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Legislation

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⁽¹⁾ Text with EEA relevance

I

(Acts whose publication is obligatory)

COUNCIL REGULATION (EC) No 486/2006**of 20 March 2006****concerning the implementation of the Agreement on Duty-Free Treatment of Multi-Chip Integrated Circuits (MCPs) by amending Annex I to Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 133 thereof,

Having regard to the proposal from the Commission,

Whereas:

- (1) Council Regulation (EEC) No 2658/87 ⁽¹⁾ established a goods nomenclature, hereinafter referred to as the 'Combined Nomenclature', and set out the conventional duty rates of the Common Customs Tariff.
- (2) By its Decision 2005/964/EC ⁽²⁾, the Council has concluded, on behalf of the European Community, the Agreement on Duty-Free Treatment of Multi-Chip Integrated Circuits (MCPs) (hereinafter referred to as 'the Agreement').
- (3) The Agreement reduces to zero the rate of all customs duties and other duties and charges applied to MCPs.
- (4) The Secretary-General of the Council of the European Union as the depository designated by the Agreement

has received instruments of acceptance from four Parties. Pursuant to Article 7(a) of the Agreement, these four Parties have agreed that the Agreement shall enter into force on 1 April 2006.

- (5) The Agreement should therefore be implemented by amending Annex I to Regulation (EEC) No 2658/87,

HAS ADOPTED THIS REGULATION:

Article 1

In Annex I, Part One, Section II 'Special Provisions' of Regulation (EEC) No 2658/87, a letter G 'Duty-Free Treatment of Multi-Chip Integrated Circuits (MCPs)' as contained in the Annex to this regulation is added.

Article 2

This Regulation shall enter into force the day following its publication in the *Official Journal of the European Union*.

It shall apply from 1 April 2006.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 20 March 2006.

For the Council
The President
U. PLASSNIK

⁽¹⁾ OJ L 256, 7.9.1987, p. 1. Regulation as last amended by Regulation (EC) No 1989/2004 (OJ L 344, 20.11.2004, p. 5).

⁽²⁾ OJ L 349, 31.12.2005, p. 24.

ANNEX

'G. Duty-Free Treatment of Multi-Chip Integrated Circuits (MCPs)

1. Relief from customs duty is provided for multi-chip integrated circuits (MCPs) consisting of two or more interconnected monolithic integrated circuits combined to all intents and purposes indivisibly, whether or not on one or more insulating substrates, with or without lead frames, but with no other active or passive circuit elements.
 2. Goods eligible to this relief of customs duty are covered by the following headings: 8418, 8422, 8450, 8466, 8473, 8517, 8518, 8522, 8523, 8525, 8528, 8529, 8530, 8531, 8535, 8536, 8537, 8538, 8543, 8548, 8708, 9009, 9026, 9031, 9504.
 3. Upon presentation to the Member State's customs authorities of the customs declaration for release into free circulation of MCPs, the declarant shall indicate in box 44 of the Single Administrative Document ("SAD") the reference number C500.'
-

COMMISSION REGULATION (EC) No 487/2006**of 24 March 2006****establishing the standard import values for determining the entry price of certain fruit and vegetables**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Commission Regulation (EC) No 3223/94 of 21 December 1994 on detailed rules for the application of the import arrangements for fruit and vegetables ⁽¹⁾, and in particular Article 4(1) thereof,

Whereas:

- (1) Regulation (EC) No 3223/94 lays down, pursuant to the outcome of the Uruguay Round multilateral trade negotiations, the criteria whereby the Commission fixes the

standard values for imports from third countries, in respect of the products and periods stipulated in the Annex thereto.

- (2) In compliance with the above criteria, the standard import values must be fixed at the levels set out in the Annex to this Regulation,

HAS ADOPTED THIS REGULATION:

Article 1

The standard import values referred to in Article 4 of Regulation (EC) No 3223/94 shall be fixed as indicated in the Annex hereto.

Article 2

This Regulation shall enter into force on 25 March 2006.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 24 March 2006.

For the Commission

J. L. DEMARTY

*Director-General for Agriculture and
Rural Development*

⁽¹⁾ OJ L 337, 24.12.1994, p. 66. Regulation as last amended by Regulation (EC) No 386/2005 (OJ L 62, 9.3.2005, p. 3).

ANNEX

to Commission Regulation of 24 March 2006 establishing the standard import values for determining the entry price of certain fruit and vegetables

(EUR/100 kg)		
CN code	Third country code ⁽¹⁾	Standard import value
0702 00 00	052	97,9
	204	52,9
	212	102,0
	624	101,8
	999	88,7
0707 00 05	052	121,0
	999	121,0
0709 10 00	624	103,6
	999	103,6
0709 90 70	052	77,4
	204	53,8
	999	65,6
0805 10 20	052	40,8
	204	43,0
	212	54,3
	220	43,9
	624	59,3
	999	48,3
0805 50 10	052	42,2
	624	67,2
	999	54,7
0808 10 80	388	76,6
	400	127,9
	404	92,9
	508	82,7
	512	76,3
	524	62,5
	528	79,9
	720	80,0
	999	84,9
0808 20 50	388	82,6
	512	76,3
	524	58,2
	528	57,2
	720	122,5
	999	79,4

⁽¹⁾ Country nomenclature as fixed by Commission Regulation (EC) No 750/2005 (OJ L 126, 19.5.2005, p. 12). Code '999' stands for 'of other origin'.

COMMISSION REGULATION (EC) No 488/2006**of 24 March 2006****fixing the exchange rates applicable to structural or environmental measures in 2006**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 2799/98 of 15 December 1998 establishing agrimonetary arrangements for the euro ⁽¹⁾,

Having regard to Commission Regulation (EC) No 2808/98 of 22 December 1998 laying down detailed rules for the application of the agrimonetary system for the euro in agriculture ⁽²⁾, and in particular the second sentence of Article 4(3) thereof,

Whereas:

- (1) In accordance with Article 4(2) of Regulation (EC) No 2808/98, the operative event for the amounts of a structural or environmental character is 1 January of the year during which the decision to grant the aid is taken.

- (2) In accordance with the first sentence of Article 4(3) of Regulation (EC) No 2808/98 the exchange rate to be used is the average of the exchange rates applicable during the month preceding the date of the operative event, calculated *pro rata temporis*,

HAS ADOPTED THIS REGULATION:

Article 1

In 2006, the exchange rate shown in the Annex shall apply to the amounts of a structural or environmental character referred to in Article 4(2) of Regulation (EC) No 2808/98.

Article 2

This Regulation shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 24 March 2006.

For the Commission

Mariann FISCHER BOEL

Member of the Commission

⁽¹⁾ OJ L 349, 24.12.1998, p. 1.

⁽²⁾ OJ L 349, 24.12.1998, p. 36 Regulation last amended by Regulation (EC) No 1044/2005 (OJ L 172, 5.7.2005, p. 76).

ANNEX

Exchange rates referred to in Article 1

(EUR 1 = average for 1 December 2005 to 31 December 2005)

0,573458	Cyprus pound
28,9712	Czech koruna
7,45403	Danish krone
15,6466	Estonian kroon
252,791	Hungarian forint
3,4528	Lithuanian litas
0,696729	Latvian lats
0,4293	Maltese lira
3,85493	Polish zloty
37,8743	Slovak koruna
239,505	Slovenian tolar
9,43950	Swedish krona
0,679103	Pound sterling

COMMISSION REGULATION (EC) No 489/2006**of 24 March 2006****amending Regulation (EC) No 796/2004, as regards varieties of hemp grown for fibre eligible for direct payments**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers and amending Regulations (EEC) No 2019/93, (EC) No 1452/2001, (EC) No 1453/2001, (EC) No 1454/2001, (EC) 1868/94, (EC) No 1251/1999, (EC) No 1254/1999, (EC) No 1673/2000, (EEC) No 2358/71 and (EC) No 2529/2001 ⁽¹⁾, and in particular Article 52(2) thereof,

Whereas:

- (1) Commission Regulation (EC) No 796/2004 of 21 April 2004 laying down detailed rules for the implementation of cross-compliance, modulation and the integrated administration and control system provided for in Council Regulation (EC) No 1782/2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers ⁽²⁾ lays down the rules for the application of Regulation (EC) No 1782/2003, concerning, *inter alia*, the conditions for the verification of the tetrahydrocannabinol content in hemp growth.
- (2) In accordance with Article 33(2) of Regulation (EC) No 796/2004, the Member States have notified to the Commission the results of the tests to determine the tetrahydrocannabinol levels in the hemp varieties sown

in 2005. Those results should be taken into account when drawing up the list of varieties of hemp grown for fibre eligible for direct payments in the coming marketing years and the list of varieties temporarily authorised for the marketing year 2006/2007. For the verification of the tetrahydrocannabinol content, some of those varieties should be submitted to procedure B provided for in Annex I to Regulation (EC) No 796/2004.

- (3) Regulation (EC) No 796/2004 should therefore be amended accordingly.
- (4) The measures provided for in this Regulation are in accordance with the opinion of the Management Committee for Direct Payments,

HAS ADOPTED THIS REGULATION:

Article 1

Annex II to Regulation (EC) No 796/2004 is replaced by the text in the Annex to this Regulation.

Article 2

This Regulation shall enter into force on the seventh day following that of its publication in the *Official Journal of the European Union*.

It shall apply from the marketing year 2006/2007.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 24 March 2006.

For the Commission

Mariann FISCHER BOEL

Member of the Commission

⁽¹⁾ OJ L 270, 21.10.2003, p. 1. Regulation last amended by Regulation (EC) No 319/2006 (OJ L 58, 28.2.2006, p. 32).

⁽²⁾ OJ L 141, 30.4.2004, p. 18. Regulation last amended by Regulation (EC) No 263/2006 (OJ L 46, 16.2.2006, p. 24).

ANNEX

‘ANNEX II

VARIETIES OF HEMP GROWN FOR FIBRE ELIGIBLE FOR DIRECT PAYMENTS

(a) **Hemp grown for fibre**

Beniko
Carmagnola
CS
Delta-Llosa
Delta 405
Dioica 88
Epsilon 68
Fedora 17
Felina 32
Felina 34 — Féline 34
Ferimon — Férimon
Fibranova
Fibrimon 24
Futura 75
Juso 14
Red Petiole
Santhica 23
Santhica 27
Tiborszálási
Uso-31

(b) **Hemp grown for fibre authorised in the marketing year 2006/2007**

Białobrzeskie
Chamaeleon ⁽¹⁾
Cannakomp
Fasamo
Fibriko TC
Finola ⁽¹⁾
Kompolti hibrid TC
Kompolti
Lipko
Silesia ⁽²⁾
UNIKO-B

⁽¹⁾ For the marketing year 2006/2007 procedure B of Annex I shall apply.

⁽²⁾ Only in Poland, as authorised by Commission Decision 2004/297/EC (OJ L 97, 1.4.2004, p. 66).'

COMMISSION DIRECTIVE 2006/35/EC

of 24 March 2006

amending Annexes I to IV to Council Directive 2000/29/EC on protective measures against the introduction into the Community of organisms harmful to plants or plant products and against their spread within the Community

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

protected zone in respect of *Erwinia amylovora* (Burr.) Winsl. *et al.*

Having regard to the Treaty establishing the European Community,

Having regard to Council Directive 2000/29/EC of 8 May 2000 on protective measures against the introduction into the Community of organisms harmful to plants or plant products and against their spread within the Community ⁽¹⁾, and in particular point (c) of the second paragraph of Article 14 thereof,

After consulting the Member States concerned,

Whereas:

(5) Italy has submitted information showing that *Erwinia amylovora* (Burr.) Winsl. *et al.* is now established in some parts of its territory. Those parts of the Italian territory should therefore no longer be recognised as a protected zone in respect of *Erwinia amylovora* (Burr.) Winsl. *et al.*

(6) Lithuania has submitted information showing that Beet necrotic yellow vein virus is now established in its territory. Lithuania should therefore no longer be recognised as a protected zone in respect of Beet necrotic yellow vein virus.

(7) The relevant Annexes to Directive 2000/29/EC should therefore be amended accordingly.

(1) Directive 2000/29/EC provides for certain measures against the introduction into the Member States from other Member States or third countries of organisms which are harmful to plants or plant products. It also provides for certain zones to be recognised as protected zones.

(8) The measures provided for in this Directive are in accordance with the opinion of the Standing Committee on Plant Health,

HAS ADOPTED THIS DIRECTIVE:

(2) From information supplied by Portugal, it appears that *Bemisia tabaci* Genn. (European populations) is now established in the Alentejo region and in some communes of the Ribatejo e Oeste region. These parts of the Portuguese territory should therefore no longer be recognised as a protected zone in respect of that harmful organism.

Article 1

Annexes I to IV to Directive 2000/29/EC are amended in accordance with the text in the Annex to this Directive.

(3) From information supplied by Slovenia, it appears that *Erwinia amylovora* (Burr.) Winsl. *et al.* is now established in the Gorenjska and Maribor regions. These regions should no longer be recognised as a protected zone in respect of *Erwinia amylovora* (Burr.) Winsl. *et al.*

Article 2

1. Member States shall adopt and publish, by 30 April 2006 at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

(4) From information supplied by Slovakia, it appears that *Erwinia amylovora* (Burr.) Winsl. *et al.* is now established in certain communes of the Dunajská Streda, Levice, Topoľčany, Poltár, Rožňava and Trebišov Counties. These communes should no longer be recognised as a

They shall apply those provisions from 1 May 2006.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such a reference is to be made.

⁽¹⁾ OJ L 169, 10.7.2000, p. 1. Directive as last amended by Commission Directive 2006/14/EC (OJ L 34, 7.2.2006, p. 24).

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 3

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 4

This Directive is addressed to the Member States.

Done at Brussels, 24 March 2006.

For the Commission
Markos KYPRIANOU
Member of the Commission

ANNEX

Annexes I to IV to Directive 2000/29/EC are amended as follows:

(1) In Annex I, Part B is amended as follows:

(a) in point 1 of heading (a) the words in brackets after 'P' are replaced by the following:

'Azores, Beira Interior, Beira Litoral, Entre Douro e Minho, Madeira, Ribatejo e Oeste (communes of Alcobaça, Alenquer, Bombarral, Cadaval, Caldas da Rainha, Lourinhã, Nazaré, Obidos, Peniche and Torres Vedras) and Trás-os-Montes';

(b) in point 1 of heading (b) 'LT' is deleted.

(2) In Annex II, Part B is amended as follows:

in the third column of point 2 of heading (b):

(a) the words '(with exclusion of the provincial area situated to the North of the State road n. 9 — Via Emilia)' are added after each of the words 'Forli-Cesena' and 'Rimini';

(b) the words 'Trentino-Alto Adige: autonomous province of Trento;' are deleted;

(c) the following words are inserted after the word 'SI': '(except the Gorenjska and Maribor regions)';

(d) the following words are inserted after the word 'SK': '(except the communes of Blahová, Horné Mýto and Okoč (Dunajská Streda County), Hronovce and Hronské Kľačany (Levice County), Velké Ripňany (Topolčany County), Málíneec (Poltár County), Hrhov (Rožňava County), Kazimír, Luhyňa, Malý Horeš, Svätuš and Zatin (Trebišov County))'.

(3) In Annex III, Part B is amended as follows:

in the second column of points 1 and 2:

(a) the words '(with exclusion of the provincial area situated to the North of the State road n. 9 — Via Emilia)' are added after each of the words 'Forli-Cesena' and 'Rimini';

(b) the words 'Trentino-Alto Adige: autonomous province of Trento;' are deleted;

(c) the following words are inserted after the word 'SI': '(except the Gorenjska and Maribor regions)';

(d) the following words are inserted after the word 'SK': '(except the communes of Blahová, Horné Mýto and Okoč (Dunajská Streda County), Hronovce and Hronské Kľačany (Levice County), Velké Ripňany (Topolčany County), Málíneec (Poltár County), Hrhov (Rožňava County), Kazimír, Luhyňa, Malý Horeš, Svätuš and Zatin (Trebišov County))'.

(4) In Annex IV, Part B is amended as follows:

(a) in the third column of point 20.1, 'LT' is deleted;

(b) in the third column of point 20.2, 'LT' is deleted;

(c) in the third column of point 21, the words 'Trentino-Alto Adige: autonomous province of Trento;' are deleted;

(d) in the third column of points 21 and 21.3:

1. the words '(with exclusion of the provincial area situated to the North of the State road n. 9 — Via Emilia)' are added after each of the words 'Forli-Cesena' and 'Rimini';

2. the following words are inserted after the word 'SI': '(except the Gorenjska and Maribor regions)';

3. the following words are inserted after the word 'SK': '(except the communes of Blahová, Horné Mýto and Okoč (Dunajská Streda County), Hronovce and Hronské Kľačany (Levice County), Velké Ripňany (Topolčany County), Málinec (Poltár County), Hrhov (Rožňava County), Kazimír, Luhyňa, Malý Horeš, Svätuš and Zátin (Trebišov County))'.

(e) in the third column of point 22, 'LT' is deleted;

(f) in the third column of point 23, 'LT' is deleted;

(g) in the third column of points 24.1, 24.2 and 24.3;

the words in brackets after 'P' are replaced by the following words 'Azores, Beira Interior, Beira Litoral, Entre Douro e Minho, Madeira, Ribatejo e Oeste (communes of Alcobaça, Alenquer, Bombarral, Cadaval, Caldas da Rainha, Lourinhã, Nazaré, Obidos, Peniche and Torres Vedras) and Trás-os-Montes'.

(h) in the third column of point 25, 'LT' is deleted;

(i) in the third column of point 26, 'LT' is deleted;

(j) in the third column of point 27.1, 'LT' is deleted;

(k) in the third column of point 27.2, 'LT' is deleted;

(l) in the third column of point 30, 'LT' is deleted.

COMMISSION DIRECTIVE 2006/36/EC

of 24 March 2006

amending Directive 2001/32/EC recognising protected zones exposed to particular plant health risks in the Community and repealing Directive 92/76/EEC

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Directive 2000/29/EC of 8 May 2000 on protective measures against the introduction into the Community of organisms harmful to plants or plant products and against their spread within the Community⁽¹⁾, and in particular the first subparagraph of Article 2(1)(h) thereof,

Whereas:

(1) By Commission Directive 2001/32/EC⁽²⁾, certain Member States or certain areas in Member States were recognised as protected zones in respect of certain harmful organisms. In some cases recognition was granted provisionally, because the information necessary to show that the harmful organism in question was not present in the Member State or area concerned had not been provided.

(2) Where the Member States concerned have now provided the necessary information, the zones in question should be recognised as permanent protected zones.

(3) Certain regions of Portugal were recognised as protected zones with respect to *Bemisia tabaci* Genn. (European populations).

(4) Portugal has submitted information showing that *Bemisia tabaci* Genn. (European populations) is now established in some parts of its territory. Those parts of the Portuguese territory should therefore no longer be recognised as a protected zone in respect of that harmful organism.

(5) Various regions or parts of regions in Austria and Italy, and the whole territory of Ireland, Lithuania, Slovenia and Slovakia, were provisionally recognised as protected zones with respect to *Erwinia amylovora* (Burr.) Winsl. *et al.* until 31 March 2006.

(6) From information supplied by Austria, Italy, Ireland, Lithuania, Slovenia and Slovakia, it appears that the

provisional recognition of the protected zones for those countries in respect of *Erwinia amylovora* (Burr.) Winsl. *et al.* should exceptionally be extended for two years to give those countries the necessary time to submit information showing that *Erwinia amylovora* (Burr.) Winsl. *et al.* is not present or, where necessary, to complete their efforts to eradicate that organism.

(7) In addition, as *Erwinia amylovora* (Burr.) Winsl. *et al.* is now established in some parts of Italy, in the Gorenjska and Maribor regions of Slovenia and in some communes of the Dunajská Streda, Levice, Topoľčany, Poltár, Rožňava and Trebišov Counties in Slovakia, these respective parts of the Italian, Slovenian and Slovakian territory should no longer be recognised as a protected zone for *Erwinia amylovora* (Burr.) Winsl. *et al.*

(8) Lithuania was provisionally recognised as a protected zone for beet necrotic yellow vein virus until 31 March 2006.

(9) Lithuania has submitted information showing that beet necrotic yellow vein virus is now established in that country. Lithuania should therefore no longer be recognised as a protected zone in respect of that harmful organism.

(10) Malta was provisionally recognised as a protected zone with respect to Citrus tristeza virus (European strains) until 31 March 2006.

(11) From information supplied by Malta, it appears that the provisional recognition of the protected zone for that country in respect of Citrus tristeza virus (European strains) should exceptionally be extended for two years to give that country the necessary time to submit information showing that Citrus tristeza virus (European strains) is not present or, where necessary, to complete its efforts to eradicate that organism.

(12) Cyprus was provisionally recognised as a protected zone with respect to *Daktulosphaira vitifoliae* (Fitch), *Ips sexdentatus* Börner and *Leptinotarsa decemlineata* Say until 31 March 2006.

⁽¹⁾ OJ L 169, 10.7.2000, p. 1. Directive as last amended by Commission Directive 2006/14/EC (OJ L 34, 7.2.2006, p. 24).

⁽²⁾ OJ L 127, 9.5.2001, p. 38. Directive as last amended by Directive 2005/18/EC (OJ L 57, 3.3.2005, p. 25).

- (13) From information supplied by Cyprus, it appears that the provisional recognition of the protected zone for that country in respect of *Daktulosphaira vitifoliae* (Fitch), *Ips sexdentatus* Börner and *Leptinotarsa decemlineata* Say should be extended for two years to give that country the necessary time to submit information showing that those harmful organisms, are not present or, where necessary, to complete its efforts to eradicate them.
- (14) Directive 2001/32/EC should therefore be amended accordingly.
- (15) The measures provided for in this Directive are in accordance with the opinion of the Standing Committee on Plant Health,

HAS ADOPTED THIS DIRECTIVE:

Article 1

Directive 2001/32/EC is amended as follows:

- 1) Article 1 is replaced by the following:

'Article 1

The zones in the Community listed in the Annex are recognised as protected zones within the meaning of the first subparagraph of Article 2(1)(h) of Directive 2000/29/EC, in respect of the harmful organism(s) listed against their names in the Annex to this Directive.'

- 2) Article 2 is deleted.

- 3) The Annex is amended as follows:

(a) In point 2 of heading (a), the words in brackets after 'Portugal' are replaced by the following words 'Azores, Beira Interior, Beira Litoral, Entre Douro e Minho, Madeira, Ribatejo e Oeste (communes of Alcobaça, Alenquer, Bombarral, Cadaval, Caldas da Rainha, Lourinhã, Nazaré, Obidos, Peniche and Torres Vedras) and Trás-os-Montes'.

(b) In points 3.1, 11 and 13 of heading (a), the words '(until 31 March 2008)' are inserted after the word 'Cyprus'.

- (c) Point 2 of heading (b) is replaced by the following:

— Spain, Estonia, France (Corsica), Italy (Abruzzi; Basilicata; Calabria; Campania; Friuli-Venezia Giulia;

Lazio; Liguria; Marche; Molise; Piedmont; Sardinia; Sicily; Tuscany; Umbria; Valle d'Aosta), Latvia, Portugal, Finland, United Kingdom (Northern Ireland, Isle of Man and Channel Islands),

— and, until 31 March 2008, Ireland, Italy (Apúlia, Emilia-Romagna: provinces of Forlì-Cesena (excluding the provincial area situated to the North of the State road n.9 — Via Emilia), Parma, Piacenza, Rimini (excluding the provincial area situated to the North of the State road n.9 — Via Emilia), Lombardy, Veneto (except in the province of Rovigo the communes Rovigo, Polesella, Villamarzana, Fratta Polesine, San Bellino, Badia Polesine, Trecenta, Ceneselli, Pontecchio Polesine, Arquà Polesine, Costa di Rovigo, Occhiobello, Lendinara, Canda, Ficarolo, Guarda Veneta, Frasinelle Polesine, Villanova del Ghebbo, Fiesso Umbertiano, Castalguglielmo, Bagnolo di Po, Giacciano con Baruchella, Bosaro, Canaro, Lusia, Pincara, Stienta, Gaiba, Salara, and in the province of Padova the communes Castelbaldo, Barbona, Piacenza d'Adige, Vescovana, S. Urbano, Boara Pisani, Masi, and in the province of Verona the communes Palù, Roverchiara, Legnago, Castagnaro, Ronco all'Adige, Villa Bartolomea, Oppeano, Terrazzo, Isola Rizza, Angiari), Lithuania, Austria (Burgenland, Carinthia, Lower Austria, Tirol (administrative district Lienz), Styria, Vienna), Slovenia (except the Gorenjska and Maribor regions), Slovakia (except the communes of Blahová, Horné Mýto and Okoč (Dunajská Streda County), Hronovce and Hronské Kľačany (Levice County), Velké Ripňany (Topoľčany County), Málinec (Poltár County), Hrhov (Rožňava County), Kazimír, Luhyňa, Malý Horeš, Svätušie and Zátin (Trebíšov County)).

- (d) In point 1 of heading (d), the word 'Lithuania' is deleted.

- (e) In point 3 of heading (d), the words '(until 31 March 2008)' are inserted after the word 'Malta'.

Article 2

1. Member States shall adopt and publish, by 30 April 2006 at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and the Directive.

They shall apply those provisions from 1 May 2006.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such a reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of domestic law which they adopt in the field governed by this Directive.

Article 3

This Directive shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

Article 4

This Directive is addressed to the Member States.

Done at Brussels, 24 March 2006.

For the Commission

Markos KYPRIANOU

Member of the Commission

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 13 May 2003

on the State aid implemented by Germany for Kahla Porzellan GmbH and Kahla/Thüringen Porzellan GmbH

(notified under document number C(2003) 1520)

(Only the German version is authentic)

(Text with EEA relevance)

(2006/239/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

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

Whereas:

I. PROCEDURE

- (1) On 16 November 1998 and 24 March 1999 the Commission received complaints from competitors alleging misuse of state aid purportedly granted by the *Land* of Thuringia to Kahla Porzellan GmbH (Kahla I) and Kahla/Thüringen Porzellan GmbH (Kahla II), both in Thuringia, Germany.
- (2) After an extensive exchange of correspondence and meetings with representatives of Germany, the Commission initiated the formal investigation procedure on 15 November 2000 in respect of the ad hoc aid granted to the companies. At the same time, Germany was requested to provide sufficient information and data to make it possible to assess whether a number of aid measures complied with the terms of approved aid schemes under which they had allegedly been granted.
- (3) The Commission's decision to initiate the procedure was published in the *Official Journal of the European Communities* ⁽²⁾. The Commission invited interested parties to submit comments on the aid. On 31 July 2001 the Commission received comments from Kahla II, which were forwarded to Germany by letter dated 7 August 2001.

⁽¹⁾ OJ C 272, 23.9.2000, p. 45, and OJ C 26, 30.1.2002, p. 19.

⁽²⁾ OJ C 185, 30.6.2001, p. 45.

- (4) On 26 March 2001 Germany responded to the request for information, submitting information on the aid and informing the Commission of further aid to the company, the existence of which had not been notified before. The Commission requested additional documentation on 28 May 2001, which was received by the Commission on 31 June 2001. Additional information was submitted on 9 August 2001.
- (5) By letter dated 30 November 2001 the Commission informed Germany that it had extended the procedure laid down in Article 88(2) of the EC Treaty to include those aid measures which did not comply with the terms of the approved aid schemes under which they had allegedly been awarded and those aid measures of which the Commission had not been informed before.
- (6) On 10 December 2001 the case was discussed at length with representatives of Germany and of the company.
- (7) The Commission's decision to extend 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. The Commission received comments from the aid recipient (Kahla II). These comments were forwarded by letter dated 6 March 2002 to Germany, which was given the opportunity to react.
- (8) On 30 January 2002 Germany responded to the extension of the formal investigation procedure, submitting extensive information. Additional information was requested by letter dated 30 April 2002. Germany submitted its reply by letter dated 29 May 2002, which was registered as received on the same day.
- (9) By letter dated 28 February 2002 the Commission received comments from Kahla II, which were transmitted to Germany by letter dated 6 March 2002. On 18 March 2002 a new complaint was received alleging that Kahla II had received new aid. This information was sent to Germany by letter dated 30 April 2002. Germany's response to this complaint was received on 29 May 2002.
- (10) On 24 July 2002 the case was discussed again with representatives of Germany. Following this meeting, Germany submitted further comments on 7 August 2002. On 30 July 2002 Kahla II indicated that it was adhering to its previous arguments. By letter dated 1 October 2002, registered as received on the same day, Germany submitted further comments.

II. DESCRIPTION

A. The relevant undertaking

- (11) Kahla II is the successor to Kahla I. Both Kahla I and Kahla II are active in the production of porcelain dishes and china. They are located in a region eligible for aid under Article 87(3)(a) of the EC Treaty.

Kahla I

- (12) The company was created on 1 March 1990 by transforming VEB Vereinigte Porzellanwerke Kahla into two private limited companies, one of which was Kahla I, in accordance with the German regulation on the conversion of state-owned combines, enterprises and installations into companies with share capital (*Verordnung zur Umwandlung von volkseigenen Kombinat, Betrieben und Einrichtungen in Kapitalgesellschaften (UmwandVO)*). On 23 April 1991 the Treuhandanstalt (THA) privatised Kahla I by selling it for DEM 2 to a Mr Hoffmann (75,1 % of the shares) and a Mr Ueing (24,9 % of the shares). The privatisation contract was concluded with the sole bidders after the THA published the intended sale in its list of companies for sale (Hoppenstedt) and contacted associations in the ceramics industry and chambers of commerce. Germany states that the company's liquidation would have implied higher costs for the THA. Germany further states that the privatisation contract became effective only on 11 December 1992.

⁽³⁾ OJ C 26, 30.1.2002, p. 19.

- (13) The following data on the company's operation were submitted by Germany (turnover and operating result in DEM million):

Table 1

	1991	1992	1993
Employees	1 561	827	696
Turnover	25,4	29,3	27,9
Operating result	-29,5	-25,8	-13,4

- (14) The company filed for bankruptcy on 9 August 1993. Bankruptcy proceedings were opened on 29 September 1993.
- (15) According to Germany, following the initiation of bankruptcy proceedings the administrator in bankruptcy sought investors to take over the assets. The administrator in bankruptcy considered that the best price for the assets would be obtained by selling the company as a going concern.

Kahla II

- (16) In November 1993 Kahla II was created by a private investor, Mr G. Raithel. In January 1994 the administrator in bankruptcy sold the real estate, plant, machinery and stock in trade of Kahla I in bankruptcy to Mr Raithel. A total of 380 employees were kept on.
- (17) The total price amounted originally to DEM 7,391 million. The contract was amended on 5 October 1994, providing in its new form that the price of DEM 2,05 million payable for plant - which was to be financed by a grant of DEM 2,5 million (see measure 15) - was to be paid upon signature of the contract as amended. Legal rights, trademarks, registered patterns and know-how were transferred for DEM 1. The list of customers and the order book were taken over free of charge. The price of DEM 2,136 million for stocks was to be paid in ten instalments starting on 1 March 1994. The real estate, which was to be free of charges, was sold for DEM 3,205 million, payable within 14 days.
- (18) Germany states that part payments were made until 1996. An amount of DEM 1 million was finally paid in 1999, after the administrator in bankruptcy had lifted a mortgage on part of the real estate. The total price finally amounted to DEM 6,727 million. Germany states that a reduction in the price for the stocks of DEM 0,664 million took place owing to defects found after the sale. The available information shows that the sale was financed mainly through state aid. Own resources not containing any element of state aid amounted to only DEM 55 000.
- (19) The sale of the real estate was approved by the THA on 18 July 1994 ⁽⁴⁾ and by its legal successor, the Bundesanstalt für vereinigungsbedingte Sonderaufgaben (BvS) on 19 October 1995.
- (20) The sale contract also provided that Thüringer Industriebeteiligungs GmbH & Co. KG (TIB), a state-owned undertaking set up by the *Land* of Thuringia and controlled by it through a foundation, would acquire a silent participation of 49 % in Kahla II. This occurred on 5 March 1994.

⁽⁴⁾ In the event of the bankruptcy of companies formerly held by the THA, their real estate was to be transferred back to the THA, which in turn had to incorporate its value into the estate in bankruptcy.

- (21) The following data on the company's operation were supplied by Germany (turnover and operating result in DEM million):

Table 2

	1994	1995	1996	1997	1998	1999	2000
Employees	380	369	327	323	307	327	322
Turnover	23	29	32	39	34	35,8	41,6
Operating result[...] (*)							

(*) Confidential information. Indexed (in relation to year 1994):

1994	1995	1996	1997	1998	1999	2000
-100	-181	3	70	78	11	186

B. Financial measures

(a) Financial measures in favour of Kahla I

- (22) The following financial measures were granted by the public authorities to Kahla I from the time of its creation until its bankruptcy (amounts in DEM million):

Table 3

Measures in favour of Kahla I

					Amount
Measures before privatisation					
1		THA	Export guarantee		4,5
Measures during privatisation					
2	23.4.1991	THA	Assumption of environmental liabilities		37,7
3	23.4.1991	THA	Taking-over of old debts		31,1
4	23.4.1991	THA	Guarantees		24,9
Measures after privatisation					
5	12.1991	Land	Direct investment grants		1,825
6	5.10.1992	THA	Loan		4,3
7	1.12.1992	THA	Loan		1,8
8	1993	THA	Revenue from exploitation of property		5,676
9		Stadtsparkasse Jena	Credits		3,9
10	1992-1995	Land	Investment allowances		0,035
Total					115,736

- (23) Measure 1: An export guarantee granted before privatisation which, according to Germany, was never called.
- (24) Measures 2 and 3: A taking-over by the THA of debts relating to credits from Dresdner Bank AG dating from before 1 July 1990 and to loans granted by the THA before privatisation.

- (25) Measure 4: Germany has indicated that these guarantees from the THA were granted to secure investments, loss cover and credits granted by Dresdner Bank AG. In support of these guarantees, the company put up several securities, which the THA refrained from availing itself of following the opening of bankruptcy proceedings. As an additional security, the THA was entitled to receive the revenues from the exploitation of that part of the company's real estate which was not directly related to the business. This real estate was valued at DEM 13,3 million. The expected revenues were to have been used to repay those credits which were backed by the THA's guarantees. Germany admits that, with the consent of the THA, the credits to which these guarantees related were never repaid. At the time they were availed of, these guarantees, including interest, totalled some DEM 24,9 million.
- (26) Measure 5: In December 1991 the company obtained direct investment grants (*Investitionszuschüsse*) of DEM 1,825 million from the *Land* of Thuringia.
- (27) Measure 6: On 5 October 1992 the THA granted a loan of DEM 4,2 million to avert insolvency.
- (28) Measure 7: A further loan of DEM 1,8 million was made available by the THA on 1 December 1992, also with the aim of averting insolvency.
- (29) Measure 8: The income from exploiting the company's real estate mentioned in measure 3 totalled DEM 5,676 million. In 1993 DEM 3,4 million of the total income was made available to Kahla I instead of being used to repay the credits guaranteed by the THA. Germany states that the payment of this amount to the THA was deferred but not waived as the whole amount of DEM 5,676 million was registered as part of the estate in bankruptcy. Consequently, the amount of the THA funds from which the company benefited instead of their being used to repay credits totalled DEM 5,676 million. Germany has not contested this fact.
- (30) Measure 9: Two credits from Kreis- und Stadtparkasse Jena totalling DEM 3,9 million. These credits bore an interest rate of 13,25 % and 17,25 % and were secured by mortgages of DEM 10 million.
- (31) Measure 10: Investment allowances of DEM 0,035 million granted during the period 1992–1995.
- (32) Kahla I benefited from financial support from the public authorities totalling DEM 115,736 million. Despite this financial support, bankruptcy proceedings were initiated on 29 September 1993. Germany states that the THA registered liabilities amounting to DEM 41,2 million as part of the estate in bankruptcy. This amount included measures 3, 6, 7 and 8, including interest.
- (33) On 27 September 1993 the THA decided not to avail itself of the securities put up by the company in support of the guarantees under measure 4. On 18 July 1994 the THA, or its successor the BvS, relinquished its legal right to take possession of the land. According to Germany, this would have meant compensating other creditors and hence additional costs.

(b) *Financial measures in favour of KAHLA II*

- (34) The following financial measures were granted by the public authorities to Kahla II from the time of its creation until 1999 (amounts in DEM million):

Table 4

Measures in favour of Kahla II

				Amount
Measures 1994-1996				
11	5.4.1994	TIB	Participation	1,975
12	5.4.1994	TIB	Shareholder loan	6,0
13	25.3.1994	Land	90 % guarantee on loans (16, 18-22)	
14	25.3.1994	Land	90 % guarantee on a loan of DEM 6,5 million from a private bank	5,85
15	10.5.1994	Land	SME investment security grant	2,5
16	4/5.6.1994	Deutsche Ausgleichsbank (DtA) – equity loan scheme (DTA-Eigenkapitalhilfe)	Loan	0,2
17	5/6.1994	ERP business start-up scheme (ERP-Existenzgründung)	Loan	1,8
18	3/4.1995	ERP reconstruction programme (ERP—Aufbau)	Loan 1	2,0
19	3/4.1995	Kreditanstalt für Wiederaufbau (KfW) small business scheme (KfW-Mittelstand)	Loan	1,0
20	6/26.4.1995	DtA environment scheme (DtA-Umwelt)	Loan	1,73
21	7/26.4.1995	ERP energy saving scheme (ERP-Energiespar)	Loan	3,45
22	3/25.4.1996	ERP reconstruction programme (ERP-Aufbau)	Loan 2	2,0
23	13.2.1996	Land	90 % guarantee on a loan of DM 1 million from a private bank	0,9
24	1994-1996/97	Land	Direct investment grants	3,36
25	1994-1996	Land	Investment allowances	0,838
26	1994-1996	Labour Office	Employment Promotion Act grants	1,549
27	1994-1996		Various grants	0,492
Measures from 1997 onwards				
28	1997-1999	Land	Direct investment grants	1,67
29	1997-1999	Land	Investment allowances	0,365
30	3./5.1999	Land	90 % guarantee on a loan of DM 2,32 million from a private bank	0,042
31	1997-1999	Labour Office	Employment Promotion Act grants	0,851
32	1997-1999		Various grants	0,352
33	1994-1999		Special depreciation	0,104
Total				39,028

- (35) Measure 11: In March 1994 TIB took a 49 % stake in Kahla II for DEM 1,975 million. TIB put an end to its participation on 31 December 1999 and transferred its shares in Kahla II to Mr G. Raithel and his son, Mr H. Raithel, for [...] (*).
- (36) Measure 12: In March 1994 TIB granted a shareholder loan of DEM 6 million. Germany states that this loan did not confer on TIB any further voting rights. The loan bore an interest rate of 12 %, the amount of interest being capped at 50 % of annual profits. The Commission notes that Kahla II only started generating modest profits as from 1996. No risk premium was agreed. Germany states that the loan was paid back on 29 December 1999 with interest totalling DEM 1,613 million.
- (37) Measures 13 and 23: The *Land* of Thuringia provided a 90 % fallback guarantee in March 1994 to cover investment credits up to a total of DEM 13,5 million. When the credits finally matured, the guarantee under measure 13 covered credits 18-22. The guarantee under measure 23 covered a credit of DEM 1 million granted by a private bank in February 1996 at an interest rate of 6,1 %.
- (38) Measure 14: A further 90 % fallback guarantee provided by the *Land* of Thuringia in March 1994 to cover working capital credits of DEM 6,5 million. The credit was granted by a private bank in September 1995 at an interest rate of 8,5 %. The guarantee was gradually reduced and expired on 31 December 1999.
- (39) For these guarantees the company paid a fee of 0,75 % p.a., reduced as from June 1995 to 0,5 %.
- (40) Measure 15: An SME (small and medium-sized enterprise) grant of DEM 2 million, subsequently increased to DEM 2,5 million, granted on 10 May 1994.
- (41) Measure 16: An equity loan of DEM 0,2 million, allegedly awarded under an aid scheme ⁽⁵⁾ in June 1994 to the investor, Mr Raithel, in the context of the creation of Kahla II. According to the scheme, the investor had to provide this amount to the company in the form of equity capital. According to Germany, the loan was paid back on 30 September 2001.
- (42) Measure 17: A loan of DEM 1,8 million purportedly granted in May 1994 under the European Recovery Programme business start-up scheme ⁽⁶⁾.
- (43) Measure 18: An investment loan of DEM 2 million allegedly granted in March 1995 under the ERP reconstruction programme ⁽⁷⁾.
- (44) Measure 19: An investment loan of DEM 1 million granted in March 1993 by Kreditanstalt für Wiederaufbau under its small business scheme ⁽⁸⁾.
- (45) Measure 20: An investment loan of DEM 1,73 million granted in April 1995 under an aid scheme for environmental investment (*DtA-Umweltprogramm*).
- (46) Measure 21: An investment loan of DEM 3,45 million allegedly granted in April 1995 under the ERP environmental programme ⁽⁹⁾.

(*) Confidential information, 30-40 % higher than the price previously paid by the TIB.

⁽⁵⁾ N 213/93, (OJ C 302, 9.11.1993, p. 6).

⁽⁶⁾ ERP-Existenzgründungsprogramm, N 108c/1994, SG (94) D/17293 of 1.12.1994; OJ C 390, 31.12.1994, p. 14.

⁽⁷⁾ ERP-Aufbauprogramm, N 108b/1994, SG (94) D/17293 of 1.12.1994; OJ C 390, 31.12.1994, p. 13.

⁽⁸⁾ KfW-Mittelstandsprogramm, NN 109/93, SG (94) D/372 of 14.1.1994, OJ C 373, 29.12.1994, p. 3.

⁽⁹⁾ ERP-Umweltprogramm, N 563d/94, SG (94) D/17530 of 5.12.1994; OJ C 390, 31.12.1994, p. 16.

- (47) Against a background of falling interest rates, on 30 March 1998 the outstanding amount of the loans under measures 18-21 (DEM 7,329 million) was converted into a loan on market terms from Hypovereinsbank. This new loan carried an interest rate of 5,9 %, which was above the applicable reference rate of 5,49 %. The Commission notes, however, that the 90 % guarantee under measure 13 was made available for this new market loan.
- (48) Measure 22: An investment loan of DEM 2 million allegedly awarded in March 1996 under the ERP reconstruction programme ⁽¹⁰⁾.
- (49) Measure 23: See paragraph 37.
- (50) Measure 24: In October 1994 Kahla II obtained direct investment grants of DEM 3,36 million from the *Land* of Thuringia for investments to be carried out during the period 1994-1996 ⁽¹¹⁾.
- (51) Measure 25: Between 1994 and 1996 the company received investment allowances amounting to DEM 0,838 million ⁽¹²⁾.
- (52) Measure 26: Employment promotion grants amounting to DEM 1,549 million during the period 1994-1996.
- (53) Measure 27: Between 1994 and 1996 the company received grants for fair attendance amounting to DEM 122 414, grants for advertising amounting to DEM 0,03 million, grants for R&D amounting to DEM 0,318 million and employee integration grants amounting to DEM 0,021 million.
- (54) Measure 28: Further direct investment grants amounting to DEM 1,67 million were made available in December 1996 for the years 1997-1999.
- (55) Measure 29: The company received investment allowances amounting to DEM 0,365 million for the years 1997-1999.
- (56) Measure 30: A loan of DEM 2,32 million was granted by a private bank in May 1999; this loan was also covered by the 90 % fallback guarantee made available in March 1994 by the *Land* of Thuringia for investment credits up to DEM 13,5 million (see measures 13 and 23). The loan was granted at an interest rate of 4,6 %.
- (57) Measure 31: Further employment promotion grants amounting to DEM 0,851 million.
- (58) Measure 32: Between 1997 and 1999, according to its annual reports the company received grants for fair attendance, advertising and employee integration amounting to DEM 342 910 and grants for R&D-related personnel costs amounting to DEM 8 602. The total amount of the grants thus came to DEM 0,352 million.
- (59) In addition, after the extension of the formal investigation procedure Germany explained that the company had participated in a scheme allowing it to write off investments substantially in the beginning but decreasingly over time (special depreciation). Germany admits that this measure did in fact confer an advantage on the company as it resulted not only in losses during the first few years but also in smaller tax payments. The loss of income to the State stemming from the reduced taxes must also be regarded as a financial measure of the State in favour of Kahla II (hereinafter: measure 33).

⁽¹⁰⁾ See footnote 7.

⁽¹¹⁾ 23. *Rahmenplan der Gemeinschaftsaufgabe zur Verbesserung der Wirtschaftsstruktur*, N 157/94, SG (94) D/11038, 1.8.1994.

⁽¹²⁾ N 561/92, SG (92) D/16623 of 24.11.1992 and N 494/A/1995, SG (95) D/17154, 27.12.1995.

C. The project

- (60) According to Germany, on 25 March 1994 a plan was drawn up to finance the needs of Kahla II. The costs originally planned were reduced slightly by some DEM 2 million, as detailed in Table 5 below, which has been extracted from the information submitted by Germany (amounts in DEM million):

Table 5

Costs	Planned	Implemented (1994-96)
Land	3,200	3,200
Buildings		
Plant/machinery	2,050	2,050
Goods	2,136	1,472
Renovation of machinery	14,650	14,977
Intangible assets		
Working capital	14,854	12,709
Total	36,890	34,408

- (61) In order to cover those costs, a financial plan was drawn up in March 1994 and amended on several occasions. Table 6 below has been extracted from the information submitted by Germany (amounts in DEM million). The measures in italics indicate alleged private resources:

Table 6

Measure	Financing plan	25.3.1994	26.4.1995	25.4.1996	Implemented
11	TIB participation	1,950	1,975	1,975	1,975
12	Shareholder loan (TIB)	6,000	6,000	6,000	6,000
15	SME grant	2,000	2,500	2,500	2,500
	Loans	13,500			
18	— KfW-ERP reconstruction programme		2,000	2,000	2,000
19	— KfW small business scheme		1,000	1,000	1,000
20	— DtA environment scheme		1,730	1,730	1,730
21	— ERP energy saving scheme		3,450	3,450	3,450
22	— KfW-ERP reconstruction programme			2,000	2,000
	— Bank loan		5,320	3,320	1,000
(14)	Working capital credit granted by a bank	6,500	6,500	6,500	6,500
24	Investment grants	3,370	3,340	3,340	3,360
25	Investment allowances	1,020	1,020	1,020	0,838
	Mr Raithel (owner)	2,550	0,055	0,055	0,055
16	— DtA equity loan scheme		0,200	0,200	0,200
17	— KfW-ERP business start-up scheme		1,800	1,800	1,800
	Total	36,890	36,890	36,890	34,408

- (62) It is noted that the TIB participation (measure 11) was increased by DEM 0,025 million in 1995 compared with what had originally been planned. It is also noted that under the original plan loans were to be granted for an amount of DEM 13,5 million. For these loans and for a working capital credit of DEM 6,5 million which was to be extended by a private bank, the *Land* provided 90 % guarantees (measures 13 and 14). In 1994 the working capital credit was brought in. The loans totalling DEM 13,5 million were provided in 1995 (measures 18-22) and effectively covered by the 90 % guarantee.
- (63) Regarding the alleged private resources, it is noted that the initially planned contribution from the investor was reduced from DEM 2,555 million to 2,055 million, i.e. by DEM 0,5 million. The SME grant (measure 15) was increased by DEM 0,5 million, precisely the same amount by which the contribution which was to be brought in by the investor decreased. In addition, when the alleged private investor contribution was effectively brought in, it consisted of DEM 0,055 million in cash from the investor's own resources and two loans totalling DEM 2 million granted by public banks under approved aid schemes (measures 16 and 17).
- (64) It is noted that Table 6, as provided by Germany, does not include any reference to the grants under measures 26 and 27 or to the special depreciation scheme from which Germany admits the company benefited (measure 33). In a separate table submitted on 30 January 2002, Germany indicated that investments written off in 1994 and 1995 totalled DEM 3,603 million.
- (65) Germany has provided the following additional table with different investments carried out by the company in 1997 and 1998 (amounts in DEM million):

Table 7

Costs	Planned	Implemented
Plant/machinery	5,580	
Intangible assets	0,150	
Total	5,730	6,769

- (66) These costs were financed as detailed in the table below submitted by Germany (amounts in DEM million):

Table 8

Measure	Financing	Planned	Implemented
	Own contribution	1,318	2,406
28	Investment grants	1,670	1,670
29	Investment allowances	0,279	0,292
	Other sources	2,400	2,400
	Total	5,730	6,769

- (67) It is noted that Table 8, as provided by Germany, does not include any reference to the grants under measures 31 and 32. However, for the financing of the costs under Table 7 Germany indicates that under the special depreciation scheme (measure 33) the company wrote off investments up to DEM 0,743 million. This latter amount is presumably included in the item "other sources" in Table 8.

- (68) Germany has also provided a further investment plan⁽¹³⁾ detailing investments carried out from 1994 until 2000 together with investments to be carried out during the period 2000–2003. This plan mentions a large amount of mainly plant and machinery in which the company invested. The overall costs for the period 1994–2000 are summarised in Table 9 as submitted by Germany (amounts in DEM million):

Table 9

1994	1995	1996	1997	1998	1999	2000	Total
8,504	4,540	1,933	1,846	4,923	1,370	0,790	23,906

- (69) The Commission notes that this latter investment plan comprises part of the investments described in Tables 5-8. In this respect, investments carried out during the period 1994-1996 totalled DEM 14,977 million, which corresponds to the investments actually implemented under the item “renovation of machinery” set out in Table 5. For the years 1997 and 1998, the total investments correspond to the amount of investments carried out according to Table 7.

D. Market analysis

- (70) Both Kahla I and Kahla II produce china and porcelain for household use. Kahla II has expanded into the professional sector, in particular hotels and decorators. Products are also exported.
- (71) In the relevant economic sector of household goods and decorative porcelain there is intensive trade among Member States. While ornamentalware is produced throughout Europe, important regional concentrations of tableware producers exist in northern Bavaria (Germany), Staffordshire (United Kingdom) and Limousin (France). Besides a plethora of SMEs, there are a number of large undertakings. These include Villeroy & Boch (Germany/Luxembourg), Hutschenreuther and Rosenthal (Germany), and Royal Doulton and Wedgwood (United Kingdom), which account for over a third of all production in the Community. Special requirements of the hotel and catering trades have given rise to the “hotelware” sector, with specially designed hard-wearing ceramics. The UK, Germany and Italy are the main producing and consuming countries. A close relationship with the final consumer and the need to compete on design are what distinguish this highly labour-intensive industry, with its enormous array of products. Sales to third countries exceed Community imports in terms of value, but in volume terms imports exceed exports owing mainly to extremely cheap imports from China⁽¹⁴⁾.
- (72) The porcelain industry is in overcapacity. Production and consumption both registered continuing growth between 1984 and 1991, but contracted during 1992 and 1993. The recovery expected for 1994 did not occur. The trade balance of recent years has been positive, but the share of imports has increased markedly, in particular for household china. Export growth is not sufficient to offset the increasing competition in the sector. On the contrary, strong competition and overcapacities are being reinforced owing to new market entrants from south-east Asia and eastern European countries, in particular the Czech Republic and Hungary, all of which benefit from preferential trading arrangements with the European Union⁽¹⁵⁾.

⁽¹³⁾ Submitted as Annex 17 to the letter of 15 March 2001, registered as received by the Commission on 26 March 2001 (A/32477).

⁽¹⁴⁾ Data extracted from the website of Cerame-Unie (<http://www.cerameunie.org>).

⁽¹⁵⁾ Panorama of EU Industry 1997, 9-20; NACE (Revision 1). See also Commission Decision 1999/157/EC in Case C 35/97 *Triptis Porzellan GmbH* (OJ L 52, 27.2.1999, p. 48).

III. REASONS FOR THE INITIATION AND EXTENSION OF THE FORMAL INVESTIGATION PROCEDURE

- (73) In its decision to initiate the formal investigation procedure, the Commission analysed the financial measures in favour of Kahla I and Kahla II in the light of Article 87(1) of the EC Treaty and Article 61(1) of the EEA Agreement. The measures derived from state resources and distorted or threatened to distort competition, affecting trade between Member States and conferring advantages on these companies. In its preliminary assessment the Commission considered that Kahla I and Kahla II were companies in difficulty. The Commission doubted, moreover, whether the State had behaved like a private investor in a market economy when it made financial resources available to them. In the preliminary assessment, these measures were regarded as state aid.
- (74) The Commission had serious doubts as to whether the aid was compatible with the common market, and it therefore initiated the formal investigation procedure in respect of the ad hoc aid granted to Kahla I and Kahla II. In addition, Germany had claimed that a number of aid measures had been granted under approved aid schemes. On the basis of the information available to it, the Commission was not in a position to determine whether these aid measures complied with the terms of the approved aid schemes under which they were purportedly granted. Therefore, within the context of the initiation of the formal investigation procedure, an information order was addressed to Germany in order to verify this point.
- (75) The information submitted in response to the order dispelled the Commission's doubts about the existing-aid character of only a number of measures allegedly granted under approved aid schemes. In addition, the Commission discovered details of several measures of which it had not been informed before. Consequently, the Commission extended the investigation procedure to assess the measures which still did not seem to comply with approved aid schemes and those measures of which it had been informed only after initiating the formal investigation procedure.

IV. COMMENTS FROM GERMANY

- (76) In its letter of 11 November 1999, Germany considered that it need not notify any of the above financial measures to the Commission. According to Germany, as from February 1994 Kahla II was an entirely new company and there was no continuity with Kahla I. Germany stated that Kahla II was not in difficulty. It insisted on this point throughout the procedure. In support of this argument, Germany first submitted two consultants reports dated 29 November 1993 and 11 January 1994. Following the extension of the investigation procedure, Germany submitted a third report by a further consultant, dated 21 January 2002.
- (77) Germany stated first of all that most of the financial measures from public entities should not be considered aid because the public authorities had acted like a market economy investor when offering financial support to Kahla II. As regards those financial measures in favour of Kahla II which would not fall under the private investor principle, Germany stated that they were either covered by approved aid schemes or fell under the *de minimis* rules. Germany submitted extensive information and documentation.
- (78) After the initiation of the formal investigation procedure, Germany acknowledged that some of the measures might constitute aid and that others might fall outside the *de minimis* rules as set out in the Commission notice on the *de minimis* rule for state aid⁽¹⁶⁾ and Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid⁽¹⁷⁾ or outside approved aid schemes. However, Germany considered that, in that case, the aid would be investment aid complying with the regional ceilings. In addition, Germany submitted several investment plans and supplementary information in this respect, including an estimate of the aid intensity of the measures.

⁽¹⁶⁾ OJ C 68, 6.3.1996, p. 9.

⁽¹⁷⁾ OJ L 10, 13.1.2001, p. 30.

- (79) Germany argued finally that, if it would not accept any of the arguments advanced, the Commission should verify – particularly in the case of measure 26 – whether the aid could not be regarded as employment aid compatible with the common market.
- (80) In its letter of 1 October 2002 Germany stated that if, in the face of all previous arguments, the Commission were to regard Kahla II as a company in difficulty, the aid measures in question should be assessed as restructuring aid on the basis of the Community guidelines on state aid for rescuing and restructuring firms in difficulty ⁽¹⁸⁾ (restructuring aid guidelines).

V. COMMENTS FROM INTERESTED PARTIES

- (81) After initiating and extending the proceedings, the Commission received comments from Kahla II, which were forwarded to Germany by letters dated 7 August 2001 and 6 March 2002. Kahla II's arguments are basically the same as Germany's.
- (82) In addition, a new complaint was received alleging that Kahla II had received fresh aid. This information was sent to Germany by letter dated 30 April 2002. On 29 May 2002 Germany replied, stating that the company had not received any grants other than those of which the Commission had been informed.
- (83) On 30 July 2002, Kahla II submitted further comments to the Commission which contained no new facts or evidence but in which Germany stood by its previous arguments to the effect that the company had never been in difficulty, that certain measures did not constitute aid and that the ad hoc aid should be regarded as compatible regional aid.

VI. ASSESSMENT

A. The relevant undertaking

- (84) In its decision to initiate the formal investigation procedure, the Commission could not determine, on the strength of the information available, whether Kahla I and Kahla II were independent undertakings or to what extent Kahla II should be regarded as the successor to an undertaking or as an *Auffanglösung*. Germany was therefore requested to provide sufficient information to clarify this point.
- (85) In its decision to extend the formal investigation procedure, the Commission concluded that Kahla I and Kahla II were different legal entities. Kahla II was regarded as an *Auffanggesellschaft* as it had been created by Mr G. Raithel as a shell company to continue the activities and to take over the assets of Kahla I in liquidation. The documents submitted often refer to Kahla II as an *Auffanggesellschaft* and the Commission noted that a change of control, ownership and legal personality took place. Germany has not contradicted this view.
- (86) The sale of the assets to Kahla II did not take place according to an open, unconditional bidding procedure. Germany states that the industry was aware that the assets were being offered for sale. According to Germany, following negotiations with two potential investors, Mr G. Raithel was chosen by the administrator in bankruptcy as the best bidder. The reasons for choosing him were, according to the administrator in bankruptcy, both his experience of the porcelain market and the fact that he made a substantially higher offer than the other candidate, who according to Germany offered DEM 1. The Commission notes, however, that, although Mr Raithel did indeed make an offer which was higher than DEM 1, the price he offered was to be financed through state resources. None the less, the information available indicates that Mr Raithel brought in DEM 55 000 from his own resources, which is higher than DEM 1. On the basis of the information available, the Commission will follow Germany's view that Mr Raithel was the best bidder.

⁽¹⁸⁾ OJ C 368, 23.12.1994, p. 12 and OJ C 288, 9.10.1999, p. 2.

- (87) The Commission acknowledges that the value of Kahla I's real estate was based on studies by independent experts. According to Germany, the value of plant and stocks – together some DEM 3,5 million – was not determined on the basis of a study owing to practical difficulties and because much of the plant was in poor condition and would need to be replaced. Taking these facts into account, the Commission concludes that there are no reasons to doubt that the price paid for Kahla I's assets did not correspond to the market price.
- (88) As regards the subsequent sale of TIB's 49 % stake in Kahla II, the question whether this amounted to the behaviour of a market economy investor will be examined in the sections below. The Commission notes, however, that the sale of the stake to Mr Raithel and his son on 31 December 1999 did not take place after any open, transparent and unconditional call for tenders.
- (89) TIB is a state-owned financial institution. According to the established case law of the Court of Justice of the European Communities and Commission policy, the Commission considers that the sale price for a public shareholding does not contain any state aid elements where it is sold in an open, unconditional and non-discriminatory tender procedure. Member States are, however, not obliged to follow such a procedure when disposing of their public shareholdings.
- (90) In the absence of such a procedure, the price may involve state aid elements and the Commission may therefore verify, where appropriate, whether the price represents fair value for the public shareholding. The Commission notes in this respect that the price at which the shares were sold to Mr Raithel and his son was higher than the price which TIB had itself paid almost six years earlier. It is also noted that the stake represented a minority shareholding. It should finally be stressed that, in the context of the initiation or the extension of the formal investigation procedure, no interested party has claimed arbitrary exclusion from the sale and none ever made any offer for the shareholding. Consequently, the Commission does not have any evidence of aid in this share deal.

B. Aid within the meaning of Article 87(1) of the EC Treaty

- (91) Financial assistance deriving from public resources was awarded to Kahla I and Kahla II, conferring on these companies advantages over their competitors. It is on record that state-controlled entities grant loans to and acquire shareholdings in private enterprises, as did TIB in the case of Kahla II, and their activities are clearly to be classed as state activities. In this connection reference is made to a consultants report dated 29 November 1993, according to which the entire Kahla restructuring plan is to be viewed in the light of the regional government's efforts to safeguard jobs at Kahla ⁽¹⁹⁾. As the porcelain market is a highly competitive European product market suffering from overcapacity, financial advantages favouring one company over its competitors threaten to distort competition and affect trade between Member States.
- (92) As regards Kahla I, in its decision to extend the formal investigation procedure the Commission came to the conclusion that measures 2, 3 and 9 did not constitute aid. The remaining measures granted by Germany were still regarded as aid within the meaning of Article 87(1) of the EC Treaty. Germany has not challenged this point of view, and it is therefore maintained.

⁽¹⁹⁾ 'The plan of *Auffangsgesellschaft Kahla* has to be seen against the background of the special structural policy conditions obtaining in the *Land of Thuringia*, in particular the efforts of the regional government to safeguard jobs within the limits of the funding possibilities' ('*Das Konzept der Auffangsgesellschaft Kahla muß unter den speziellen strukturpolitischen Bedingungen des Landes Thüringen gesehen werden, insbesondere unter dem Aspekt der Bemühungen der Landesregierung, im Rahmen von Förderungsmöglichkeiten bestehende Arbeitsplätze zu erhalten*'), report by Röls Bühler Stüppes Hauck & Partner, transmitted as Annex 1 to the letter of 31 January 2000, registered as received on 3 April 2000 under No A/32839.

- (93) As regards Kahla II, Germany persists in its view that this is a new company which provides no continuity with Kahla I and which was never in difficulty. Therefore, when offering financial support to it, the public authorities acted like market economy investors. The Commission will analyse first of all whether the public entities which provided financial support to Kahla II acted like market economy investors. It will then examine the issue of the company's difficulties.

Market economy investor

- (94) Germany has provided two consultants reports in support of its contention that the public entities which provided financial support to Kahla II acted like market economy investors.
- (95) As indicated in paragraph 91, the first report, dated 29 November 1993, proposes a restructuring plan for the *Auffanggesellschaft* in the light of the regional government's efforts to preserve jobs at Kahla ⁽²⁰⁾. Restructuring was to take place over the period 1994-1997 and to cost a total of DEM 18,779 million. The break-even point was to be reached in 1996, with a positive result of DEM 0,101 million.
- (96) The second report was prepared for TIB on 11 January 1994, i.e., before it took its 49 % stake in the company. The study explains that TIB's objective is to maintain and create jobs in Thuringia ⁽²¹⁾. It points out that viability can be restored only through a restructuring drive enjoying the support of the public authorities. Break-even should be achieved in 1996, with a positive result of DEM 1,394 million. In addition, the study points out that the public commitment towards Kahla II involves substantial risks, and any possibility of the company paying back any financial support before 1998 is ruled out.
- (97) In the light of these reports, the Commission concludes that the public financial institutions – particularly TIB – did not act like market economy investors in offering financial support to Kahla II. The reports clearly state that the objective of the regional government and its financial institutions was to preserve jobs, which is not the main aim of a market economy investor. Moreover, the reports forecast losses for at least two years and do not analyse any potential *quid pro quos* for the authorities' participation, something that would have been a must for any private investor.
- (98) As regards more specifically the TIB participation, the Commission cannot but adhere to its view that it is not in keeping with the private investor principle and that, consequently, it must be regarded as aid. The fact that five years later TIB sold its stake to the majority shareholders, Mr G. Raithel and his son, for more than it had itself paid in 1994 does not alter this conclusion. TIB's behaviour must be assessed *ex ante*, taking the potential risks and expected revenues into account. On the basis of the reports available at that time, those risks were high ⁽²²⁾, no measures were taken to address them and no analysis of future revenues was undertaken. What is more, the profit actually made by TIB was small.

⁽²⁰⁾ See footnote 19.

⁽²¹⁾ 'Zielsetzung der TIB ist die Erhaltung und Schaffung industrieller Arbeitsplätze im Freistaat Thüringen', report by Arthur Andersen, submitted as Annex 2 to the letter of 31 January 2000, registered as received on 3 April 2000 under No A/32839.

⁽²²⁾ 'There are, however, a number of risks which might result in the plan failing' ('Es bestehen jedoch eine Vielzahl von Risiken, die zum Scheitern des Konzepts führen können') and 'A decision in favour of a participation in Kahla/Thüringen Porzellan GmbH can therefore be recommended in principle, bearing in mind the continuing high risk. But this will mean at the same time having to say 'no' to other Thuringian porcelain manufacturers so as not to further jeopardise the plan's success' ('Eine Entscheidung für eine Beteiligung an der Kahla/Thüringen Porzellan GmbH kann daher grundsätzlich befürwortet werden, wenn man sich des verbleibenden, hohen Risikos bewußt ist. Es bedeutet zugleich aber auch eine Absage an andere thüringische Porzellanhersteller, um den Erfolg des Konzepts nicht weiter zu gefährden'), Arthur Andersen report (see footnote 23).

- (99) Contrary to what Germany maintains, the terms of the TIB participation are not comparable to the terms offered by the private investor, Mr Raithel. Raithel allegedly invested DEM 2,055 million in the company. However, only DEM 0,055 million came out of his own pocket. The remaining DEM 2 million came from state resources in the form of two loans granted to Raithel (measures 16 and 17). Moreover, one of the loans (measure 16) was included in a Federal Government guarantee to the granting Deutsche Ausgleichsbank, while the other (measure 17) was secured by a first mortgage on Kahla II's land ⁽²³⁾. TIB, on the other hand, made available to the company DEM 1,975 million of its own resources in the form of a holding. This amount constituted capital which in the event of insolvency would be treated as junior ranking. The risk assumed by TIB is therefore much higher than that assumed by the private investor. As will be explained in paragraph 111, Mr Raithel was entitled, furthermore, to withdraw from the agreement if the TIB participation and/or other measures did not materialise, whereas TIB did not have that right. The TIB participation is therefore not in keeping with the private investor principle.
- (100) As regards the remaining measures taken by Germany, in view of the particular situation of the company and of the fact that it operated in a market suffering from structural overcapacity, a market economy investor would have granted financial support only under conditions which reflected those facts.
- (101) The Commission will first analyse the loans granted by TIB and state-owned banks. These loans are summarised in Table 10.

Table 10

Measure	Amount (DEM)	Interest rate	Reference rate	Securities
12	6 million	12 % ⁽²⁴⁾	6,62 %	—
16	0,2 million	0 %-5 % ⁽²⁵⁾	6,62 %	Federal Government guarantee
17	1,8 million	5,5 %	6,62 %	1st mortgage on real estate for DEM 1,8 million; secondary mortgage on real estate for DEM 20 million
18	2 million	6,5 %	8,28 %	2nd mortgage on real estate for DEM 1,8 million, 2nd and 3rd mortgages for DEM 20 million, cession of machinery and rights over third parties, cession of stock, cession of claims against customers, 90 % guarantee from <i>Land</i> of Thuringia
19	1 million	6,75 %	8,28 %	As measure 18
20	1,73 million	6,65 %	8,28 %	As measure 18
21	3,45 million	6,65 %	8,28 %	As measure 18
22	2 million	5 %	7,33 %	As measure 18

⁽²³⁾ It will be recalled that the acquisition of Kahla II's assets was financed predominantly by aid.

⁽²⁴⁾ The loan carried an interest rate of 12 %, but interest payments were capped at 50 % of annual profits.

⁽²⁵⁾ Interest during the first three years was taken over by the Federal Government. The interest rate was 2 % during the 4th year, 3 % during the 5th and 5 % during the 6th.

- (102) Table 10 proves that the public financial institutions did not behave like market economy investors. Specifically, as regards the shareholder loan from TIB (measure 12), it is noted that the agreed rate of interest was 12 % but that the amount of interest was capped at 50 % of annual profits. The reports had already pointed out that Kahla II would not generate any profits during at least the first two years, which is what in fact happened. No increased interest rate was agreed to compensate for the years for which interest payments were improbable. Consequently, TIB knowingly granted a shareholder loan which did not give it any additional voting rights, without demanding any security and at 0 % interest for at least two years. No risk premium was agreed to offset the risks forecast in the report on the basis of which the shareholder loan (and the holding) was agreed. As regards the remaining loans, the table shows they were all granted below the reference interest rate. Moreover, when security was provided, it either came from the public authorities or the same assets were used repeatedly to secure all loans. These assets were not independently valued, so their actual value is uncertain. It must also be remembered that they were financed with state support.
- (103) The guarantee agreement provided that a subsidiary guarantee amounting to DEM 0,7 million should be given by Mr G. Raithel, unless it could be proved that he had given a personal guarantee for the equity loan (measure 16). The loan agreement for measure 16 does not mention any provision of a personal guarantee, but refers to a Federal Government guarantee. The Commission was never informed that such a DEM 0,7 million guarantee was ever given. Rather, according to the Commission's information, the loan was secured by a Federal Government guarantee and not by a personal guarantee. Even if it had been given, it would rank lower than every other security and would cover only a very small part of the potentially high risk of non-payment. In view of the above, the Commission can only conclude that the public banks and institutions did not act like market economy operators. Moreover, as regards the loans under measures 16-22, Germany itself describes them as aid⁽²⁶⁾, albeit of the existing variety. The Commission shares Germany's view that they constitute aid. As regards their classification as existing aid, this issue will be analysed in the sections that follow.
- (104) Regarding the grants (measures 15, 24-29 and 31-32), the Commission considers that a market economy investor would not have granted non-reimbursable subsidies. Germany has not contested this point. Finally, as regards the 90 % state guarantees (measures 13, 14, 23 and 30), Germany itself accepts that they constitute aid. In view of the related high risk and the lack of an appropriate risk premium, the Commission fully shares this view. There is therefore no need to analyse this issue further. Germany asserts that these guarantees fall under the *de minimis* rules. This will be examined in Section D.
- (105) In view of the above, the Commission cannot conclude that the public financial institutions offered support to Kahla II under conditions comparable to those of a market economy investor. Consequently, all Germany's measures are still regarded as aid within the meaning of Article 87(1) of the EC Treaty.

⁽²⁶⁾ Following the extension of the procedure Germany altered its stance, stating that the loans under measures 16 and 17 were not aid since, despite their having nominally been granted under an approved aid scheme, they had been paid direct to Mr G. Raithel.

Company in difficulty

- (106) Kahla II is an *Auffanglösung*, this is, a new set-up which has taken over the assets of a bankrupt company. Although they are newly created companies, *Auffanglösungen*, a peculiar eastern German creation, can be regarded as companies in difficulty. The reason for this is that these shell companies take over the assets of a company which has gone bankrupt and continue their business, usually without undergoing any acceptable restructuring. *Auffanglösungen* therefore “inherit” a number of structural deficiencies and need substantial changes if they are to operate in a market economy. Among these changes are investments to replace and update old plant and machinery, changes in the company’s structure (traditionally large conglomerates operating under a planned economy), personnel reduction (eastern German conglomerates usually operated with an excessively large workforce), a new product orientation, marketing, etc. In addition, the confidence of customers, suppliers and credit institutions needs to be regained since the *Auffanggesellschaft* is the successor to a failed company. In this sense they are not comparable to other newly created companies.
- (107) The adjustment usually takes place through a restructuring involving, in most cases, state aid. Taking the specific situation of the former eastern Germany into account, the Commission has adopted a flexible, generous approach allowing *Auffanglösungen* to benefit from restructuring aid until the end of 1999. This approach is codified in footnote 10 of the restructuring aid guidelines ⁽²⁷⁾. In view of their specific situation, *Auffanggesellschaften* form an exception to the rule that newly created companies are ineligible for rescue and restructuring aid under the restructuring aid guidelines.
- (108) In separate proceedings ⁽²⁸⁾, Germany expressly stated in letters dated 5 March and 6 May 1999 that Kahla II was a company in difficulty. However, two years later, in a letter dated 26 September 2001, Germany contradicted its earlier statements, asserting that Kahla II had never been in difficulty. In the context of these proceedings, Germany considers that Kahla II cannot be regarded as a firm in difficulty as not all the conditions of the restructuring aid guidelines are met.
- (109) The Commission would point out that the restructuring aid guidelines do not give a precise definition of a company in difficulty, but instead mention typical symptoms. In the case of Kahla II, the general criterion set out in point 2.1 of the (1994) restructuring aid guidelines, by which it is determined whether a firm is in difficulty, is fulfilled: it is a firm “unable to recover through its own resources or by raising the funds it needs from shareholders or borrowing”. This is stated in the reports available at the time Kahla II was created ⁽²⁹⁾ and when the aid was awarded (relevant moment for the assessment), which consider Kahla II to be a company in difficulty and describe a restructuring intended to restore its viability ⁽³⁰⁾. *Ex post* this is confirmed by the fact that, according to the information available, the company never obtained any external bank finance without state support ⁽³¹⁾.
- ⁽²⁷⁾ Although, as is explained in paragraph 163, these are not applicable to aid granted during the period 1994-96. Footnote 10 of the 1999 restructuring guidelines codifies the Commission’s approach, stating that the only exceptions to the rule that a newly created company is not eligible to receive rescue or restructuring aid are ‘any cases dealt with by the BvS 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’.
- ⁽²⁸⁾ C 69/98, SG (98) D/11285 of 4.12.1998.
- ⁽²⁹⁾ The calculations in the business plan show that the company ... [is] not in a position to bear the costs of restructuring, which are enormous compared with the projected turnover, on its own’ (*Die Berechnungen des Geschäftsplanes zeigen, daß die Auffanggesellschaft (...) nicht in der Lage (ist), die im Verhältnis zum geplanten Umsatz enormen Finanzierungskosten den Umstrukturierungsprozeß alleine zu tragen*), Röls Bühler Stüppes Hauck & Partner report (see footnote 21).
- ⁽³⁰⁾ The purpose of our study is to assess the capacity and need for reorganisation of the company whose activity is being continued within the *Auffanggesellschaft*, having particular regard to the jobs that can be safeguarded in the long term and the financial resources available to TIB as a potential shareholder’ (*Ziel unser Arbeiten sollte sein, die Sanierungsfähigkeit und Sanierungswürdigkeit des in der Auffanggesellschaft fortgeführten Unternehmens unter besonderer Berücksichtigung der dauerhaft erhaltbaren Arbeitsplätze und der von der TIB als potentielltem Gesellschafter zur Verfügung zu stellenden Finanzmittel zu beurteilen*), Arthur Andersen report (see footnote 23).
- ⁽³¹⁾ All loans from private banks of which the Commission has been informed were covered by 90 % state guarantees.

- (110) Effectively some of the indicators set out in the restructuring guidelines are not envisaged for *Auffanglösungen* since, as start-ups, the past cannot be looked into. Consequently, at the time of their creation they do not suffer from deteriorating profitability, increasing losses, diminishing turnover, growing inventories, declining cash flow, rising interest charges, etc. The Commission here recalls that *Auffanglösungen* are the exception to the rule that under the restructuring aid guidelines newly created companies cannot be considered firms in difficulty and therefore are not eligible for restructuring aid.
- (111) On the other hand, other indicators do apply to *Auffanglösungen*, particularly low net asset value. In the case of Kahla II, the Commission would point out that it is the successor to a bankrupt company and is therefore likely to have lost the confidence of a number of customers, suppliers and financial institutions. Even the acquisition of assets was thus dependent on state support. The contract for the sale of Kahla I's assets stipulated that the new investor, Mr G. Raithel, was entitled to withdraw from the contract if the financing, including as it did various state measures (such as the TIB participation and state loans), was not assured ⁽³²⁾. Moreover, Kahla II took over the assets of Kahla I, which never underwent a successful restructuring, a fact which led to its bankruptcy. *Ex post* it is clear that structural difficulties were passed on as Kahla II received no private financing without state support.
- (112) Another indicator is the excessive size of the workforce. As the state support granted to *Auffanglösungen* is usually conditional on the safeguarding of jobs, this implies that during a certain period they endure the additional handicap of preserving a certain number of jobs. As evidenced by the reports referred to in paragraph 91, the main aim of the regional government was to preserve jobs. In the years that followed, Kahla II reduced the number of its employees, from which it can be deduced that it started off with too many.
- (113) Moreover, since *Auffanglösungen* are forced to restructure in order to be able to operate in a market economy, losses are incurred and cash flow does not increase during the first few years and the necessary investment translates into substantial debts and high interest rates. This, again, was the case with Kahla II. Although Germany has never characterised the process undergone by Kahla II as a restructuring of a firm in difficulty, the Commission notes that both reports, that of November 1993 and that of January 1994, proposed a restructuring as being necessary to restore the company's viability. Moreover, a report by Project Management Eschbach (PME) submitted by Germany in connection with another proceeding ⁽³³⁾ described Kahla II as a company undergoing a restructuring process which would not be completed before the end of 1996 ⁽³⁴⁾. In the Commission's view, such a process is not typical of a healthy firm.

⁽³²⁾ 'The purchaser may rescind the entire contract without any financial consequences ... if ... the financing referred to below is not confirmed by 31.12.1994; he may also do so if the financing is only partly forthcoming' ('Der Käufer hat das Recht ohne weitere Kostenfolge (...) vom gesamten Vertrag zurückzutreten, wenn (...) die nachfolgende Finanzierung nicht bis zum 31.12.1994 zugesagt ist; dies gilt auch, wenn die Finanzierung nur teilweise zustande kommt'). The financial measures in this contract concern ERP and KfW loans of DEM 2,5 million, a TIB participation worth DEM 7,95 million, bank loans amounting to DEM 13,35 million and a 90 % Land guarantee for DEM 20 million (sale contract between the administrator in bankruptcy of Kahla I and Günter Raithel, negotiated on 26 January 1994).

⁽³³⁾ C 36/2000, *Graf von Henneberg Porzellan GmbH*.

⁽³⁴⁾ 'Since Kahla is currently undergoing reconstruction and will certainly still need the whole of 1996 in which to consolidate, an early transfer of production volumes is out of the question' ('Da auch Kahla sich aktuell im Wiederaufbau befindet und zur Konsolidierung sicherlich noch das volle Jahr 1996 benötigt, sei an eine frühere Verlagerung von Produktionsmengen kaum zu denken'), PME report dated 24.8.1995.

- (114) Germany also considers that the losses which Kahla II incurred during the first few years were due only to the application of a special depreciation scheme (measure 33). The Commission takes the view, however, that, while it may be true that higher losses were incurred owing to the application of this depreciation scheme, without state support the company would certainly have incurred much higher losses and would probably have been driven out of the market. It should be noted that the 1993 and 1994 reports supplied by Germany regarded state support as essential to the company's survival and to the restoration of viability.
- (115) Germany has provided a report drawn up by a consultant on 21 January 2002 in support of its argument that Kahla II was never in difficulty.

Table 11

	1994	1995	1996	1997	1998	1999	2000
Turnover (DEM million)	23,19	28,95	31,46	39,10	34,34	35,81	41,60
Operating result before tax (DEM million)	[...] (*)						
Cash flow (DEM million)	[...]						
Stocks	[...]						
% capacity utilisation	[...]						
% own capital	[...]						
% outside capital	[...]						

(*) Confidential information. See Table in paragraph. (21).

- (116) The Commission notes that Table 11 is an *ex post* evaluation of the company's history. It is useful in that it confirms that the main forecasts of the reports available in 1994 were correct: losses were to be incurred during at least the first two years. However, the Commission must make its assessment from an *ex ante* point of view, that is, it must establish whether from 1994 Germany fulfilled its obligations under the EC Treaty and notified the aid. Had Germany fulfilled its obligations, the Commission would have based its assessment on the reports available at that time. As already stated in paragraphs 95, 96 and 113, those reports are based on the premiss that the company had to restore its viability and concluded that state support was absolutely essential to achieve that aim. In the light of those reports, the Commission would have followed its established practice and regarded Kahla II (an *Auffanglösung*) as a firm in difficulty. This conclusion cannot be altered, *ex post*, by the fact that, thanks to substantial aid awards, these difficulties were surmounted within a short space of time.
- (117) To sum up, on the basis of the reports available at the relevant point in time, the Commission concludes that Kahla II was unable to recover through its own resources or by raising financing on the market. The Commission notes in particular that Germany expressly admitted this back in 1999. Moreover, without state support the company would probably have been driven out of the market. The fact that not every indicator in the restructuring aid guidelines applies to Kahla II is irrelevant: the guidelines contain a non-exhaustive list of typical symptoms and not an exhaustive, cumulative list of criteria.

- (118) Consequently, the Commission adheres to its view that Kahla II was a company in difficulty during the period from 1994 to the end of 1996, when, most likely thanks to the aid injected, a slightly positive result was first achieved and the share of own capital began to increase. The Commission considers that the lack of private financing without state support and the available data bear this out.

C. Aid purportedly covered by approved aid schemes

- (119) Part of the aid to Kahla I and Kahla II was allegedly granted under approved aid schemes. Since the Commission had serious doubts about the compliance of these aid measures with the terms of the schemes under which they had allegedly been awarded, it issued an information order under Article 10(3) of Council Regulation No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ⁽³⁵⁾, requiring Germany to supply all documentation, information and data necessary for their assessment. In so far as the information transmitted by Germany is an insufficient basis on which to conclude that these measures are covered by the relevant schemes, the Commission is accordingly empowered to take a decision on the basis of the information available.
- (120) In its decision to extend the formal investigation procedure, the Commission concluded that measures 1, 4, 5, 6, 7 and 10 in favour of Kahla I constituted existing aid which did not need to be reassessed. It still considers that measure 8 was not granted under any approved aid scheme and falls to be assessed as ad hoc aid.
- (121) As regards Kahla II, in its decision to extend the formal investigation procedure the Commission concluded that measures 28 and 29 in favour of Kahla II constituted existing aid which did not need to be reassessed. It still considers that measures 11, 12 and 20 were not granted under any scheme approved by it. As regards the remaining measures allegedly granted under approved aid schemes, the Commission will partially review the provisional assessments made in the decisions to initiate and extend the formal investigation procedure.
- (122) *Measures 13, 14, 23 and 30:* These 90 % state guarantees were based on a scheme which was never notified to the Commission. The scheme was registered under number NN 46/97 and was never approved by the Commission. Consequently, as stated in the decision to extend the formal investigation procedure, these guarantees fall to be assessed as ad hoc aid. Moreover, in its decision on the guarantee guidelines of the *Land of Thuringia* ⁽³⁶⁾, the Commission noted Thuringia's commitment no longer to apply this non-notified scheme.
- (123) In respect of the aid element in these guarantees, Germany claims that, according to an agreement between Germany and the Commission, the aid element in the guarantee should be 0,5 % of the amount covered by the guarantee. The Commission would point out, however, that this agreement concerned 80 % state guarantees complying with approved aid schemes. The guarantees here exceed this limit by 10 % and were based, not on approved aid schemes, but on a non-notified scheme never approved by the Commission. Moreover, the agreement excluded companies in difficulty from its scope. Consequently, despite Germany's claims, the rate of 0,5 % cannot be applied to these guarantees.

⁽³⁵⁾ OJ L 83, 27.3.1999, p. 1.

⁽³⁶⁾ NN 25/95, SG (96) D/11031 of 16.12.1996.

- (124) In respect of the guarantees under measures 13, 14 and 23, according to the Commission notice on the application of Articles 87 and 88 of the EC Treaty to state aid in the form of guarantees, the following applies: "Where, at the time the loan is granted, there is a strong probability that the borrower will default, e.g. because he is in financial difficulty, the value of the guarantee may be as high as the amount effectively covered by that guarantee" ⁽³⁷⁾. As stated in Section B of the Assessment (paragraphs 106 to 118), Kahla II was a company in difficulty at the time of the granting of these measures. This means that for guarantees provided until 1996, the aid element in these guarantees is potentially 90 % of the credits to which they relate.
- (125) As regards measure 30, which was granted when the company was no longer in difficulty, Germany again considers that, on the basis of the agreement with the Commission referred to in paragraph 123, the aid equivalent should be set at 0,5 %. The Commission would point out once more, however, that the agreement concerned 80 % guarantees provided under approved aid schemes. The guarantee here exceeded the 80 % limit by 10 % and was not provided under an approved aid scheme. Consequently, the 0,5 % aid equivalent cannot be applied here. At the time of the provision of this guarantee, the *Land* of Thuringia had agreed to make guarantees subject to the Commission decision on the guarantee guidelines of the *Land* of Thuringia ⁽³⁸⁾, according to which, for 80 % guarantees provided under approved aid schemes, the aid element in these guarantees would be set at between 0,5 % and 2 %. Although that decision again concerns 80 % guarantees provided under approved aid schemes, the Commission considers it appropriate to apply this rule here by analogy. Nevertheless, in view of the fact that the guarantee covered a large part of the risks inherent in the loan, which is reflected by the low interest rate fixed by the private bank, the Commission will apply the maximum percentage allowed for guarantees in the scheme, i.e., 2 %.
- (126) Similarly, the Commission considers it appropriate to apply a 2 % aid element to the 90 % guarantee under measure 13, and this from 30 March 1998, when the loans under measures 18-21 were converted into a market loan. The interest rate of the market loan came to 5,90 %. Before the loans under measures 18-21 were converted, their interest rate came to between 6,5 % and 6,75 %. The loans, which were obtained from state resources, were thus converted into a private loan at the precise time when it was possible for the company to secure a lower interest rate for a private loan on the market than was payable on loans obtained from state resources. It should be pointed out in this connection that the conversion was possible only because a 90 % state guarantee had been provided in respect of this new loan.
- (127) Germany states that these guarantees fall under the *de minimis* rules. The application of the *de minimis* rules will be verified in Section D of the Assessment.
- (128) *Measure 15*: A grant of DEM 2,5 million was allegedly granted under an approved aid scheme ⁽³⁹⁾. In its decision to extend the formal investigation procedure, the Commission erroneously stated that this scheme was intended only for SMEs. Germany correctly pointed out that large companies were also eligible for aid under this scheme under certain circumstances. However, the scheme expressly excludes companies in difficulty from its scope.

⁽³⁷⁾ OJ C 71, 11.3.2000, p. 14, point 3.2.

⁽³⁸⁾ NN 25/95, SG (96) D/11031 of 16.12.1996.

⁽³⁹⁾ N 408/93, SG (93) D/19245, 26.11.1993 (OJ C 213, 19.8.1992, p. 2).

- (129) The Commission recently reached a negative decision in respect of this scheme on grounds of misuse, since it had been used for, amongst others, companies in difficulty⁽⁴⁰⁾. In its decision the Commission specifically noted that Germany had included Kahla II amongst the companies in difficulty which had benefited from this scheme, contrary to the specific provisions approved by the Commission. In its decision concerning this scheme, the Commission stated that its decision on the scheme was without prejudice to its decision in the present case, in the context of which this individual application was being examined. In the present decision, the Commission considers that Kahla II was in difficulty at the time of the granting of this aid measure. Consequently, the view that the aid here must be regarded as new aid is maintained.
- (130) *Measure 16*: A loan of DEM 0,2 million was allegedly granted under an approved equity loan scheme⁽⁴¹⁾. This scheme was intended only for SMEs. However, since Kahla II had more than 250 employees and therefore did not qualify as an SME at the time of the granting of this measure, the aid manifestly does not comply with the scheme. Germany recently argued that the loan was granted to Mr G. Raithel and not to the company. However, according to the Commission's approval of the scheme on the basis of which the loan was awarded, investors may receive such support only on condition that they bring it into the company as capital. This is what Mr Raithel did. Consequently, although directly granted to a private person, the purpose of the loan was to support an undertaking. Hence the loan is regarded as new aid to Kahla II.
- (131) *Measures 17, 18, 19 and 22*: In the course of its examination the Commission came to the conclusion that the conditions set out in the scheme under which these loans were granted⁽⁴²⁾ were fulfilled in the present case. Consequently, these credits constitute existing aid which does not need to be reassessed by the Commission.
- (132) *Measure 21*: This loan was allegedly granted under an approved aid scheme⁽⁴³⁾. However, the scheme provided for loans of a maximum of DEM 2 million for companies in the new *Länder*. The loan here exceeds this limit. Consequently, the Commission cannot conclude that the conditions of the relevant scheme were complied with. Taking into account the subsidised rate of interest, the reduced value of the collateral provided and the presence of a 90 % guarantee covering almost the whole risk of default, the Commission considers that at the time they were granted these loans constituted aid potentially to their full amount.
- (133) *Measures 24 and 25* were granted under approved aid schemes for the purpose of covering the investments detailed in Table 5. In addition, the information provided by Germany indicates that part of the investment aid granted under the special depreciation scheme (*measure 33*) also contributed to the coverage of these investments. Germany has provided evidence that all these measures comply with the terms of the schemes under which they were allegedly granted. Consequently, measures 24, 25 and 33 constitute existing aid, which the Commission does not need to reassess.

⁽⁴⁰⁾ C 69/98, SG (2002) D/34461 of 19.6.2002 (not yet published).

⁽⁴¹⁾ ERP-Eigenkapitalhilfeprogramm, N 213/93, SG (93) D/16665 of 13.10.1993.

⁽⁴²⁾ ERP-Existenzgründungsprogramm, N 108c/1994 (see footnote 6).

ERP-Aufbauprogramm, N 108b/1994 (see footnote 7).

KfW-Mittelstandsprogramm, NN 109/93 (see footnote 8).

⁽⁴³⁾ ERP-Umweltprogramm, N 563d/94 (see footnote 9).

- (134) *Measure 26*: Grants for the promotion of employment in connection with environmental investments, allegedly awarded under an approved scheme, do not count as aid ⁽⁴⁴⁾. However, as stated in the decision to extend the formal investigation procedure, the scheme was intended - as far as its environmental aspects are concerned - for the cleaning-up of environmental hazards in state-owned enterprises. The grants are therefore clearly not in keeping with the scheme on the basis of which they were allegedly granted. By letter dated 29 July 1994 ⁽⁴⁵⁾, Germany explained to the Commission how this provision was to be interpreted. Germany clearly stated that such measures could be carried out only in municipalities, towns, etc. Companies held by the THA were also eligible for such aid before their privatisation, as up to that point they were to be regarded as state-owned enterprises ⁽⁴⁶⁾. The Commission considered that such measures did not constitute aid as they did not confer an advantage on any one company ⁽⁴⁷⁾.
- (135) When it benefited from these measures, Kahla II was a private company and hence ineligible. Moreover, part of these grants were awarded by the *Land* of Thuringia, whereas according to the relevant scheme only the Bundesanstalt für Arbeit was entitled to award such grants. Consequently, the Commission is unable to find that these measures constituted existing aid ⁽⁴⁸⁾.
- (136) Following the extension of the formal investigation procedure, Germany changed tack, arguing that these measures did not confer any advantage on the company. It stated first of all that the measures had been granted for the clearance of old installations, which was ostensibly of importance to the environment. However, the Commission cannot accept that the clearance of old installations did not confer an advantage on the company. Any such works would necessarily lead to an increase in the available surface area and in the value of the company.
- (137) Germany recently stated that the measures were intended for the removal of environmental hazards dating from July 1990. According to the Commission's practice, such measures do not constitute aid. However, Germany has not provided any evidence that there were any hazards dating from before July 1990. In addition, those hazards had supposedly been removed by Kahla I, which already benefited from such support in 1991 (measure 2) for the amount needed to remove them. Germany has never furnished any proof that the environmental hazards had still not been removed when the assets were purchased by Kahla I. Even if this were the case, the acquirer might reasonably be expected to have verified that the assets were free of this type of hazard. If it were not the case, he did not exercise the necessary care and it is therefore unacceptable that state support was subsequently provided for the purpose. If suitable checks had been carried out, the existence of these risks and the need to earmark resources for their removal would have been taken into account in the purchase price and there would have been no subsequent recourse to state support.
- ⁽⁴⁴⁾ NN 117/92, SG (95) D/341 of 13.1.1995.
- ⁽⁴⁵⁾ Registered under number A/33865 on 29.7.1994.
- ⁽⁴⁶⁾ 'The beneficiaries of measures pursuant to Article 124h of the Employment Promotion Act in the area of decontamination and improvement of the environment shall be public law entities, and in particular territorial authorities (towns, districts, municipalities, etc.) and public undertakings owned by the Treuhandanstalt' (*Träger der Massnahmen nach § 124 h AFG im Bereich Umweltsanierung und Umweltverbesserung sind juristische Personen des öffentlichen Rechts, vor allem die Gebietskörperschaften (Städte, Kreise, Gemeinde u.a.), sowie Regiebetriebe der Treuhandanstalt*). Letter dated 29.7.1994 (see footnote 52).
- ⁽⁴⁷⁾ 'In other words, measures which are in the interest of a particular company are ineligible for aid' (*Das bedeutet, dass Massnahmen die im Interesse eines Unternehmens sind, nicht förderfähig sind*). Letter dated 29.7.1994, referred to in footnote 52.
- ⁽⁴⁸⁾ See also the decision in Case C 36/2000, SG (2001) D/292014.

- (138) Germany also stated that, if the company had known that these measures constituted aid, it might not have carried out the relevant work or it would have employed its own personnel or fewer or different personnel. Germany claims that the fact that the Commission had classified the scheme as non-aid and had approved it was enough to raise legitimate expectations that the measures were not aid. The Commission cannot accept this argument as its clearance of the scheme was effected on the basis of the notification and of the additional information submitted by Germany. Hence Germany cannot consciously act in contradiction of the notification and claim breach of legitimate expectations. Nor can the beneficiary claim such expectations when it is clearly stipulated in the German scheme that these measures cannot be implemented in the interests of an individual company and that only the Bundesanstalt für Arbeit was entitled to award such grants, whereas here part of the support was granted by the *Land* of Thuringia.
- (139) Germany finally argued that the grants constituted a general measure from which all companies in Germany could benefit without discrimination. The Commission notes, however, that this claim contradicts all the information previously submitted. It is clear from the relevant German legal provisions (Article 249h of the Employment Promotion Act) and from all the documents transmitted to the Commission, which enabled the Commission to classify the scheme as non-aid and to approve it, that not all companies can benefit from such measures. On the contrary, the German act and all the documents transmitted by Germany, which were intended to enable the Commission to assess the provisions, refer to public law entities and expressly exclude measures in favour of an individual company. This provision involves a clear element of selectivity, which means that the measure cannot be considered a general measure.
- (140) *Measure 27*: Grants for various purposes awarded in 1995 and 1996. Since no legal basis was invoked, the Commission provisionally regarded them as new aid. Germany then claimed that grants for research and development amounting to DEM 0,318 million had been awarded under an approved aid scheme⁽⁴⁹⁾. On the basis of the information available, the aid here complies with the terms of this scheme and thus constitutes existing aid which does not need to be reassessed.
- (141) As for the employee integration grants amounting to DEM 0,021 million, Germany considers that they do not constitute aid within the meaning of Article 87(1) of the EC Treaty as they were simply intended for the promotion of the employment of handicapped people. The Commission would point out, however, that, for such measures not to constitute aid, they must be granted in accordance with the guidelines on aid to employment⁽⁵⁰⁾ (employment aid guidelines) on the basis of objective criteria to individuals and without favouring certain undertakings or the production of certain goods. In spite of the information order relating specifically to this point, Germany has not provided any evidence in this respect. Consequently, the Commission concludes on the basis of the information transmitted that these measures constituted state aid within the meaning of Article 87(1) of the EC Treaty.
- (142) The remaining grants for fair attendance totalling DEM 0,122 million and the grants for advertising amounting to DEM 0,030 million are claimed to fall under the *de minimis* rules. Their compliance with the *de minimis* rules will be assessed below.
- (143) *Measures 28 and 29*: As stated in the decision to extend the formal investigation procedure, on the basis of the information available these measures are regarded as existing aid. In addition, the information provided by Germany states that part of the investment aid granted under the special depreciation scheme (*measure 33*) also contributed to the coverage of these investments. Germany has provided evidence that these measures comply with the terms of the schemes under which they were allegedly granted. They consequently constitute existing aid which the Commission does not need to reassess.

⁽⁴⁹⁾ N 660/93, SG D/21632 of 31.12.1993 and N 477/91, SG (91) D/22704 of 25.11.1991.

⁽⁵⁰⁾ OJ C 334, 12.12.1995, p. 4.

- (144) *Measure 31*: Further grants for the promotion of employment awarded under an approved aid scheme ⁽⁵¹⁾. On the basis of the information submitted by Germany, the Commission considers that these grants comply with the terms of the scheme under which they were awarded. Consequently they constitute existing aid which does not need to be reassessed by the Commission.
- (145) *Measure 32*: Grants for various purposes. Since no legal basis was invoked, the Commission provisionally regarded them as new aid. Germany claims, however, that the grants for research and development amounting to DEM 0,009 million were awarded under an approved aid scheme ⁽⁵²⁾. However, this scheme is intended only for SMEs. On the basis of the information available, Kahla II never qualified as an SME between 1997 and 1999, mainly because it always exceeded the ceiling of 250 employees, even after deducting the number of trainees. Consequently, the aid manifestly does not come under the scheme under which it was allegedly granted and falls to be assessed as new aid.
- (146) As regards the employee integration grants, Germany again explained that they do not constitute aid within the meaning of Article 87(1) of the EC Treaty as they were intended for the promotion of employment of handicapped people. However, as in the case of the grants under measure 27 above, Germany has not provided any evidence in this respect in spite of the information order relating specifically to this point. According to the figures in the company's annual reports ⁽⁵³⁾, the employee integration grants amounted to DEM 0,119 million in 1997 and 1998 and to an unknown proportion of the grants for fair attendance and job familiarisation amounting to DEM 0,121 million for 1999 listed in the 1999 annual report. Consequently, the Commission concludes on the basis of the information available that these measures constituted state aid within the meaning of Article 87(1) of the EC Treaty.
- (147) The remaining grants for fair attendance and grants for advertising amounting to DEM 0,103 million for 1997 and 1998 and an unknown proportion of the grants for fair attendance and job familiarisation amounting to DEM 0,121 million for 1999 listed in the 1999 annual report are claimed to fall under the *de minimis* rules. Their compliance with the *de minimis* rules is assessed in Section D of the Assessment.
- (148) In view of the above, measures 17, 18, 19, 22, 24 and 25, part of measure 27, and measures 28, 29, 31 and 33 constitute existing aid which the Commission does not need to reassess.

D. Measures claimed to be *de minimis*

- (149) Measures 13, 14, 23, part of measure 27, measure 30 and part of measure 32 are claimed to fall under the *de minimis* rules ⁽⁵⁴⁾. This rule stipulates that the ceiling for aid to be considered *de minimis* will be €100 000 over a three-year period beginning when the first *de minimis* aid was granted. This ceiling will apply to the total of public assistance considered to be *de minimis* aid and will not affect the possibility of the recipient obtaining aid under schemes approved by the Commission. The relevant periods are 25 March 1994 to 25 March 1997 and 25 March 1997 to 25 March 2000.
- (150) As regards the first period from 1994 to 1997, the measures claimed to fall under *de minimis* rules are 13, 14, 23 and part of measure 27.

⁽⁵¹⁾ NN 107/97, in force since 1 April 1997, approved by letter SG (98) 1049 of 6.2.1993.

⁽⁵²⁾ NN 331/96, SG (97) D/482, of 23.1.1997.

⁽⁵³⁾ Reports on the auditing of the annual accounts of Kahla/Thüringen Porzellan GmbH for 1997, 1998 and 1999.

⁽⁵⁴⁾ See footnotes 16 and 17.

- (151) Although the part of the grants under measure 27 claimed to be *de minimis*, i.e., grants for fair attendance of DEM 122 000 and grants for advertising of DEM 30 000, totals 152 000 (€77 716), this amount should be combined with the aid equivalent of the guarantees under measures 13, 14 and 23. As stated in paragraph 124, the value of the guarantee may be as high as the amount effectively covered by that guarantee ⁽⁵⁵⁾. This implies that the aid element in these guarantees was, at the time of their award, potentially 90 % of the credits to which they relate, which largely exceeds the *de minimis* limit. Consequently, it cannot be accepted that all these measures fall under the *de minimis* rules.
- (152) As regards the period 1997-2000, the guarantee under measure 30 and part of measure 32 are claimed to fall under the *de minimis* rules.
- (153) As regards the guarantee under measure 30, applying a 2 % aid equivalent as explained in paragraph 125, the aid element in this guarantee can be put at DEM 41 760. The part of measure 32 claimed to be *de minimis* consists of grants for fair attendance of DEM 294 000 and grants for cost reduction of DEM 114 000. In addition, the new value of the guarantee under measure 13, as from the moment it covered the market loans, should be added. As explained in paragraph 47, these loans totalled DEM 7,329 million. Applying again a 2 % aid equivalent to the amount of the loans covered by the guarantee, this results in an aid equivalent of DEM 131 922. Hence the measures claimed to be *de minimis* for the period 1997-2000 total DEM 581 682, which far exceeds the *de minimis* limit.
- (154) In view of the above, the Commission cannot accept that the *de minimis* rules apply to all these measures. Consequently, they constitute aid within the meaning of Article 87(1) of the EC Treaty.

E. New aid

- (155) In view of the foregoing, measure 8 in favour of Kahla I and measures 11, 12, 13, 14, 15, 16, 20, 21, 23, 26, 27, 30 and 32 in favour of Kahla II fall to be assessed as new aid. On the basis of the information available, the Commission cannot conclude that they comply with the terms of approved aid schemes.

F. Compatibility with the common market

- (156) The EC Treaty provides for several exceptions to the principle of the general incompatibility of state aid with the common market. The exemptions in Article 87(2) of the EC Treaty do not apply in the present case because the aid measures neither have a social character and are granted to individual consumers, nor do they make good the damage caused by natural disasters or exceptional occurrences, nor are they granted to the economy of certain areas of the Federal Republic of Germany affected by its division. Further exemptions are laid down in Article 87(3)(a) and (c) of the EC Treaty. Article 87(3)(a) allows the Commission to authorise aid for the economic development of certain areas. Article 87(3)(c) provides for the authorisation of state aid that is granted to facilitate the development of certain economic activities or certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest. The Commission has issued various guidelines to spell out the conditions under which aid can be authorised on the basis of this provision.

⁽⁵⁵⁾ *Loc. cit.*, see footnote 37.

Aid granted until the end of 1996

- (157) Germany does not contest the fact that, despite the company concerned being located in an area where regional aid may be granted in accordance with Article 87(3)(a) of the EC Treaty, the aid to Kahla I falls to be assessed under the 1994 restructuring aid guidelines as the primary objective of the aid was not regional but concerned the restoration of the long-term viability of an undertaking in difficulty. The Commission would make clear here that only the aid granted under measure 8 falls to be assessed.
- (158) With regard to Kahla II, Germany claims that the objective of the measures found to constitute aid not covered by approved aid schemes or falling outside the *de minimis* rules was regional. The Commission would make clear here that the ad hoc aid to be assessed is constituted by measures 11, 12, 13, 14, 15, 16, 20, 21, 23, 26, 27, 30 and 32.
- (159) The Commission considers that the guidelines on national regional aid ⁽⁵⁶⁾ (regional aid guidelines) are not the appropriate provision for the assessment of the compatibility of the aid awarded from 1994 to 1996. According to footnote 10 of the guidelines, "ad hoc aid for firms in difficulty is governed by specific rules and is not conceived as regional aid as such". These specific rules are the restructuring aid guidelines.
- (160) The Commission would point out that the current regional aid guidelines were not applicable at the time the aid was granted. However, the rules in force at the time of the award, i.e., those referred to in footnote 2 of the current guidelines, also clearly state that such aid must not be granted in violation of the specific rules on aid granted to companies in difficulty. As explained in Section B of the Assessment (paragraphs 106-118), the Commission has come to the conclusion that, until 1996, Kahla II was a company in difficulty. Consequently, the ad hoc aid cannot be assessed under these provisions. This is also clear in the light of the kind of costs which were covered by the aid. The Commission would point to Table 5, according to which 80 % of expenditure went on renovation of machinery and working capital. These are typical expenditures within a restructuring project but not within an investment project.
- (161) In view of the above, the Commission cannot conclude that all the ad hoc aid to Kahla II until 1996 can be regarded as regional aid compatible with the common market.
- (162) Germany recently argued that the aid under measure 26 should be regarded as employment aid. The employment aid guidelines ⁽⁵⁷⁾ provide for aid for the creation of new jobs. According to Germany, the grants were used for the clearance of part of Kahla II's installations. This work was carried out by unemployed people and consequently led to the provisional employment of unemployed people. However, it did not lead to any lasting employment. Nor can the aid be regarded as aid to preserve jobs as the size of the company's workforce was reduced considerably (from 380 in 1994 to 327 in 1996). Moreover, Germany's explanations concerning the utilisation of the aid, namely, the temporary employment of unemployed people, clearly reinforce the view that no jobs at Kahla II were safeguarded. The Commission therefore considers that measure 26 cannot be authorised as employment aid on the basis of the employment aid guidelines. This view of the Commission's also holds true with respect to the aid granted prior to the entry into force of the guidelines inasmuch as the guidelines simply confirmed existing practice, and in any event employment aid cannot be approved where jobs are neither created nor preserved.

⁽⁵⁶⁾ OJ C 74, 10.3.1998, p. 9.

⁽⁵⁷⁾ See footnote 50.

- (163) Since the company was in difficulty at the time the ad hoc aid was granted, it must now be examined whether the aid to Kahla II until 1996 and the aid to Kahla I can be regarded as compatible with the common market under the restructuring aid guidelines. The Commission considers that none of the other Community guidelines, such as those on aid for research and development, environmental protection, small and medium-sized enterprises, or training, can apply. Since all the aid measures were granted before the revised version of the restructuring aid guidelines entered into force, the guidelines of 23 December 1994 are applicable ⁽⁵⁸⁾. The fulfilment of the main conditions set out in these guidelines will be assessed in turn.
- (164) Restructuring aid is usually a combination of operating aid to cover losses, social costs, working capital, etc., and material investments. This can be clearly verified by looking at the purpose of the aid measures in favour of Kahla I and of those in favour of Kahla II until 1996 ⁽⁵⁹⁾.
- (165) As regards the aid to Kahla I, as pointed out in the decisions to initiate and to extend the formal investigation procedure, no restructuring plan has ever been submitted to the Commission. In the absence of a restructuring plan, the conditions which must be met if the restructuring is to be approved in accordance with the restructuring aid guidelines, in particular the existence of a sound restructuring plan when the aid was granted, are not fulfilled ⁽⁶⁰⁾. Consequently, the aid granted under measure 8 must be considered incompatible with the common market.
- (166) As regards the aid granted from 1994 until 1996 to Kahla II, in its decisions to initiate and to extend the formal investigation procedure the Commission noted that there were indications that the company had undergone restructuring. The reports submitted by Germany describe the following measures aimed at restoring viability: new product orientation, personnel reduction, the replacement of old plant and machinery, the closure of production facilities, investments aimed at meeting technical and environmental standards, and the setting-up of a distribution network. During the formal investigation procedure, Germany stated that these measures formed part of the original business plan, which was subsequently further developed, and it refused to describe them as a restructuring plan. In its letter of 1 October 2002, Germany finally declared that, if the Commission were to consider Kahla II to be a company in difficulty, these measures should be regarded as a restructuring plan.
- (167) It is not clear, however, which of the documents transmitted is to be considered the relevant restructuring plan. The Commission notes that the first report was drawn up before the assets sale took place, and what is more it was intended only for TIB to help it decide whether to acquire a stake in the company. Although both suggested a number of measures that were necessary for the company's viability, these measures were, according to Germany, developed further by the investor. If the reports were to be considered a restructuring plan, clearly the proposed measures do not represent the final version of the plan, especially as far as the analysis of the cost of the proposed measures is concerned. The first report provided for total costs of DEM 30,945 million, consisting of investments, acquisition of the assets, loss coverage and interest payments on loans. The second report proposed restructuring measures costing a total of DEM 27,727 million, consisting of investments (including the taking-over of the assets), loss coverage

⁽⁵⁸⁾ Point 7.5 of the 1999 restructuring aid guidelines states that 'the Commission will examine the compatibility with the common market of any rescue or restructuring aid granted without its authorisation and therefore in breach of Article 88(3) of the Treaty ... on the basis of the Guidelines in force at the time the aid is granted'.

⁽⁵⁹⁾ See, in particular, Table 5.

⁽⁶⁰⁾ Judgment of the Court of Justice of the European Communities in Case 17/99 *France v Commission* [2001] ECR I-2481, paragraph 27.

and working capital. Neither the costs provided for in the first report nor those provided for in the second report correspond to those described by Germany in the 'investment plan' and set out in detail in Table 5, on the basis of which the aid was allegedly granted. In both reports, the list of measures intended for financing these costs omits numerous aid measures that were actually granted to the company (see Table 4), something which also holds true for the 'investment plan' (Table 5). If one of these documents were to be considered the restructuring plan, the Commission can only conclude that either the plan was not the final plan or the company received excessive aid.

- (168) Even if it were possible to regard these documents as a restructuring plan, they cannot be considered the final version of such a plan. It is not clear, moreover, to what extent the proposed measures were actually implemented.
- (169) In order to establish whether the criteria set out in the restructuring aid guidelines have been fulfilled, the Commission needs to know first of all precisely what restructuring measures were taken to restore the company's long-term viability.⁽⁶¹⁾ Despite repeated requests from the Commission, Germany has never submitted the final version of a restructuring plan for Kahla II or indicated which restructuring measures were effectively implemented. In the absence of such a plan, the criteria of these guidelines cannot be verified.
- (170) The Commission notes, moreover, that the private contribution to the overall costs cannot be regarded as substantial. It will be recalled that the Commission formally ordered Germany to furnish information about any contribution made or to be made by a private investor. In its letter of 1 October 2002, Germany describes the supposed private financing in accordance with the report of 29 November 1993. It consists of a contribution by Mr G. Raithel worth DEM 2,055 million, DEM 0,986 million of interest on the loans granted to Mr Raithel, cash flow of DEM 2,217 million and the DEM 7,975 million capital injection by TIB.
- (171) The alleged investor contribution consisted of two soft loans granted by the State (measures 16 and 17) worth a total of DEM 2 million, and DEM 0,055 million which the investor brought into the company from his own resources by way of own capital. Only the latter contribution was fully private. The DEM 0,2 million loan under measure 16 was secured by a Federal Government guarantee. The DEM 1,8 million loan under measure 17 was secured by a mortgage on Kahla II's land. The purchase of these assets was financed by state aid. In view of the fact that these loans were granted out of state resources and bearing in mind the security provided, the loans under measures 16 and 17 clearly cannot be considered a contribution by a private investor. As for the alleged new interest payments amounting to DEM 0,986 million, the Commission has never received the slightest piece of information about this. Presumably they relate to the interest paid by Mr Raithel on the two loans under measures 16 and 17. However, these interest payments do not finance any restructuring costs. As regards cash flow, the Commission would point out that the forecast profit the company was to earn cannot be considered a substantial contribution within the meaning of the restructuring aid guidelines. What is more, the Commission has not been informed whether this cash flow was actually achieved or whether it was used to cover restructuring costs.

⁽⁶¹⁾ See footnote 60.

- (172) As the company started generating some profits, on 30 March 1998 the investor converted part of the public loans into private loans. However, this contribution was uncertain at the time of the granting of the aid and was not made until after the restructuring. It can therefore be assumed that the subsequent contribution was possible thanks only to the improvement in the company's financial situation due to the state aid. The Commission would go further and say that the contribution was possible thanks only to a 90 % guarantee provided to cover these loans⁽⁶²⁾. What is more, this happened after the restructuring was completed, and it was unclear at the time of the granting of the aid and it is still unclear what resources were used for the purpose. Lastly, in the absence of a precise breakdown of the restructuring costs, it cannot be concluded that the private contribution was substantial.
- (173) Restructuring aid may be granted only on the basis of a viable restructuring plan, which must include measures to mitigate as far as possible any adverse effects of the aid and a substantial contribution from private resources. Since, despite the information order, there is no proof that the aid was granted under these conditions, it is safe to assume that these conditions were in fact not satisfied. Consequently, the ad hoc aid granted to Kahla II until 1996 constitutes restructuring aid incompatible with the common market.
- (174) In view of the above, the Commission cannot conclude that the ad hoc aid granted to Kahla II until 1996 can be considered compatible with the common market.

Aid to Kahla II granted as from 1997

- (175) In view of the modest positive operating results obtained, the Commission considers that, as from 1997, Kahla II can no longer be regarded as a company in difficulty. In accordance with Germany's request, the Commission will assess the aid to Kahla II in the light of the regional aid guidelines. The Commission would recall that this relates only to measures 30 and 32, which fall to be assessed as ad hoc aid, since the remaining measures constitute existing aid.
- (176) The regional aid guidelines state that an individual ad hoc aid payment made to a single firm may have a major impact on competition in the relevant market and its effects on regional development are likely to be too limited. Such aid generally comes within the ambit of specific or sectoral industrial policies and is often not in keeping with the spirit of regional aid policy as such. Consequently, unless it can be shown otherwise, such aid does not fulfil the requirements set out in the regional aid guidelines. The Commission notes that the porcelain market is saturated and that the porcelain industry is suffering from overcapacity. This adds to the negative presumption concerning ad hoc aid, as any investment aid would be likely to have a negative impact on the sector.
- (177) The object of regional aid is to secure either productive investment (initial investment) or job creation which is linked to investment. By 'initial investment' is meant 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).
- (178) The Commission notes first of all that part of the aid at issue here (measure 32) is made up of grants allegedly awarded for research and development, employee integration, fair attendance and cost reduction. Such expenditures do not constitute investments. On the other hand, measure 30 is a guarantee for a loan which could have been used for investments, although this point has never been made by Germany.

⁽⁶²⁾ The loan agreement provided by way of secondary security for the same mortgages as in Table 10 and for the assignment of Mr G. Raithel's life assurance policy worth DEM 1,8 million.

- (179) The Commission has expressly and formally ordered Germany to furnish a description of the investments undertaken or to be undertaken. In order to verify whether an initial investment was carried out, the sole data submitted by Germany are the investment plans detailed in Tables 7 and 9. Germany has not provided any description of the alleged investment project. According to these plans, machines were acquired and investments were made in existing installations. In the absence of any further explanation, the Commission cannot conclude that the investments relate to the extension of the establishment, or the starting-up of an activity involving a fundamental change in the product or production process.
- (180) Even if they did, the Commission does not have any information to draw on in this connection. Consequently, the overall eligible costs cannot be determined. In the absence thereof, it is impossible, given the combination with the other investment aid measures covered by approved aid schemes (measures 28 and 29 and part of measure 33), to establish whether the maximum allowable 35 % aid intensity is being complied with.
- (181) Moreover, according to point 4.2 of the regional aid guidelines, to ensure that the productive investment aided is viable and sound, the recipient's contribution to its financing must be at least 25 %. This minimum contribution must not contain any aid. This is not the case, for instance, where a loan includes an interest rate subsidy or is backed by government guarantees containing elements of aid.
- (182) The Commission has expressly and formally ordered Germany to inform it of any contribution made or to be made by the investor. According to the information available, on 30 March 1998 the investor converted the public loans into market loans. However, it is doubtful whether these loans could be regarded as a private contribution completely free of aid since they relate to aid measures granted previously. In addition, these market loans continued to be covered by a 90 % state guarantee. According to Table 8, the own contribution to the alleged investments carried out between 1997 and 1998 totalled DEM 2,406 million. However, no explanation has been provided as to the origin of this contribution. In the absence thereof, the Commission cannot conclude that the recipient contributed at least 25 % of the overall investment costs.
- (183) These measures can likewise not be regarded as operating aid compatible with the common market because the conditions set out in the regional aid guidelines are not fulfilled. These conditions are that such aid must be justified in terms of its contribution to regional development and its nature and that its level must be proportional to the handicaps it seeks to alleviate. Germany has not demonstrated any such points. Nor has it shown that the aid is limited in time and progressively reduced.
- (184) To sum up, the Commission cannot conclude that the alleged investments carried out by Kahla II as from 1997 constitute eligible investments within the meaning of the regional aid guidelines. Nor is there any evidence that 25 % of the overall costs were free of aid and covered by the aid recipient. Finally, the Commission cannot conclude that the aid had a beneficial effect on the region or on the market. Consequently, the Commission is unable to find that the aid can be regarded as compatible with the common market within the meaning of the regional aid guidelines.

CONCLUSIONS

- (185) The Commission finds that Germany has unlawfully implemented the aid in question in breach of Article 88(3) of the EC Treaty. On the basis of the information available, the Commission cannot conclude that the ad hoc aid in favour of Kahla I and Kahla II can be considered compatible with the common market.

- (186) Pursuant to Article 14 of Regulation (EC) No 659/1999 ⁽⁶³⁾, aid which is incompatible with the common market must be recovered unless recovery would be contrary to a general principle of Community law. In the Commission's view, that is not the case here. In particular, the facts of this case do not suggest that the recipient could claim legitimate expectations.
- (187) Consequently, all illegal and incompatible aid granted to Kahla I and Kahla II must be recovered. As far as those aid measures which have already been repaid are concerned, recovery must nevertheless be effected to the extent that the amount repaid is smaller than the amount owed inclusive of interest at the reference rate applicable to regional aid.
- (188) The aid to be recovered must include interest from the date on which it was at the disposal of the recipient until the date of its recovery. Interest must be calculated on the basis of the reference rate used for calculating the grant equivalent of regional aid,

HAS ADOPTED THIS DECISION:

Article 1

1. The state aid implemented by Germany for Kahla Porzellan GmbH under measure 8 – income from exploiting the company's real estate to be used to repay loans guaranteed by the Treuhand – is incompatible with the common market.
2. The following state aid granted by Germany to Kahla/Thüringen Porzellan GmbH is incompatible with the common market:
 - (a) Measure 11: a capital participation by TIB;
 - (b) Measure 12: a shareholder loan from TIB;
 - (c) Measures 13, 14, 23 and 30: 90 % guarantees of the *Land* of Thuringia;
 - (d) Measure 15: a grant from the *Land* of Thuringia;
 - (e) Measure 16: an equity loan from a state-owned bank;
 - (f) Measure 21: a loan from a state-owned bank;
 - (g) Measure 26: employment promotion grants;
 - (h) Measure 27: measures for employee integration, fair attendance and advertising;
 - (i) Measure 32: measures for research and development, employee integration, fair attendance and cost reduction.

⁽⁶³⁾ OJ L 83, 27.3.1999, p. 1.

Article 2

1. Germany shall take all necessary measures to recover from the recipient the aid referred to in Article 1 and unlawfully made available to the recipient. If the aid has already been paid back, recovery shall be effected to the extent that the amount paid back is smaller than the amount including interest calculated on the basis of the reference rate for regional aid applicable on the date on which the aid was granted.

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 recipient 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, 13 May 2003.

For the Commission

Mario MONTI

Member of the Commission

COMMISSION DECISION
of 16 November 2004
on aid granted by Germany to grain brandy distilleries

(notified under document number C(2004) 3953)

(Only the German text is authentic)

(Text with EEA relevance)

(2006/240/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 and having regard to their comments ⁽¹⁾,

Whereas:

(3) The Commission first asked Germany for further information about the criticised amendments on 3 January 2001. Germany replied by letter dated 14 February to the effect that the aid measures in question had already been notified to the Commission in 1976 and that the new Law merely served to improve the existing mechanism. On 16 March the Commission addressed a further set of questions to Germany, which then asked for an extension of the time limit; this was granted by the Commission by letter dated 9 April.

(4) On 24 April Germany's reply reached the Commission, which on 19 November again communicated its initial conclusions and comments. By letter dated 19 December Germany confirmed its explanations of 14 February and gave a renewed assurance that the aid in question complied with Community law.

I. PROCEDURE

(1) By letter dated 22 November 2000, six German industrial producers which are members of the Federation of Industrial Grain Distilleries submitted a complaint to the Commission about the amendment of Germany's Spirits Monopoly Law of 2 May 1976 by the Budget Consolidation Law ('HsanG') of 22 December 1999 ⁽²⁾.

(2) The complainants wanted it to be established that by amending the Spirits Monopoly Law ⁽³⁾ the German legislator had introduced a scheme which infringes Article 87 of the EC Treaty: it treats industrial and agricultural grain distilleries - which up to then had been equally entitled to aid - unfairly, since only the agricultural producers would still be eligible for aid. They claim that the new scheme gives the agricultural grain brandy distilleries an indisputable advantage in the form of aid that is incompatible with the Community competition rules.

(5) By letter dated 22 February 2002 the Commission requested Germany, under Article 17(2) 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 ⁽⁴⁾, to comment and submit appropriate proposals on how the legislation on aid for grain distilleries could be made consistent with Article 87(1) of the EC Treaty. On 19 March Germany informed the Commission in writing that it regarded such measures as unnecessary, because it could not endorse the Commission's conclusions. This applied in particular to the conclusion that grain brandy was an industrial not an agricultural product.

(6) By decision of 19 June 2002 the Commission proposed a number of appropriate measures to Germany for revising the German Law on Aid to Grain Distilleries. By letters dated 19 and 23 July Germany informed the Commission that it was rejecting the proposal and was therefore not prepared to carry out the appropriate measures within the time limits set.

⁽¹⁾ OJ C 269, 8.11.2003, p. 2.

⁽²⁾ Bundesgesetzblatt Jahrgang 1999 Teil I Nr. 58, published in Bonn on 28 December 1999. The Budget Consolidation Law introduced a general reform of the German spirits monopoly. It came into force on 1 October 2000.

⁽³⁾ Branntweinmonopolgesetz of 2 May 1976.

⁽⁴⁾ OJ L 83, 27.3.1999, p. 1, as amended by the 2003 Act of Accession.

- (7) Under Article 19 of Regulation (EC) No 659/1999 the Commission therefore decided on 16 October 2002 to initiate a formal investigation procedure in respect of the aid measures concerned. The decision was published on 11 September in the *Official Journal of the European Union* ⁽⁵⁾, all interested parties being invited to submit comments on the measures in question.
- (8) Germany commented on the initiation of the procedure on 12 November.
- (9) The Commission received a total of 54 submissions from third parties, including a petition with some 2 000 signatures. These were forwarded to Germany on 7 February 2003, with a request for comments. On 26 February Germany asked the Commission to extend the time limit for its reply, which was granted on 27 February. Germany's reply was finally received in the Commission on 19 March.
- (10) On 5 June a meeting took place at Germany's request; Germany submitted a preparatory letter to the Commission on 4 June; this was followed by a further letter on 2 July.
- (11) The complainants commented in writing to the Commission on 13 August prior to a meeting which took place at their request on 29 August.
- (12) On 5 March 2004 the Commission forwarded the complainants' letter of 13 August 2003 to Germany. Germany replied to this by letter dated 5 April.
- (14) On 9 April 1976 Germany notified to the Commission the reformed Spirits Monopoly Law ⁽⁹⁾ under Article 93(3) (now Article 88(3)) of the EC Treaty read in conjunction with Article 4 of Council Regulation No 26 of 4 April 1962 applying certain rules of competition to production of and trade in agricultural products ⁽¹⁰⁾. Article 4 of the said Regulation states: 'The provisions of Article 93(1) and of the first sentence of Article 93(3) of the Treaty shall apply to aids granted for production of or trade in the products listed in Annex II to the Treaty' [*now and in what follows Annex I of the EC Treaty, Commission italics*] ⁽¹¹⁾. Consequently, the Member States have a simple duty to inform, without an authorisation by the Commission being necessary.
- (15) In its letter of notification, Germany pointed out to the Commission that it would continue to meet its legal obligation to buy up the production of domestic spirits manufacturers at a cost covering price.
- (16) In the 1976 notification, no distinction was made by type of product, i.e. between neutral alcohol and aromatic alcohol such as grain brandy. The Commission did not comment at that time on the wording of the notification.

II. DESCRIPTION OF THE SCHEME

A. The German spirits monopoly and its development

- (13) The German spirits monopoly was introduced by the Law of 8 April 1922 ⁽⁶⁾ and amended as a consequence of decisions of the Court of Justice of the European Communities (*inter alia* Case 45/75 *Rewe-Zentrale* ⁽⁷⁾) by

- (17) Following the amendment of the statute in 1976, the monopoly consisted in the buying-up and marketing of alcohol by the Federal Spirits Board ('BfB', *Bundesmonopolverwaltung für Branntwein*). The BfB buys the alcohol at statutorily guaranteed prices, rectifies it ⁽¹²⁾ and sells it at market prices. This does not include grain brandy.

⁽⁵⁾ OJ C 308, 11.9.2002, p. 6.

⁽⁶⁾ Reichsgesetzblatt I, pp. 335, 405.

⁽⁷⁾ [1976] ECR 181 (para. 27). The Court held in particular that Article 37 (now Article 31) of the Treaty is infringed 'if the charge imposed on the imported product is different from that imposed on the similar domestic product which is directly or indirectly covered by the monopoly'.

⁽⁸⁾ Gesetz zur Änderung des Gesetzes über das Branntweinmonopol, Bundesgesetzblatt I N 50, 7 May 1976, p. 1145.

⁽⁹⁾ The notification concerned all products covered by the monopoly, including grain brandy.

⁽¹⁰⁾ OJ 30, 20.04.1962, p. 62/993, as amended by Regulation No 49 (OJ 53, 1.7.1962, p. 62/1571).

⁽¹¹⁾ Annex II of the Treaty became Annex I with the entry into force of the Treaty of Amsterdam. The contents remained unchanged, however.

⁽¹²⁾ Rectification: processing of alcohol by distillation, filtration, etc.

- (18) In the case of grain brandy, Deutsche Kornbranntwein-Vermarktung GmbH ('DKV', German Grain Brandy Marketing) ⁽¹³⁾, founded on 14 June 1930, was given a similar task to the BfB by the Law of 2 May 1976, but only for the buying-up and marketing of grain brandy. The 1976 Law granted DKV the exclusive right to purchase the bulk of domestic grain brandy production at statutorily guaranteed prices which cover the costs ⁽¹⁴⁾ of the producers, whether industrial or agricultural, and to market the grain brandy at market prices, if necessary after conversion and/or rectification. Up to the year 2000, over 80 % of the grain brandy produced in Germany was marketed by DKV, and the other 20 % by the distilleries themselves ⁽¹⁵⁾.
- (19) In return for performing the statutory duty transferred to it in Article 82 of the Spirits Monopoly Law, DKV receives a consideration, which in the absence of a market price is determined in accordance with the Basic principles of pricing public contracts on a total production cost basis (LSP).
- (20) The German grain brandy producers entitled to aid are obliged to deliver to DKV quantities corresponding to their distillation rights, which are determined annually by the government agencies. They may also produce a larger quantity of alcohol, but without a price guarantee. The agricultural distilleries (in contrast to the commercial ones, for obvious reasons) have a statutory duty to process the materials (grain) which they produce themselves and to use the by-products of distillation in their farming operations, e.g. feeding the stillage to cattle and using the slurry as fertiliser.
- (21) Some distilleries/producers, however, also exploit and market all or part of their production themselves, without making use of DKV. Where this is the case, they receive from DKV, as part of the distillation rights granted to them, the equivalent of the rectification, storage and marketing costs which DKV has saved. These producers, therefore, are placed on an equal financial footing with those who deliver their production to DKV.
- (22) In the HsanG, amendments were made to the monopoly in order to reduce the aid. First of all, the group of recipients was restricted and the mechanism for allocating the aid partly revised. Following the entry into force of the HsanG, only the agricultural distilleries qualify fully for the old scheme, since under Article 40(5) of the amended Spirits Monopoly Law the distillation rights of the commercial distilleries for the operating years 2000/2001 to 2005/2006 were fixed at 50 % of the regular distillation rights ⁽¹⁶⁾. After the transitional period up to 2005/2006 provided for in the statute, only the agricultural distilleries are eligible for aid.
- (23) The industrial distilleries, which under Article 58a of the Spirits Monopoly Law as amended by the HsanG may no longer be part of the monopoly at all after the 2006/2007 operating year, i.e. after 30 September 2006, may, however, already leave the monopoly voluntarily as from 2001. To offset the inevitable losses of the industrial distilleries, the legislator has provided that those who leave the monopoly early will receive compensatory payments. For this reason, many of the industrial distilleries have opted to leave the monopoly early.
- (24) On grounds of equal treatment, agricultural distilleries too may apply under the Law to leave the monopoly, in which case they receive the same compensatory payments as the industrial distilleries.
- (25) DKV will carry out the task transferred to it by the Law of 2 May 1976 up to 30 September 2006; thereafter the BfB could take over its role.

B. Description of the aid

Offsetting production costs

- (26) The dismantling of the spirits import monopoly in the second half of the 1970s and the opening-up of the market led immediately to a significant increase in German imports of spirits and at the same time to a significant decline in the selling price of spirits, without a noticeable fall in the manufacturers' prices.
- (27) The monopoly adapted (through DKV and the BfB) to the new market conditions and lowered its own selling prices to a competitive level. Thus the selling price of alcohol declined from an average of DEM 333/hl in 1976 to DEM 115/hl in 1999/2000.

⁽¹³⁾ The civil-law partnership DKV (GmbH), set up in 1930 by regulation of the Reichsmonopolamt (now the Bundesmonopolbehörde - Federal Monopolies Authority) and today coming under the Ministry of Finance, holds the exclusive selling rights for grain brandy.

⁽¹⁴⁾ Until the entry into force of the Law of 28 December 1999.

⁽¹⁵⁾ According to DKV, in the 2000/2001 operating year (i.e. one year after the entry into force of the HsanG) 24 %, and in the 2000/2001 operating year 40,6 %, of grain brandy output was produced in the open market.

⁽¹⁶⁾ The operating year starts on 1 October of each year and ends on 30 September of the following year.

(28) For 1999/2000, the statutory purchase price which DKV had to pay the grain distilleries was DEM 263 per hl alcohol (compared with DEM 296/hl paid by the BfB to producers of other spirit). The purchase price is calculated in such a way as to cover the producers' costs. The reference costs are the average production costs of a conscientious producer per hectolitre of alcohol. In the same period, the selling price for grain brandy through DKV was DEM 157/hl alcohol (as against DEM 93/hl for neutral alcohol).

(29) The compensation system is thus clearly intended to soften the impact of a shortfall on affecting the spirits distribution monopoly and hence DKV as well. According to Germany, the subsidies paid to the grain distilleries for the period 1 October 1999 to 30 September 2000 amounted to DEM 36,6 million (EUR 18,7 million).

(30) The difference between the purchase price and the selling price in the market (market price) clearly constitutes an aid. This is not disputed by Germany.

Compensatory amounts in the event of early withdrawal from the monopoly

(31) The system provided for in Article 58a of the Spirits Monopoly Law will make it easier for the grain distilleries to leave the monopoly. As already explained above (see paragraph 22), distilleries which are prepared to leave the monopoly early receive, in return for leaving of their own free will and instead of the operating aid for offsetting production costs, degressive compensatory amounts up to September 2006, which in each case are paid out in the first four months of an operating year. The compensatory amounts enable producers which would like to do so to continue operating in the 'open' grain brandy market despite leaving the monopoly⁽¹⁷⁾. This is therefore a deflection of existing aid, which can be used by the producers in whatever way they want.

(32) It will be noted that virtually all industrial and some agricultural distilleries have chosen this alternative.

⁽¹⁷⁾ The 'open' grain brandy market constituted 40,8 % of the market in the 2001/2002 operating year.

Funding the aid

(33) The deficit from the difference between the purchase price and the sale of the products at the market price in Germany is covered from Federal budget resources. To offset this, alcohol duty was raised. This is a consumption tax which is levied on both domestic and imported alcohol.

Market in figures

(34) At the end of the 1999/2000 operating year (before the Law was introduced) there were 68 industrial and 409 agricultural distilleries, which produced a total of 253 000 hectolitres of grain brandy. At 1 October 2001, in the wake of the reform, there were only 11 industrial distilleries still operating in the market, with a total production of 5 000 hectolitres. The number of agricultural distilleries had fallen to 340, with a total production of 142 000 hectolitres.

(35) The 57 industrial distilleries that had left the monopoly early had received compensatory amounts totalling EUR 5,9 million at the end of the 2001/2002 operating year, the six agricultural ones EUR 0,6 million. The 47 distilleries that market their output themselves (total of 5 400 hl grain brandy) received EUR 315 000 in aid for this purpose. Lastly, in the 2001/2002 operating year, DKV received a grant of EUR 6,6 million.

C. Comments from third parties

(36) After publication of the decision to initiate the procedure, the Commission received 54 replies from third parties, including natural persons, undertakings, federations and trade associations. The overwhelming majority (47) reject the measures proposed by the Commission, which form the starting point for the procedure; three replies were positive in part, and four wholly so.

(37) The four positive replies were submitted by representatives of the spirits industry. They even consider that the Commission did not go far enough in its decision to initiate the procedure and that the German spirits monopoly must be thoroughly reformed.

Agricultural producers

- (38) All 35 agricultural distilleries reject the Commission's position. Most are small family farms. The Commission's view that grain brandy is an industrial product is disputed by all. In their opinion it is clearly an agricultural product. Also criticised is the concept 'grain brandy' used by the Commission: a more appropriate name for the product delivered to DKV would be 'raw alcohol' or 'grain raw alcohol'. The alcohol delivered to DKV is not a drinkable product but must be processed further or rectified. Some also argue that the situation of the agricultural producers cannot be compared with that of the industrial firms, because they are not subject to the same constraints. In this respect, a detailed description is given of the different stages of grain brandy production, which is based on a recycling system (grain cultivation, distillation, use of the stillage as cattle feed, use of the slurry as fertiliser for grain cultivation) that requires strictly ecological methods. The agricultural distilleries therefore consider that in their case the provisions of the EC Treaty relating to agricultural products must continue to apply and that they would inevitably be at a disadvantage compared with agricultural firms which deliver their alcohol to the BfB if, instead, the stricter competition rules in the EC Treaty were to apply to them. The end of the monopoly from 1 January 2004 would certainly be disastrous for them, since many of them had made investments which they would then no longer see mature. In addition, in some cases, the distillery was the centre of the farm and if it ceased to operate, the whole business would fold. A trade association representing the agricultural distilleries which market their own grain brandy also classifies grain brandy as an agricultural product and thinks that the Commission should accept this. Lastly, several replies argue that the aid measures could not distort competition and affect trade between Member States, since grain brandy is an alcohol that can be produced only in the German language area.

The complainant and the industrial distilleries

- (39) The Association of Industrial Grain Distilleries criticises the initiation of the procedure because it is proposed to do away with all aid of whatever type, both for agricultural and industrial distilleries. They set the procedure in motion but regret that the Commission should call into question the compensatory amounts for industrial distilleries, which were conceived as an incentive for leaving the monopoly early. In the complainant's view, the compensatory amounts did not constitute state aid within the meaning of Article 87(1). Rather, they are the counterpart of the distillation rights, which in contrast to the agricultural distilleries they would have to surrender. The authorisation of the compensatory amounts provided for in the HsanG was desirable simply in order to protect legitimate expectations and was also essential for giving the distilleries

concerned the opportunity, until the expiry of the transitional period, to convert their operations under economically acceptable conditions, especially as the amounts were not anything like as large as the losses caused by the new Law. Moreover, trade between Member States was not restricted by the payments, since there was no distortion of competition: all members of the trade association had ceased production of grain brandy, since it was impossible to survive in a subsidised market without receiving grants oneself. The complainant, however, maintains its point of view that the aid for the agricultural distilleries is unlawful because of the unequal treatment. Three industrial distilleries have bluntly called for the provisions of the HsanG on the payment of compensatory amounts as compensation for early departure from the monopoly to be kept.

Other comments

- (40) The other comments, including those of an expert who claims to have been involved in the preparatory work on Council Regulation (EEC) No 1576/89 of 29 May 1989 laying down general rules on the definition, description and presentation of spirit drinks⁽¹⁸⁾ or those of a consumer association which has collected 2 000 signatures, categorically reject the position taken by the Commission in initiating the procedure, mostly using the same arguments and contending in particular that grain brandy must continue to be classified as an agricultural product and that the Commission should not call into question the traditional methods of manufacturing that product. DKV claims that if the Commission, in its final decision, should insist on the appropriate measures which it proposes, it should observe the principle of proportionality when setting the time limit for their implementation and extend the transitional deadline beyond 1 January 2004 to give the undertakings concerned the opportunity to convert their operations.

D. Germany's comments

- (41) Germany does not dispute that the system of refunding the manufacturing costs by DKV has the character of operating aid. It considers, however, that grain brandy should continue to be caught by the provisions of the EC Treaty applying to agricultural products and should not be treated by the Commission as an industrial product. It does not share the Commission's view at all that the grain distillates produced under the monopoly are not an agricultural product that comes under the umbrella concept of ethyl alcohol but a spirituous

⁽¹⁸⁾ OJ L 60, 12.6.1989, p. 1; as last amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council (OJ L 284, 31.10.2003, p. 1).

beverage designated as a spirit and therefore an industrial product. It bases its position on the fact that the wording of Annex I of the EC Treaty is clear and that the substance of an EC Treaty text cannot be called into question by a provision of secondary legislation, as it describes Regulation (EEC) No 1576/89.

(42) In support of its arguments, Germany submits that by confirming the non-discriminatory character of alcohol duty in several judgments (*inter alia* Case 91/78 Hansen v Hauptzollamt Flensburg⁽¹⁹⁾ and Case 253/83 Sektkellerei C.A Kupferberg v Hauptzollamt Mainz)⁽²⁰⁾ the Court of Justice has acknowledged the compatibility of the duty with the provisions of Articles 37 and 95 (now Articles 31 and 90)⁽²¹⁾ and hence indirectly with Articles 87 and 88 of the EC Treaty.

(43) With regard to the compensatory amounts for distilleries which have decided to leave the monopoly early, Germany explains that these are necessary incentives on account of the long-standing involvement of the distilleries in the spirits monopoly, having first made it clear that, contrary to what the complainant maintains, the distillation rights are not an asset. Moreover, it was also possible for the agricultural distilleries, for reasons of equal treatment, to leave the monopoly, and under the same conditions as the industrial distilleries.

(44) Germany points out that – should the Commission maintain its assessment – in the case of both operating aid for the distilleries remaining in the monopoly and compensatory amounts in return for leaving the monopoly early, a transitional period of several years is essential on account of the traditional involvement of grain brandy producers in the spirits monopoly and the associated protection of legitimate expectations. The distilleries, whether industrial or part of a farm, needed the time to adjust their production structures to the open market or to convert their operations to other types of production. Germany has therefore proposed a transitional time limit of 30 September 2006. It has given the Commission concrete reasons why the original time limit of 1 January 2004 laid down by the Commission in the appropriate measures should be extended to at least the 2005/2006 operating year. Any other decision would result in the closure of numerous industrial and agricultural distilleries and the loss of many jobs.

(45) Germany disputes the complainant's contention that the HSanG of 22 December 1999 has led to discrimination

against the industrial grain distilleries, since it is limited to reorganising the monopoly through a minimal reduction of the number of aid recipients and with a transitional period of six years and appropriate financial compensation, which is paid to industrial and agricultural distilleries alike.

III. LEGAL ASSESSMENT

A. Applicability of the competition rules

Grain brandy not covered by Annex I to the EC Treaty

(46) It was explained above that the processing of grain brandy was organised separately from the other alcohol products of agricultural origin covered by the monopoly (see paragraphs 16 to 24). In 1930, an agency with its own legal personality, DKV, was set up specifically for this product under the spirits monopoly. With the Law of 2 May 1976, Germany again confirmed the special treatment of grain brandy by maintaining the coexistence of two different market organisation agencies – the BfB and DKV.

(47) The majority of the basic alcohol products (distillates) delivered to the BfB are plainly intended for the manufacture of neutral alcohol which is not ready for use, while the distillates transferred to DKV (described by Germany as 'grain fine distillate') are distinguished by their aromatic properties and therefore suited for human consumption

(48) The main reasons for this distinction are the condition in which the basic production of the distilleries is delivered to the two marketing organisations, and the quality of the marketed product after conversion and/or rectification by the two agencies.

(49) The BfB receives mainly raw alcohol (*inter alia* fruit-, potato-, molasses- or cereals-based) and sells it generally after rectification and/or conversion as neutral alcohol.

(50) DKV receives a distillate – "grain fine distillate" – which is already regarded as a spirit drink within the meaning of Regulation (EEC) No 1576/89. The rectification of the distillate carried out by DKV consists in particular in standardising the alcohol content of the end product (32 % in the case of the product known as 'Korn', and 37,5 % in the case of 'Kornbrand').

⁽¹⁹⁾ [1979] ECR 935.

⁽²⁰⁾ [1985] ECR 157.

⁽²¹⁾ Article 90 (ex Article 95) states: 'No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products. ... no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products.'

- (51) Annex I to the Treaty as amended by Council Regulation No 7a adding certain products to the list in Annex II to the Treaty establishing the European Economic Community⁽²²⁾ refers to 'ethyl alcohol or neutral spirits, whether or not denatured, of any strength, obtained from agricultural products listed in Annex I to the Treaty, excluding liqueurs and other spirituous beverages and compound alcoholic preparations (known as "concentrated extracts") for the manufacture of beverages'. This text can be interpreted with the aid of headings ex 22.08 and 22.09 (now 22.07 and 22.08) of the Harmonised System Tariff Nomenclature, where undenatured ethyl alcohol, spirits, liqueurs and other spirituous beverages are defined.
- (52) In the Explanatory Notes to the Harmonised System, spirits, which are thus not covered by Annex I, are defined as follows: 'Spirits produced by distilling wine, cider or other fermented beverages or fermented grain or other vegetable products, without adding flavouring; they retain, wholly or partly, the secondary constituents (esters, aldehydes, acids, higher alcohols, etc.) which give the spirits their peculiar individual flavours and aromas.'
- (53) The heading also includes 'undenatured ethyl alcohol with an alcoholic strength by volume of less than 80 % ...'. Concerning this product, the Explanatory Notes state '... contrary to those at (A) [e.g. spirits], these spirits are characterised by the absence of secondary constituents giving a flavour or aroma, whether intended for human consumption or for industrial purposes'.
- (54) Grain brandy is therefore a spirit which is characterised by the presence of aromatic components, and hence cannot be regarded as ethyl alcohol. This is also supported by point (C)(4) of the explanatory notes to heading ex 22.09 (now 22.08, point (C)(2)), which stresses that this heading, as well as ethyl alcohol, covers 'Whiskies and other spirits obtained by distilling fermented mash of cereal grains (barley, oats, rye, wheat, corn, etc.)'.
- (55) In its replies to the Commission, Germany confuses grain alcohol (*Kornalkohol*), which under the above-mentioned conditions (see paragraph 53) can be regarded as ethyl alcohol, with the spirit drink grain brandy (*Kornbranntwein*). Judging by the wording of the Spirits Monopoly Law as amended by the Hsanc of 22 December 1999, the German legislator has in fact treated grain alcohol and grain brandy differently, precisely because they are different products.
- (56) The Commission, consequently, sticks to its view that these are different products; the former is used for producing neutral alcohol, while the latter, which is the subject of these proceedings, has components which give it aroma and taste.
- (57) Article 1(1) of Regulation (EEC) No 1576/89 states that the Regulation covers the definition, description and presentation of spirit drinks.
- (58) Article 1(4) of the said Regulation lists the different categories of spirit drinks. In subparagraph (c), 'grain spirit' is defined as:
- '(1) A spirit drink produced by the distillation of a fermented mash of cereals and having organoleptic characteristics derived from the raw materials used.'
- 'Grain spirit' may be replaced by Korn or Kornbrand, for the drink produced in Germany and in regions of the Community where German is one of the official languages provided that this drink is traditionally produced in these regions and if the grain spirit is obtained there without any additive:
- either exclusively by the distillation of a fermented mash of whole grains of wheat, barley, oats, rye or buckwheat with all their component parts,
 - or by the redistillation of a distillate obtained in accordance with the first subparagraph.
- (2) For a grain spirit to be designated 'grain brandy', it must have been obtained by distillation at less than 95 % vol from a fermented mash of cereals, presenting organoleptic features deriving from the raw materials used.'
- (59) In the present case, the grain brandy producers deliver to DKV a product (grain fine distillate) obtained in accordance with the procedure described in Regulation (EEC) No 1576/89 which, if necessary, is subsequently rectified and/or transformed by DKV so that it can then be marketed.

⁽²²⁾ OJ 7, 30.1.1961, p. 71/61.

- (60) Germany takes the view that the Commission should not rely on this text, because it only establishes rules for the sale of spirit drinks in the interests of consumer protection. The Commission does not dispute that such is the purpose of the Regulation, but this by no means prevents the text from being used to describe and define grain brandy as a spirit drink, which as such is directly subject to the competition rules. It therefore considers, without wanting to give a definitive ruling on the matter, that this passage taken from secondary legislation supports its view as regards the classification of the product in question.
- (61) In one of its communications to the Commission, Germany points out that the wording of Annex I to the EC Treaty varies according to the language version. Thus the word 'spirits (*Branntwein*)' is missing in the English and Dutch versions, where there is only mention of 'liqueurs' and 'spirituous beverages'. The Commission would comment in this respect that the German and other language versions are clear in this connection and that 'spirits' are undoubtedly mentioned in them. The language versions which, like the English and the Dutch, do not specifically exclude spirits must be interpreted and applied in the light of the other language versions and can only be understood in such a way that spirits are among the alcoholic beverages which are also excluded from the scope of Annex I.
- (62) As part of the operation and development of the common market in agricultural products, the Council on 8 April 2003 adopted Council Regulation (EC) No 670/2003 laying down specific measures concerning the market in ethyl alcohol of agricultural origin⁽²³⁾. The Regulation creates for the first time a common organisation of the market for alcohol of agricultural origin.
- (63) In its decision to introduce the procedure the Commission used some points from the Regulation, which was still in the preparation stage at the time, to support its arguments. It believes it is still appropriate to refer to the preparatory work on this legal instrument as well as to the final version of the Regulation in order to support, where necessary, its analysis that grain brandy is an industrial product. Thus, in a first draft of Article 1, spirit drinks within the meaning of Regulation (EEC) No 1576/89 were explicitly excluded from the scope of the Regulation. In the final version of the Regulation, the agricultural products concerned are defined with reference to Annex I to the EC Treaty. In the Combined Nomenclature headings mentioned in Article 1 to which the Regulation applies, spirits in the form of grain brandy are not listed, but only undenatured and denatured ethyl alcohol and denatured other spirits.
- (64) The Commission therefore concludes that grain brandy is a spirit drink which is excluded from the scope of Annex I to the EC Treaty and is hence subject to the Community competition rules.
- B. The measures in question should be regarded as existing aid within the meaning of Article 87(1) of the EC Treaty**
- (65) The Commission has shown that grain brandy is an industrial product to which Articles 87 and 88 of the EC Treaty apply.
- (66) Under Article 87(1), 'save as otherwise provided in this 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'.
- Covering the production costs*
- (67) The measures in question confer an advantage on the producers of grain brandy, since they ensure that they will cover their manufacturing costs in the context of the distillation rights granted to them irrespective of the price at which the product finally comes onto the German market. It will be noted that grain brandy was purchased by DKV in the 1999/2000 operating period at a price of DEM 263/hl, to be marketed subsequently at a price of DEM 157/hl, which constitutes aid for the period amounting to DEM 36,6 million (EUR 18,7 million). Thus German grain brandy producers can sell their production on financial terms which are substantially more favourable than those that would apply if they had to sell their production direct under normal market conditions – i.e. without the considerable subsidies of the monopoly.
- (68) In those cases where DKV is not itself involved in the grain brandy manufacturing process, the producers concerned receive an indemnity in accordance with their distillation rights for the grain brandy rectification, marketing, storage, etc. costs which DKV has saved.
- (69) As a result of this aid, the German producers can sell that part of the grain brandy production not covered by the distillation rights, which they have to market directly, at prices which they could not demand if, thanks to the monopoly, they did not receive an excessive purchasing price for the remaining production delivered to DKV.

⁽²³⁾ OJ L 97, 15.4.2003, p. 9.

- (70) This preferential treatment affects the current manufacturing and marketing costs, i.e. the operating costs, of each undertaking.

Compensatory amounts

- (71) The producers also receive an advantage from the compensatory amounts, which are granted to them instead of their manufacturing costs being refunded if they leave the monopoly early, so that if necessary they can survive in the 'open' grain brandy market. The funds granted replace the subsidies for manufacturing and marketing a particular product, but are by nature akin to subsidies. It is immaterial that the compensatory measures can also be used for purposes other than remaining in the 'open' grain brandy market, e.g. for closing or restructuring distilleries.

- (72) The HsanG, which is supposed overall to reduce the subsidies under the spirits monopoly, is plainly intended to create balanced transitional arrangements which will meet the needs of all producers in accordance with their respective particularities and objectives. It will be noted in this respect that not all producers are subject to the same constraints: the agricultural producers, for example, are obliged by law to use the ecological principle of recycling in their production.

- (73) The compensatory amounts are not linked to investments and hence concern the day-to-day running of the assisted distilleries.

- (74) The measures are financed from state resources, whether in the form of subsidies for manufacturing costs or of compensatory amounts. The shortfall from the difference between the purchase price and the sale of the products at market price in Germany is met from Federal budget resources; this also applies to the compensatory amounts for producers which leave the monopoly early.

- (75) The aim of the measures is to support grain brandy production. They have the following selective character.

- (76) The measures quite clearly distort competition in the common market and restrict trade between Member States, since German producers compete with those from other Member States, who would like perhaps to sell the same alcohol on the German market. As various third parties have noted, the designation 'grain brandy' may be used, pursuant to the already cited Regulation (EEC) No 1576/89, 'for the drink produced in Germany and in regions of the Community where German is one of the official languages⁽²⁴⁾ provided that this drink is traditionally produced in these regions ...'. Moreover, grain

brandy competes with other spirits and spirituous beverages from other Member States. The fact that the Court of Justice held in *Hansen and Sektellerei C.A. Kupferberg* that Articles 95 and 37 of the EEC Treaty must be interpreted as not precluding the de facto reduction made in the selling price of spirit sold by the federal monopoly administration in a given period 'provided that the rate of taxation actually applied to imported products during that period did not exceed the rate of taxation actually levied on corresponding domestic products' does not anticipate the assessment of the state aid by the Commission.

- (77) There is no doubt therefore that the measures in question are likely to affect trade between Member States.

- (78) Consequently, the measures in question constitute state aid within the meaning of Article 87(1) of the EC Treaty. Since the aid is meant to cover the day-to-day running costs of the undertakings concerned, it is operating aid.

- (79) After examining the documents submitted by Germany, the complainants and interested third parties, the Commission finds that the aim in the HsanG of 22 December 1999 was to reform the spirit monopoly as amended by the Law of 2 May 1976 so as generally to reduce the subsidies for the manufacture of grain brandy. The Commission also notes that Germany notified the measures arising out of the 1976 Law in April of that year on the basis of the provisions applying to agricultural products and that the notification prompted no further comments at the time.

- (80) Pursuant to Article 88(1) of the EC Treaty and Article 18 of Regulation (EC) No 659/1999, the Commission recommended by decision of 19 June 2002 that Germany take appropriate measures, after it had reached the conclusion that grain brandy should be regarded as an industrial product and that the measures concerned constitute aid which is no longer compatible with the common market; however, Germany objected to this.

- (81) The state aid resulting from the Spirits Monopoly Law, including the aid measures for grain brandy under the Law of 2 May 1976 had been duly notified by Germany without the Commission expressing reservations at the time about its compatibility with the Community competition rules. Germany informed the Commission at that time that it was proposing to implement the measures. Consequently, the aid is existing state aid within the meaning of Article 1(b)(iii) of Regulation (EC) No 659/1999.

⁽²⁴⁾ Commission italics.

- (82) Thus, in its decision of 19 June 2002 on appropriate measures, the Commission did not classify the measures resulting from the Law of 22 December 1999 as new aid.
- (83) The HsanG of 22 December 1999 is actually intended to reduce the number of recipients and the level of the subsidies granted. It changes nothing at the heart of the system introduced by the Law of 2 May 1976, under which the producers' costs are covered irrespective of the market price of grain brandy. The same applies to the compensatory amounts, which are granted in return for leaving the monopoly early and replace the subsidies for a certain period.
- (84) The HsanG 1999, therefore, did not need to be notified to the Commission before its entry into force.
- (85) This view accords with the decision of the Court of Justice in Case C-44/93 *Namur-Les assurances du crédit SA* ⁽²⁵⁾. Here, a public undertaking had decided to expand its activity so that the public aid it had been granted under legislation predating entry into force of the Treaty would also benefit the expanded operations. The Court held that it was impossible to argue that this is a case of granting or altering aid, as envisaged in Article 93(3), since the decision was taken without any amendment of the aid scheme established by the legislation.
- (86) Accordingly, aid which is granted under an aid scheme predating entry into force of the Treaty is not subject either to the duty of prior notification or the ban on implementation under Article 93(3), but must be kept under constant review in accordance with paragraph 1 of the same Article.
- 'A factor of legal uncertainty would be introduced if Member States were to be required to notify to the Commission and submit for its preventive review not only new aid or alterations of aid properly so-called granted to an undertaking in receipt of existing aid but also all measures which affect the activity of the undertaking and which may have an impact on the functioning of the common market or on competition.'
- (87) The Commission shares this assessment.
- (88) In the light of the above, the Commission initiated the procedure provided for in Regulation (EC) No 659/1999.
- (a) Preparatory measures pursuant to Regulation (EC) No 659/1999
- (89) Article 17 of Regulation (EC) No 659/1999 reads, under the heading 'Cooperation pursuant to Article 93(1) of the Treaty':
- '1. The Commission shall obtain from the Member State concerned all necessary information for the review, in cooperation with the Member State, of existing aid schemes pursuant to Article 93(1) of the Treaty.
2. Where the Commission considers that an existing aid scheme is not, or is no longer, compatible with the common market, it shall inform the Member State concerned of its preliminary view and give the Member State concerned the opportunity to submit its comments within a period of one month. ...'
- (90) By letter dated 22 February 2002 the Commission duly informed Germany that it had reached the conclusion, after examining its replies and the facts submitted by the complainants, that the Community competition rules apply to the aid measures in question and that the special provisions on agricultural products cannot be invoked, since grain brandy is an industrial product, which as such does not fall within Annex I to the EC Treaty.
- (91) After the Commission had established that Germany's measures in support of the grain distilleries constitute existing aid whose compatibility with the provisions of the EC Treaty is doubtful, it requested Germany under Article 17 of Regulation (EC) No 659/1999 to state its views on this within one month of receiving the letter of 22 February 2002. Germany was also requested to submit appropriate measures amending its monopoly legislation to make it compatible with Article 87 of the EC Treaty.
- (92) By letter dated 19 March 2002 Germany objected to the Commission's assessment and again submitted that grain brandy should be covered by the provisions applying to agricultural products.
- (b) Proposal of appropriate measures
- (93) Article 18 of Regulation (EC) No 659/1999 states with regard to appropriate measures:
- 'Where the Commission, in the light of the information submitted by the Member State pursuant to Article 17, concludes that the existing aid scheme is not, or is no longer, compatible with the common market, it shall issue a recommendation proposing appropriate measures to the Member State concerned. The recommendation may propose, in particular: (a) substantive amendment of the aid scheme, or (b) introduction of procedural requirements, or (c) abolition of the aid scheme.'

⁽²⁵⁾ [1994] ECR I-3829.

(94) Pursuant to Article 88(1) of the EC Treaty read in conjunction with Article 18 of Regulation (EC) No 659/1999, the Commission recommended in the decision of 19 June 2002 that Germany take appropriate measures to reform the relevant provisions of German grain brandy legislation (Law of 2 May 1976 and Law of 22 December 1999) as follows:

- (a) agricultural and industrial distilleries may no longer receive any operating aid in the form of subsidies for maintaining statutorily guaranteed prices;
- (b) they may no longer claim other aid of whatever kind as compensation for any early departure from the system;
- (c) the legislative amendments must ensue as soon as possible after the start of the 2002/2003 operating year and enter into force at the latest on 1 January 2004;
- (d) Germany must inform the Commission of the measures taken in a report to be submitted at the latest at the end of the first quarter of 2003. A second report on the actual implementation of the measures should be submitted to the Commission at the latest by the end of November 2003.

C. Assessment of the case law cited by Germany as justification for the aid measures

- (95) The Court of Justice has ruled many times on the compatibility of the statutory provisions on the German spirits monopoly with certain provisions of the EC Treaty (in particular in *Hansen and Sektkellerei C.A. Kupferberg*, see paragraph 42).
- (96) Germany invokes this case law in its replies to the Commission and infers from it that the provisions of the Spirits Monopoly Law of 2 May 1976 have already been examined and confirmed by the Court. Consequently, the Spirits Monopoly Law (as amended by the Law of 22 December 1999) cannot be called into question by the Commission, since the Court did not object to it.
- (97) It is therefore appropriate to go into the operative provisions of this case law in more detail.
- (98) In the cases cited in this context the Court was asked for a preliminary ruling on the validity in the light of Articles 37 and 95 (now Articles 31 and 90) of the EC Treaty of

the tax provisions introduced by the German spirits monopoly. The Court on this occasion gave its view on the compatibility of the tax measures resulting from the Spirits Monopoly Law with the EC Treaty.

- (99) In its judgment it limited itself to pointing out that 'the intervention of the Commission plays a large part in the implementation of Articles 92 and 93 whilst Article 37 is intended to be directly applicable', i.e. it confirmed that the Commission is authorised by the EC Treaty to assess the measures in question from the standpoint of the aid rules.
- (100) The Court explains, moreover, that while Articles 92 and 93 and Article 37 have the common objective of preventing the Member States from distorting the conditions of competition within the common market and creating a discrimination against the products or trade of other Member States through 'action by a state monopoly and the granting of aids', 'the application of those provisions presupposes distinct conditions peculiar to the two kinds of state measure which they are intended to govern'. Lastly, the Court explained that there was no need in the particular case to examine how far Articles 92 and 93 were applicable to the production of the agricultural products concerned and to trade in them.
- (101) It cannot be inferred from this justification that the Court considered that the aid provisions of the EC Treaty are not applicable to the subsidies granted in the context of the grain brandy monopoly.
- (102) While Germany acknowledges that the Court did not comment directly on the legality of the monopoly as regards Articles 92 and 93, it claims that there is no doubt that the Court classified the product in question as an agricultural product which may be subject to a common organisation of the market.
- (103) The Commission observes that the Court did not comment on the state aid in question. It therefore considers that the Court's judgments which Germany invokes in this case do not anticipate either the classification of the product in question or the assessment of the aid to German grain distilleries. The case law cited is therefore not relevant in the present case.

D. Compatibility of the aid

- (104) Article 87(2) of the EC Treaty lists certain types of aid that are compatible with the EC Treaty. Given the type and composition of the aid, however, it is clear that the exemptions in Article 87(2)(a), (b) and (c) do not apply in the present case.

- (105) Article 87(3) lists the types of aid that may be regarded as compatible with the common market. It is clear that the scheme in question does not serve to promote important projects of common European interest or to remedy a serious disturbance in the economy of a Member State or to promote culture and heritage conservation within the meaning of the exemptions in Articles 87(3)(b) and (d).
- (106) As regards the exemptions in Article 87(3)(a) and (c), provided for in the interests of regional development, it should be noted that the aid in question applies to all regions of Germany without distinction. There is also no doubt that the aid is not intended to promote measures within the meaning of the exemption on facilitating the development of certain economic activities (Article 87(3)(c)) in the fields of research and development, environmental protection, employment or training in accordance with the relevant Community frameworks or guidelines. Since no other reason concerning the development of certain economic activities can be given, the aid in question should be regarded as incompatible with the common market.
- (107) The Commission considers, however, that there are quite specific reasons for allowing the system practised in Germany to be maintained for a certain transitional period.
- (108) After the initiation of the procedure, all circles concerned, with the exception of the spirit drinks industry, protested against the time limit proposed by the Commission. Germany explained to the Commission that a period of several years was essential, so that the aid in question could be dismantled under acceptable conditions without threatening the existence of the producers concerned, who had thus far benefited from the duly notified subsidy system, which the Commission had not complained of in several decades.
- (109) The Commission notes first of all that in grain brandy production the operating year starts on 1 October and ends on 30 September of the following year. It will take account of this in setting the time limit by which Germany must have implemented the statutory reform.
- (110) Germany has convincingly explained to the Commission that the industrial and agricultural distilleries, which have hitherto delivered the distillates manufactured under the monopoly to DKV and would like in future to market the grain brandy themselves under the new system, have to make considerable investments. These include, for example, the purchasing of new distillation equipment or the construction of new buildings and storage areas (steel vats, wooden barrels, laboratory equipment, bottling plant, storage area for packaged goods, application for building permits, etc.). Germany estimates that a distillery with an annual production of 1 000 hl grain alcohol must invest at least EUR 400 000 a year in marketing that quantity of alcohol.
- (111) Clearly, the necessary restructurings are not feasible unless an additional period is granted in which the existing financial aid, whether in the form of a refund of production costs or of compensatory amounts, is maintained. This applies in particular to the small distilleries, which make up the overwhelming majority of the undertakings and/or farms.
- (112) The Commission accepts the justification for Germany's request, since it can be shown that abruptly stopping aid which has been granted for decades would threaten the existence of most of the firms affected by the measures, especially the agricultural distilleries. A transitional period should therefore be provided which is determined in such a way that the distilleries can adjust their production in that period to the new situation.
- (113) The Commission also notes that grain brandy competes with other products that come under Annex I and receive aid. Since the present case concerns operating aid, however, the latter must be terminated within an appropriate period: in view of the above explanations, it would probably be appropriate to preserve the scheme for a further two and a half years approximately (until 30 September 2006) in this respect. Thereafter Germany must abolish the scheme and all its consequences.
- (114) The Commission therefore determines as follows:
- (a) agricultural and industrial distilleries may no longer receive any operating aid in the form of subsidies for maintaining statutorily guaranteed prices;
 - (b) they may no longer claim other aid of whatever kind as compensation for any early departure from the system;
 - (c) the legislative amendments must ensue as soon as possible after the start of the 2005/2006 operating year and enter into force at the latest by 30 September 2006;
 - (d) Germany must inform the Commission of the measures taken in a report to be submitted at the latest at the end of the second quarter of 2005. A second report on the actual implementation of the measures should be submitted to the Commission at the latest by the end of 2006,

HAS ADOPTED THIS DECISION:

By 31 December 2006 at the latest Germany shall report to the Commission on the actual application of the measures taken.

Article 1

The aid scheme for grain brandy producers contained in Germany's Spirits Monopoly Law is incompatible with the common market.

Article 4

This Decision is addressed to the Federal Republic of Germany.

Article 2

Germany shall take all necessary measures to abolish the aid scheme referred to in Article 1 as from 30 September 2006.

Brussels, 16 November 2004.

Article 3

By 30 June 2005 at the latest Germany shall report to the Commission on the measures for abolishing the aid scheme.

For the Commission

Mario MONTI

Member of the Commission

COMMISSION DECISION

of 24 March 2006

concerning certain protective measures with regard to certain products of animal origin, excluding fishery products, originating in Madagascar*(notified under document number C(2006) 888)***(Text with EEA relevance)**

(2006/241/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Directive 97/78/EC of 18 December 1997 laying down the principles governing the organisation of veterinary checks on products entering the Community from third countries ⁽¹⁾, and in particular Article 22 thereof,

Whereas:

- (1) Commission Decision 97/517/EC of 1 August 1997 concerning certain protective measures with regard to certain products of animal origin, excluding fishery products, originating in Madagascar ⁽²⁾ has been substantially amended ⁽³⁾. In the interests of clarity and rationality the said Decision should be codified.
- (2) Community inspections in Madagascar have shown that there are serious deficiencies with regard to infrastructure and hygiene in meat establishments and that there are not enough guarantees of the efficiency of the controls carried out by the competent authorities. Animal health management in Madagascar shows severe deficiencies and non-application of Community rules. There is a potential risk for public health with regard to the production and processing of animal products, excluding fishery products, in this country.
- (3) Imports of products of animal origin, excluding fishery products, from Madagascar should not be allowed until it can be guaranteed that no more risk exists.

- (4) The measures provided for in this Decision are in conformity with the opinion of the Standing Committee on the Food Chain and Animal Health,

HAS ADOPTED THIS DECISION:

Article 1

This Decision shall apply to products of animal origin, excluding fishery products, originating in Madagascar.

Article 2

Member States shall prohibit imports of the products referred to in Article 1.

Article 3

Decision 97/517/EC is repealed.

References to the repealed Decision shall be construed as references to this Decision and shall be read in accordance with the correlation table in Annex II.

Article 4

This Decision is addressed to the Member States.

Done at Brussels, 24 March 2006.

For the Commission

Markos KYPRIANOU

Member of the Commission

⁽¹⁾ OJ L 24, 30.1.1998, p. 9. Directive as last amended by Regulation (EC) No 882/2004 of the European Parliament and of the Council (OJ L 165, 30.4.2004, p. 1).

⁽²⁾ OJ L 214, 6.8.1997, p. 54. Decision as amended by Decision 97/553/EC (OJ L 228, 19.8.1997, p. 31).

⁽³⁾ See Annex I.

ANNEX I

Repealed Decision and its amendment

Commission Decision 97/517/EC (OJ
L 214, 6.8.1997, p. 54)

Commission Decision 97/553/EC (OJ
L 228, 19.8.1997, p. 31)

Only as regards the reference to
Decision 97/517/EC in Article 1

ANNEX II

Correlation table

Decision 97/517/EC	This Decision
Article 1	Article 1
Article 2 first paragraph	Article 2
Article 2 second paragraph	—
Article 3	—
—	Article 3
Article 4	—
Article 5	Article 4
—	Annex I
—	Annex II

(Acts adopted under Title V of the Treaty on European Union)

COUNCIL COMMON POSITION 2006/242/CFSP

of 20 March 2006

relating to the 2006 Review Conference of the Biological and Toxin Weapons Convention (BTWC)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Article 15 thereof,

Whereas:

- (1) The European Union considers the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction (BTWC) as a key component of the international non-proliferation and disarmament framework and the cornerstone of efforts to prevent biological agents and toxins from ever being developed and used as weapons. Furthermore, the European Union remains committed to the development of measures to verify compliance with the BTWC in the longer term.
- (2) On 17 May 1999, the Council adopted Common Position 1999/346/CFSP ⁽¹⁾ relating to progress towards a legally binding Protocol to strengthen compliance with the BTWC and on 25 June 1996, Common Position 96/408/CFSP ⁽²⁾ relating to preparation for the Fourth Review Conference of the BTWC.
- (3) On 17 November 2003 the Council adopted Common Position 2003/805/CFSP on the universalisation and reinforcement of multilateral agreements in the field of non-proliferation of weapons of mass destruction and means of delivery ⁽³⁾. Under that Common Position, the BTWC is included as one of these multilateral agreements.
- (4) On 12 December 2003, the European Council adopted a Strategy against the Proliferation of Weapons of Mass Destruction which aims, *inter alia*, at reinforcing the BTWC, continuing reflection on verification of the BTWC, supporting national implementation of the BTWC, including through penal legislation, and strengthening compliance with it.
- (5) On 28 April 2004, the United Nations Security Council unanimously adopted Resolution 1540 (2004) describing the proliferation of weapons of mass destruction and their means of delivery as a threat to international peace and security. Implementation of the provisions of this Resolution contributes to implementation of the BTWC.
- (6) On 1 June 2004, the Council adopted a statement of support for the Proliferation Security Initiative on Weapons of Mass Destruction.
- (7) On 14 November 2002, the States Parties to the BTWC decided, by consensus, to hold three annual meetings of States Parties of one week duration commencing in 2003 until the Sixth Review Conference, to be held not later than the end of 2006. Each meeting of the States Parties would be prepared by a two-week meeting of experts, and the Sixth Review Conference would consider the work of these meetings and decide on any further action. The States Parties decided that the Sixth Review Conference would be held in Geneva in 2006, and would be preceded by a Preparatory Committee.
- (8) On 13 December 1982, the United Nations General Assembly adopted a Resolution (A/RES/37/98) on Chemical and Bacteriological (Biological) Weapons requesting the United Nations Secretary-General to investigate information that may be brought to his attention concerning activities that may constitute a violation of the 1925 Geneva Protocol. On 26 August 1988 the United Nations Security Council adopted Resolution 620 which, *inter alia*, encourages the Secretary-General to carry out promptly investigations in response to allegations concerning the possible use of chemical and bacteriological (biological) or toxin weapons that may constitute a violation of the 1925 Geneva Protocol.
- (9) On 27 February 2006, the European Union agreed on a Joint Action in respect of the BTWC with the objectives of promoting universality of the BTWC and supporting its implementation by States Parties in order to ensure that States Parties transpose the international obligations of the BTWC into their national legislation and administrative measures.

⁽¹⁾ OJ L 133, 28.5.1999, p. 3.

⁽²⁾ OJ L 168, 6.7.1996, p. 3.

⁽³⁾ OJ L 302, 20.11.2003, p. 34.

- (10) In parallel with the Joint Action, the European Union agreed on an Action Plan in respect of the BTWC in which Member States undertook to submit Confidence Building Measures returns to the United Nations in April 2006 and lists of relevant experts and laboratories to the United Nations Secretary-General to facilitate any investigation of alleged chemical and biological weapons use.
- (11) In the light of the forthcoming BTWC Review Conference during the period 20 November to 8 December 2006 and its Preparatory Committee 26 to 28 April 2006, it is appropriate to update the European Union position,
- (d) help build a consensus for a successful outcome of the Sixth Review Conference, on the basis of the framework established by previous such Conferences, and shall promote, *inter alia*, the following essential issues:
- (i) universal accession of all States to the BTWC, including calling on all States not party thereto to accede to the BTWC without further delay and to commit legally to the disarmament and non-proliferation of biological and toxin weapons; and, pending the accession of such States to the BTWC, encouraging such States to participate as observers in the meetings of the States Parties to the BTWC and to implement its provisions on a voluntary basis. Working towards the ban on biological and toxin weapons being declared universally binding rules of international law, including through universalisation of the BTWC;

HAS ADOPTED THIS COMMON POSITION:

Article 1

The objective of the European Union shall be to strengthen further the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons Convention and on Their Destruction (BTWC). The European Union continues to work towards identifying effective mechanisms to strengthen and verify compliance with the BTWC. The European Union shall therefore promote a successful outcome of the Sixth Review Conference in 2006.

Article 2

For the purposes of the objective laid down in Article 1, the European Union shall:

- (a) contribute to a full review of the operation of the BTWC at the Sixth Review Conference, including the implementation of undertakings of the States Parties under the BTWC;
- (b) support a further intersessional work programme during the period between the Sixth and Seventh Review Conferences and identify specific areas and procedures for further progress under this work programme;
- (c) support a Seventh Review Conference of the BTWC, to be held no later than 2011;
- (ii) full compliance with the obligations under the BTWC and effective implementation by all States Parties;
- (iii) in relation to full compliance with all the provisions of the BTWC by all States Parties, strengthening, where necessary, national implementation measures, including penal legislation, and control over pathogenic micro-organisms and toxins in the framework of the BTWC. Working towards identifying effective mechanisms to strengthen and verify compliance within the BTWC;
- (iv) efforts to enhance transparency through the increased exchange of information among States Parties, including through the annual information exchange among the States Parties to the Convention (Confidence Building Measures (CBM)), identifying measures to assess and enhance the country coverage and the usefulness of the CBM mechanism, and exploring the relevance of any possible enhancement of its scope;
- (v) compliance with obligations under United Nations Security Council Resolution 1540 (2004), in particular to eliminate the risk of biological or toxin weapons being acquired or used for terrorist purposes, including possible terrorist access to materials, equipment, and knowledge that could be used in the development and production of biological and toxin weapons;
- (vi) the G8 Global Partnership programmes targeted at support for disarmament, control and security of sensitive materials, facilities, and expertise;

(vii) consideration of, and decisions on further action on, the work undertaken to date under the intersessional programme during the period 2003 to 2005 and the efforts to discuss, and promote common understanding and effective action on: the adoption of necessary national measures to implement the prohibitions set forth in the BTWC, including the enactment of penal legislation; national mechanisms to establish and maintain the security and overseeing of pathogenic micro-organisms and toxins; enhancing international capabilities for responding to, investigating, and mitigating the effects of, cases of alleged use of biological or toxin weapons or suspicious outbreaks of disease; strengthening and broadening national and international institutional efforts and existing mechanisms for the surveillance, detection, diagnosis and combating of infectious diseases affecting humans, animals, and plants; the content, promulgation, and adoption of codes of conduct for scientists; noting that continued efforts on the abovementioned subjects will be required by all States Parties to enhance implementation of the BTWC.

Article 3

Action taken by the European Union for the purposes of Article 2 shall comprise:

(a) agreement by Member States on specific, practical and feasible proposals for the effective enhancement of the implementation of the BTWC for submission on behalf of the European Union for consideration by States Parties to the Convention at the Sixth Review Conference;

(b) where appropriate, approaches by the Presidency, pursuant to Article 18 of the Treaty on European Union

- (i) with a view to promoting universal accession to the BTWC;
 - (ii) to promote national implementation of the BTWC by States Parties;
 - (iii) to urge States Parties to support and participate in an effective and complete review of the BTWC and thereby reiterate their commitment to this fundamental international norm against biological weapons;
 - (iv) to promote the abovementioned proposals submitted by the European Union for States Parties' consideration which are aimed at further strengthening the BTWC;
- (c) statements by the European Union delivered by the Presidency in the run up to, and during, the Review Conference.

Article 4

This Common Position shall take effect on the day of its adoption.

Article 5

This Common Position shall be published in the *Official Journal of the European Union*.

Done at Brussels, 20 March 2006.

For the Council

The President

U. PLASSNIK

COUNCIL JOINT ACTION 2006/243/CFSP**of 20 March 2006**

on support for activities of the Preparatory Commission of the Comprehensive Nuclear-Test-Ban Treaty Organisation (CTBTO) in the area of training and capacity building for verification and in the framework of the implementation of the EU Strategy against Proliferation of Weapons of Mass Destruction

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Article 14 thereof,

Whereas:

- (1) On 12 December 2003, the European Council adopted the EU Strategy against Proliferation of Weapons of Mass Destruction, Chapter III of which contains a list of measures to combat such proliferation which need to be taken both within the EU and in third countries.
- (2) The European Union is actively implementing the EU Strategy and is giving effect to the measures listed in Chapter III thereof, in particular through releasing financial resources to support specific projects conducted by multilateral institutions.
- (3) The States Signatories to the Comprehensive Nuclear-Test-Ban Treaty (CTBT), adopted by the General Assembly of the United Nations on 10 September 1996, have decided to establish a Preparatory Commission, endowed with legal capacity, for the purpose of carrying out the effective implementation of the CTBT, pending the establishment of the CTBT Organisation (CTBTO).
- (4) On 17 November 2003, the Council adopted Common Position 2003/805/CFSP on the universalisation and reinforcement of multilateral agreements in the field of non-proliferation of weapons of mass destruction and means of delivery ⁽¹⁾.
- (5) The early entry into force and universalisation of the CTBT and the strengthening of the monitoring and verification system of the Preparatory Commission of the CTBTO are important objectives of the EU Strategy against the Proliferation of Weapons of Mass Destruction.

- (6) The Preparatory Commission of the CTBTO pursues the same objectives appearing in recitals 4 and 5 and is already engaged in identifying by what means its verification system could best be strengthened through the timely provision of expertise and training to personnel from Signatory States involved in the implementation of the verification regime. It is therefore appropriate to entrust the Preparatory Commission of the CTBTO with the technical implementation of this Joint Action,

HAS ADOPTED THIS JOINT ACTION:

Article 1

1. For the purposes of immediate and practical implementation of some elements of the EU Strategy against the Proliferation of Weapons of Mass Destruction, the European Union shall support the activities of the Preparatory Commission of the CTBTO in the area of training and capacity building for verification in order to further the following objectives:

- enhancing the operational performance of the verification system of the Preparatory Commission of the CTBTO,
- improving the capacity of CTBT Signatory States to fulfil their verification responsibilities under the CTBT and to enable them to benefit fully from participation in the treaty regime and from potential civil and scientific applications.

2. The project of the Preparatory Commission of the CTBTO, corresponding to measures of the EU Strategy, shall have the following objectives:

- to provide training for the purpose of building capacity with regard to the verification system of the Preparatory Commission of the CTBTO,
- to provide electronic, interactive access to training courses and technical workshops as well as continuous access to training modules.

⁽¹⁾ OJ L 302, 20.11.2003, p. 34.

The project shall be carried out for the benefit of all CTBT Signatory States.

A detailed description of the project is set out in the Annex.

Article 2

1. The Presidency, assisted by the Secretary-General of the Council/High Representative for the CFSP (SG/HR), shall be responsible for the implementation of this Joint Action, in full association with the Commission of the European Communities.

2. The Commission shall supervise the proper implementation of the financial contribution referred to in Article 3.

3. The technical implementation of the project referred to in Article 1(2) shall be entrusted to the Preparatory Commission of the CTBTO, which shall perform this task under the responsibility of the Presidency and under the control of the SG/HR. For this purpose, the SG/HR shall enter into the necessary arrangements with the Preparatory Commission of the CTBTO.

Article 3

1. The financial reference amount for the implementation of the project referred to in Article 1(2) shall be EUR 1 133 000.

2. The management of the expenditure financed by the general budget of the European Union specified in paragraph 1 shall be subject to the procedures and rules of the Community applying to budget matters with the proviso that any pre-financing shall not remain the property of the Community.

3. For the purpose of implementing the expenditure referred to in paragraph 1, the Commission shall conclude a specific financing agreement with the Preparatory Commission of the CTBTO in accordance with the Regulations and Rules of the CTBTO. It shall stipulate that the Preparatory Commission of the CTBTO shall ensure visibility of the EU contribution, appropriate to its size.

Article 4

The Presidency, assisted by the SG/HR, shall report to the Council on the implementation of this Joint Action on the basis of regular reports prepared by the Preparatory Commission of the CTBTO. The Commission shall be fully associated and shall provide information on the financial aspects of the implementation of the project referred to in Article 1(2).

Article 5

This Joint Action shall enter into force on the day of its adoption.

It shall expire 15 months after its adoption.

Article 6

This Joint Action shall be published in the *Official Journal of the European Union*.

Done at Brussels, 20 March 2006.

For the Council
The President
U. PLASSNIK

ANNEX

EU support for activities of the Preparatory Commission of the Comprehensive Nuclear-Test-Ban Treaty Organisation (CTBTO) in the area of training and capacity building for verification and in the framework of the implementation of the EU Strategy against Proliferation of Weapons of Mass Destruction

1. Description

The CTBTO Preparatory Commission is establishing a global verification regime consisting of 321 monitoring stations, 16 reference laboratories, the International Data Centre (IDC) and an on-site inspection (OSI) capability. An essential characteristic of the regime is its decentralized nature whereby data collected by the stations are distributed to Signatory States together with products from the IDC for final analysis and On-Site Inspection teams will be composed from an international roster. The regime therefore relies on the availability of experts in Signatory States to operate the stations and make use of the International Monitoring System (IMS) data and IDC products through their National Data Centres (NDCs), as well as on the availability of capabilities for OSI teams.

In order to improve the capacity of CTBT Signatory States to fulfil their verification responsibilities under the CTBT and to enable them to fully benefit from participation in the treaty regime, the Preparatory Commission of the CTBTO has since its creation emphasised the importance of training and capacity building. In addition to traditional training methods, new information and communication technologies offer a range of possibilities for deepening and broadening capacity building in the future.

The e-training project is global in nature. It will reach all CTBT Signatory States and will provide electronic, interactive access to training courses and technical workshops to authorised users as well as continuous access to training modules through the Expert Communication System of the CTBTO Preparatory Commission.

2. Project description

A pilot project was launched in November 2005 to explore the technological options available for web-casting and web-conferencing as well as for computer-based training with selected CTBT Signatory States in all regions. On the basis of the results of this pilot phase which will pay particular attention to the differing technological environments in which e-training methods should be used, the methodology, technical infrastructure, and substance of the capacity-building actions will be developed.

The project will cover the development and implementation of capacity building based on the following concept:

— computer-based training/self-study (CBT).

Computer-based training/self-study (CBT) allows for some interactivity and for continuous availability of training modules for the authorised user. CBT requires a long development time as the story board must be developed, reviewed, tested and revised many times before the first release to students. If the material being taught does not change very much, this can be an effective method of delivering consistent training material to a wide audience. For example, staff of NDCs need basic familiarisation with the concepts and tools used in the Provisional Technical Secretariat. Participants in OSI activities (Integrated Field Experiment 2008) will need to be trained in large numbers.

After the pilot phase, which is financed through bilateral voluntary contributions, the project will be implemented in two phases as follows:

— *Phase 1: Development of a prototype eLearning system and initiation of courseware*

The results of the pilot phase should allow the identification of a concept that meets the differing demands of the potential recipients in both technical and substantive terms.

Prototype modules for computer-based training will be developed and tested.

Components that should be considered for distance learning include:

— online training modules for system elements,

— training packages and lectures presenting static information or mature processes,

- provision of training material, including technical and political documentation available on a web site,
 - test systems where station operators can run dummy sessions related to routine operations and maintenance procedures,
 - hands-on training in Geotool based on the tutorial. This could be part of preparatory training for a more specialised training course,
 - modules of the training cycle for the participants in the OSI Integrated Field Exercise.
- *Phase 2: Full implementation of the courseware*

In the second phase, all remaining modules for the computer-based training will be developed and implemented. The content development of certain modules will be outsourced to partner institutions in CTBT Signatory States, which were instrumental in the development of techniques and procedures used in the CTBTO Preparatory Commission. The modules developed in phase 2 would benefit from the experience gained in the prototype development in phase 1.

Extensive evaluation accompanying the development and implementation phase is envisaged in order to fine tune the methodology and technologies used to the various needs of the potential recipients. To this end, a specific evaluation mechanism will be added to the CTBTO Preparatory Commission's ongoing evaluation of training and capacity-building activities. A number of CTBT Signatory States from all regions will be invited to cooperate closely with the CTBTO Preparatory Commission during the entire project and provide feedback on the usability of the capacity-building products. The computer-based training element of the project, in particular, will have to go through several testing and evaluation loops before a final product can be implemented.

Project Results

- Increased number of trained experts for testing, evaluating and provisionally operating the CTBT verification regime,
- improved preparation of participants for technical workshops,
- increased number of participants and better dissemination and implementation of conclusions of technical workshops,
- improved accessibility of training modules independent of time zones and technological development of the recipient state,
- provision of training and capacity building by electronic means to all CTBT Signatory States.

3. Duration

The total estimated duration of the two consecutive phases of the project will be 15 months.

4. Beneficiaries

The beneficiaries of e-training are all CTBT Signatory States. The capacity of these States to implement the CTBT and its verification regime and to benefit fully from participation in the work of the CTBTO Preparatory Commission is essential to the proper functioning of the CTBT. Due attention will be given to the linguistic diversity of beneficiaries, including, where appropriate, language versions of training modules.

5. Implementing entity

The CTBTO Preparatory Commission will be entrusted with the implementation of the project. The project will be implemented directly by staff of the Provisional Technical Secretariat of the CTBTO Preparatory Commission, CTBTO Preparatory Commission Signatory States' experts or contractors. In the case of contractors, the procurement of any goods, works or services by the CTBTO Preparatory Commission in the context of this Joint Action will be carried out in accordance with the applicable rules and procedures of the CTBTO Preparatory Commission, as detailed in the EU Contribution Agreement with the CTBTO Preparatory Commission.

6. Third party participants

The project will be financed 100 % by this Joint Action. Experts from the CTBTO Preparatory Commission Signatory States may be considered as third party participants. They will work under the standard rules of operation for CTBTO Preparatory Commission experts.

7. Estimated required means

The EU contribution will cover full implementation of the two phases of the project described in this Annex. The estimated costs are as follows:

— Phase 1 (terms of reference, prototype development, including testing of first modules):

EUR 519 400

— Phase 2 (development of remaining modules, testing and evaluation of modules with selected beneficiaries):

EUR 580 600

In addition, a contingency reserve of about 3 % of eligible costs (for a total amount of EUR 33 000) is included for unforeseen costs.

8. Financial reference amount to cover the cost of the project

The total cost of the project is EUR 1 133 000.

COUNCIL COMMON POSITION 2006/244/CFSP**of 20 March 2006****on participation by the European Union in the Korean Peninsula Energy Development Organisation (KEDO)**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Article 15 thereof,

Whereas:

- (1) On the basis of Common Position 2001/869/CFSP⁽¹⁾, the European Union has participated in the Korean Peninsula Energy Development Organisation (KEDO), in order to contribute to finding an overall solution to the issue of nuclear non-proliferation in the Korean Peninsula.
- (2) The EU strategy against proliferation of weapons of mass destruction, adopted by the European Council on 12 December 2003, attaches particular importance to compliance by all parties with the provisions of the Treaty on the Non-proliferation of Nuclear Weapons.
- (3) Through its participation in KEDO, the European Union has been making a contribution to the European Union's objective, namely to find an overall solution to the issue of nuclear proliferation in the Korean peninsula in accordance with the objectives of the six-party-talks.
- (4) There is consensus amongst the Executive Board Members of KEDO to terminate KEDO's nuclear light water reactor project (hereinafter referred to as LWR project) as soon as possible and to wind up KEDO in an orderly manner before the end of 2006.
- (5) To that end the European Atomic Energy Community (Euratom) has negotiated the renewal of its membership of KEDO with the specific purpose of supporting the objective of terminating the LWR project and of winding up KEDO.
- (6) The existing detailed arrangements for the representation of the European Union on KEDO's Executive Board should be kept in place. In that connection, the Council and the Commission have agreed that if KEDO's Executive Board was to address any matter falling outside Euratom's competence, it is the Presidency of the Council which should take the floor to express a position on such matters.

- (7) Common Position 2001/869/CFSP expired on 31 December 2005 and should be replaced by a new Common Position,

HAS ADOPTED THE FOLLOWING COMMON POSITION:

Article 1

The objective of this Common Position is to enable the European Union to participate in the process to terminate the LWR project as soon as possible and to wind up KEDO in an orderly manner before the end of 2006.

Article 2

1. For matters falling outside the competence of Euratom, the position within KEDO's Executive Board shall be determined by the Council and expressed by the Presidency.

2. The Presidency shall therefore be closely associated with the proceedings of KEDO's Executive Board and shall be informed immediately of any common foreign and security policy matter which must be discussed at Executive Board meetings.

3. The Commission shall report to the Council, on a regular basis and as the need arises, under the authority of the Presidency assisted by the Secretary-General/High Representative for the CFSP.

Article 3

This Common Position shall take effect on the date of its adoption. It shall be applicable from 1 January 2006 until the termination of KEDO or until 31 December 2006, whichever date occurs first.

Article 4

This Common Position shall be published in the *Official Journal of the European Union*.

Done at Brussels, 20 March 2006.

For the Council
The President
U. PLASSNIK

⁽¹⁾ OJ L 325, 8.12.2001, p. 1.