expenditure of ESP 158 973 459 in investment for the modernisation of underground workings, none of which are related to the closure of the installations.
- (15) Spain continues to grant González y Díez SA aid of ESP 463 592 000 in respect of 2000 and ESP 393 971 600 in respect of 2001 to cover exceptional costs of reducing production by 38 000 tonnes in 2000 and 34 000 tonnes in 2001. By letter of 17 July 2001, the Commission asked Spain to refrain from paying the aid scheduled for 2001. In spite of this request, Spain proceeded with payment.
- (16) By letters of 7 September 2000 and 24 April 2001, the Commission asked Spain for additional information about the aid it had granted in 1998 and 2000 or planned to grant in 2001 to González y Díez SA destined to cover exceptional closure costs. Spain replied by letter of 29 June 2001 and also provided the Commission with a technical and financial report prepared by González y Díez SA. The Commission, considering this report to be unsatisfactory, questioned several aspects of the justification of these costs by letter of 17 July 2001.
- (17) Following Decision 2002/241/ECSC the Commission invited Spain to comment in accordance with Article 88 of the Treaty on the utilisation of the aid granted in 1998, 2000 and 2001 to González y Díez SA to cover the exceptional costs of closure. By letter of 13 December 2001, it set a deadline of 15 working days for a reply. By letter of 9 January 2002, Spain asked for an extension of this deadline, to which the Commission agreed by letter of 18 January 2002.
- (18) By letters of 28 February 2002 and 24 April 2002, Spain forwarded to the Commission the technical reports from González y Díez SA dated 13 February 2002 and 26 February 2002 respectively. These reports were accompanied by a technical and financial audit of plant closure costs totalling ESP 658 700 000 (EUR 3 958 866,73) in connection with an annual reduction in production capacity of 120 000 tonnes in 1998, 2000 and 2001.
- (19) The Commission's analysis of the data notified by Spain shows that the costs of closing down production installations equivalent to an annual capacity reduction of 120 000 tonnes in 1998, 2000 and 2001 amount to EUR 3 958 866,73 (ESP 658 700 000). The aid of EUR 9 072 112,69 (ESP 1 509 472 542) granted in 1998, 2000 and 2001 exceeds the costs of plant closure totalling EUR 5 113 245,96 (ESP 850 772 542,30).

- (20) In view of the above and on the basis of the information provided by Spain, the aid totalling EUR 5 113 245,96 (ESP 850 772 542,30) is not compatible with Article 5 of Decision No 3632/93/ECSC and consequently is not compatible with the proper functioning of the common market.
- (21) Part of the aid, amounting to EUR 2 745 428,96 (ESP 456 800 942,90), was granted for 1998 and 2000 and must be repaid to Spain by González y Díez SA.
- (22) The balance of EUR 2 367 817,00 (ESP 393 971 600) which Spain notified to the Commission in respect of 2001 is not consistent with Article 5 of Decision No 3632/93/ECSC. The payment by Spain of this amount in anticipation of a Commission decision must be seen as an unjustified cash advance under Article 9(5) of Decision No 3632/93/ECSC. Consequently, the aid to be refunded must include interest charged at the market rate.
- (23) González y Díez SA has set an average selling price for 2001 of approximately EUR 51/tce (ESP 8 480/tce) for the sale of 200 000 tonnes of its coal production (147 400 tce) to power stations. Compared with the average production cost of EUR 92/tce (ESP 15 307/tce) envisaged for 2001, the Commission notes that the notified aid corresponds to the difference between the cost of production and the selling price freely agreed by the contracting parties in the light of the conditions prevailing on the world market.
- (24) In Decision 2002/241/ECSC the Commission did not rule on aid totalling EUR 6 704 295,70 (ESP 1 115 500 944), pending the communication to it by Spain of information on the utilisation by González y Díez SA of the sum of EUR 9 072 112,70 (ESP 1 509 472 544) granted by Spain to cover exceptional costs of restructuring. Spain communicated this information to the Commission by letters of 28 February 2002 and 24 April 2002, so that the Commission can now decide on the aid to current production totalling EUR 6 704 295,70 (ESP 1 115 500 944) in respect of 2001 (Articles 3 and 4 of Decision No 3632/93/ECSC).

III

- (25) The aid of EUR 6 704 295,70 (ESP 1 115 500 944) which Spain plans to grant González y Díez SA for 2001 is intended to offset all or part of the operating losses of its production units.
- (26) This aid is intended to cover the difference between the cost of production and the selling price freely agreed between the contracting parties in the light of the conditions prevailing on the world market.
- (27) The amount notified comprises operating aid of EUR 5 850 488,28 (ESP 973 439 343) under Article 3 of Decision No 3632/93/ECSC and aid for the reduction of activity of EUR 853 807,42 (ESP 142 061 601) under Article 4 of the Decision.
- (28) The operating aid of EUR 5 850 488,28 (ESP 973 439 343) is intended to cover operating losses in respect of planned total production of 166 000 tonnes for 2001.
- (29) The aid for reduction of activity amounting to EUR 853 807,42 (ESP 142 061 601) is intended to cover operating losses in respect of planned production of 34 000 tonnes in 2001. Spain indicated that the undertaking would close this production capacity before the end of 2001.
- (30) The aid to cover González y Díez SA's operating losses has been included in the general State budget for 2001. Spain notified the Commission of its Council of Ministers' approval of the allocation of this aid to individual undertakings. The approval was published in the Boletín Oficial del Estado ⁽⁴⁾.
- (31) The inclusion of this measure in the modernisation, rationalisation, restructuring and activity-reduction plan notified by Spain and the degressive nature of the aid and the sums scheduled for 2001 are in line with the objectives laid down in the first and second indent of Article 2(1) of Decision No 3632/93/ECSC and, more specifically, contribute to resolving the social and regional problems relating to the development of the coal industry.
- (32) On the basis of the information provided by Spain, the aid amounting to EUR 6 704 295,70 (ESP 1 115 500 944) which Spain has planned to grant González y Díez SA in respect of 2001 is compatible with Articles 3 and 4 of Decision No 3632/93/ECSC and with the proper functioning of the common market.

⁽⁴⁾ BOE No 83, 6.4.2001, p. 13055.

IV

- (33) The aid granted by Spain to the coal industry is restricted to the production of coal for use in electricity generation. Spain is committed to ensuring that coal sold to the industrial and domestic sectors by González y Díez SA is sold at prices (without compensation) that cover the costs of production.
- (34) Spain must ensure that the aid granted to current production under this Decision does not give rise to any discrimination between coal producers, between purchasers or between users on the Community coal market.
- (35) Spain must ensure that, in accordance with the third indent of Article 3(1) of Decision No 3632/93/ECSC, aid to cover the difference between the cost of production and the selling price per tonne does not cause selling prices for Community coal to be lower than those for coal of a similar quality from non-member countries.
- (36) Within the framework of Article 86 of the Treaty, Spain must ensure that the aid is limited to that which is strictly necessary in the light of the social and regional considerations which characterise the decline of the Community's coal industry. The aid may not give any economic advantage, whether directly or indirectly, to production for which no aid is authorised or to other activities distinct from coal production. In particular, Spain must ensure that aid granted to undertakings under Article 5 of Decision No 3632/93/ECSC to cover the technical costs of closure is not used by the undertakings as aid to current production (Articles 3 and 4 of the Decision), that the closure of capacity for which the aid is intended is definitive and that it is carried out in optimum conditions of safety and environmental protection.
- (37) In accordance with the second indent of Article 3(1) and with Article 9(2) and (3) of Decision No 3632/93/ECSC the Commission must verify that the aid authorised for current production is used exclusively for the purposes laid down in Articles 3 and 4 of the Decision. Spain must notify the Commission, no later than 30 September 2002, of the amount of aid actually paid to González y Díez SA during 1998, 2000 and 2001, and declare any corrections made to the amounts originally notified. When submitting this annual statement of aid paid, Spain must also supply the Commission with all the information necessary for verification of the criteria set out in the Articles in question.
- (38) In approving the aid, the Commission has recognised the need to soften, as far as possible, the social and regional impact of the restructuring of the coal industry, given the economic and social situation relating to the mines affected.
- (39) In view of the above, and on the basis of the information provided by Spain, the aid and the measures proposed for the coal industry are compatible with the objectives of Decision No 3632/93/ECSC and with the proper functioning of the common market,
- HAS ADOPTED THIS DECISION:
- Article 1*
- The State aid totalling EUR 5 113 245,96 (ESP 850 772 542) granted by Spain to González y Díez SA to cover exceptional restructuring costs in 1998, 2000 and 2001 pursuant to Article 5 of Decision No 3632/93/ECSC is incompatible with the common market.
- Article 2*
- Spain shall adopt all necessary measures to recover from González y Díez SA the aid for 1998 and 2000 mentioned in Article 1, totalling EUR 2 745 428,96 (ESP 456 800 943).
 - Recovery shall take place within two months, in accordance with the procedures laid down by national law, provided they allow immediate, effective implementation of this Decision. The aid to be recovered shall be liable to interest charges at the market rate payable from the date on which it was placed at the disposal of the recipient to the date of recovery thereof.
 - The aid totalling EUR 2 367 817 (ESP 393 971 600) which Spain granted to González y Díez SA in respect of 2001 to cover exceptional restructuring costs in accordance with Article 5 of Decision No 3632/93/ECSC is not authorised.
- Article 3*
- Spain is hereby authorised to pay the following aid to González y Díez SA in respect of 2001:
- operating aid of EUR 5 850 488,28 (ESP 973 439 343) under Article 3 of Decision No 3632/93/ECSC;

- (b) aid for the reduction of activity of EUR 853 807,42 (ESP 142 061 601) under Article 4 of Decision No 3632/93/ECSC.

in full, by the undertaking which received it, within one month of notification of this Decision to Spain. González y Díez SA shall pay interest charges at the market rate on this amount.

Article 4

In accordance with Article 86 of the ECSC Treaty, Spain shall adopt all appropriate measures, whether general or particular, to ensure fulfilment of the obligations resulting from this Decision. It shall ensure that the aid authorised is used for the purposes intended and that any unspent, overestimated or incorrectly used aid for any item covered by this Decision is repaid to it.

Article 5

In accordance with Article 9(5) of Decision No 3632/93/ECSC, any payment made by Spain to González y Díez SA in anticipation of authorisation by the Commission in excess of the aid authorised for this undertaking in 2001 shall be repaid

Article 6

Spain shall notify the Commission, by 30 September 2002 at the latest, of the amount of aid actually paid to González y Díez SA in respect of 2001.

Article 7

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 2 July 2002.

For the Commission

Loyola DE PALACIO

Vice-president
