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II

(Non-legislative acts)

DECISIONS

COMMISSION DECISION

of 2 December 2009

on the State aid C 39/08 (ex N 148/08) planned by Romania for training by Ford Craiova*(notified under document C(2009) 9350)***(Only the Romanian text is authentic)****(Text with EEA relevance)**

(2010/357/EU)

THE EUROPEAN COMMISSION,

(now Article 108(2) TFEU) ⁽²⁾ with respect to the notified aid, and called on interested parties to submit comments ⁽³⁾.

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

- (3) Romania submitted comments by letter of 7 November 2008. On 18-19 November 2008, the Commission met with the Romanian authorities and Ford representatives on the premises of the Craiova plant.

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

- (4) By letter of 26 November 2008, the Commission accepted the beneficiary's request to extend the deadline for submitting its comments. Ford submitted its comments by letter of 18 December 2008. These comments were forwarded to Romania by letter of 9 March 2009.

Having called on interested parties to submit their comments pursuant to those provisions ⁽¹⁾,

Whereas:

- (5) The Commission requested further information by letters of 6 March 2009 and 23 June 2009. The Romanian authorities responded on 2 April 2009 and 22 July 2009 respectively.

1. PROCEDURE

- (1) Romania notified to the Commission by letter of 1 April 2008 an *ad hoc* individual training aid for the amount of EUR 57 million in favour of car producer Ford Romania SA, located in Craiova.

- (6) The Commission did not receive comments from other interested third parties.

- (2) By letter dated 10 September 2008, the Commission informed Romania that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty

⁽²⁾ With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the TFEU. The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty where appropriate.

⁽³⁾ The Commission Decision to initiate the procedure was published in the *Official Journal of the European Union*, see footnote 1.

⁽¹⁾ OJ C 270, 25.10.2008, p. 29.

2. DESCRIPTION OF THE PROJECT

The beneficiary

- (7) The aid beneficiary is Ford Romania SA, part of Ford Motor Company, which on 12 September 2007 purchased from the Romanian privatisation agency AVAS the car plant and business formerly operated in Craiova by SC Automobile Craiova SA and SC Daewoo Automobile SA (hereinafter referred to as 'Ford Craiova').
- (8) By decision of 27 February 2008, the Commission found that the privatisation agreement entailed incompatible aid, and ordered recovery of EUR 27 million ⁽⁴⁾. The sum was reimbursed with interest on 27 June 2008.
- (9) Ford purchased the Craiova car plant to start producing, as of 2009, two new types of vehicles (B-MAV, a small multifunctional model, and ISV, a light vehicle suitable for the transport of goods and/or passengers), and as of 2011, a new generation of low CO₂ engines. This project will entail the setup of two new production lines, for an estimated overall investment of EUR 675 million. Under the privatisation agreement, Ford committed to retain the 3 900 existing workforce and to create new jobs, reaching a total of 9 000 employees by the end of the year 2012.
- (10) The Craiova plant is based in a disadvantaged region eligible for aid under Article 107(3)(a) TFEU. By decision of 30 April 2008, the Commission approved EUR 143 million of regional aid to Ford Craiova, corresponding to the maximum aid intensity allowed for a large investment project of this size in a region eligible for a basic maximum aid intensity of 50 % of the eligible investment costs ⁽⁵⁾.

The training project

- (11) The notified aid supports a comprehensive 5-year training programme which Ford intends to offer to both the existing workforce (3 900) and future employees of the Craiova car plant, up to a total of 9 000 employees. The training programme is estimated to cost a total of EUR 185,5 million ⁽⁶⁾, of which EUR

128,5 million will be contributed by Ford, and EUR 57 million will be provided by Romania in the form of training aid.

- (12) The training programme has a bi-dimensional structure.
- (13) On the vertical dimension, the programme consists of several layers. The first layer comprises training that is either required by EU/Romanian law and/or necessary in order to run the plant efficiently – which could be defined as 'company-specific training'. This layer of training is not eligible for aid. Its estimated cost of approximately EUR 29,7 million is entirely borne by Ford. The additional layers include: training that would only partially be offered in the absence of aid (i.e. up to 40 % of the complete course content); training that would not be offered at all in the absence of aid; and training related to the selection of categories of employees.
- (14) On the horizontal dimension, the programme offers 269 courses, grouped around four main training themes/blocks:
- Safety: 79 courses aimed at developing a safety culture in the workplace. These courses are divided into four principal sub-themes: basic safety for the workplace; safe use of machinery and personal protection equipment; pedestrian safety; hazard risk identification and prevention. Each course consists of an introductory part, to be followed by in-depth behavioural training. Of the 79 courses offered under this block, 61 are addressed to both blue-collar employees and staff in leadership positions, while 18 courses are addressed only to the latter category of professionals.

Training that must be provided by the company to meet internal company safety standards and to satisfy requirements resulting from EU and Romanian safety regulations is not considered eligible for aid ⁽⁷⁾. Eligible costs for this block amount to EUR 17,57 million, for which aid up to EUR 8,43 million could be claimed.

⁽⁴⁾ Commission Decision 2008/717/EC of 27 February 2008 on State aid C 46/07 (ex NN 59/07) implemented by Romania for Automobile Craiova (formerly Daewoo Romania), OJ L 239, 6.9.2008, p. 12. The Commission found that the privatisation price was reduced, in exchange for Ford's commitments to preserve the existing force (3 900) and create new jobs up to a total of 9 000 by 2012, and to reach by the end of 2012 a production level of 200 000 vehicles per year. The Commission ordered recovery of EUR 27 million, representing the difference between the net asset value and the purchase price. As part of the privatisation deal, the Romanian government had signed on 7 November 2007 a Binding Commitment Letter, undertaking to give Ford regional aid totalling EUR 156 million and training aid totalling EUR 57 million in relation to the Craiova project.

⁽⁵⁾ Commission Decision of 30 April 2008 on State aid N 767/2007, Regional investment aid to Ford Craiova, OJ C 238, 17.9.2008, p. 4.

⁽⁶⁾ As submitted by the beneficiary on 18 December 2008.

⁽⁷⁾ As following: Health and Safety Induction for Production; Safe Cell Entry Training; ECPL Stand Down; ECPL Stand Down for Production; Health and Safety Induction for Office Workers; Site Induction for Visitors and Contractors; Environmental Energy Response Plan; MATS System and Data Management for Hazardous Materials; Risk Evaluators; Induction for Fenced Areas or Construction Sites; Fire Risk Assessment and Safety; Safety Stand Down on legal requirements (bi-annually); Safety Stand Down on Pedestrian Safety (bi-annually); Health and Safety for Managers and the Health and Safety Committee; First Aid.

- Core Skills: 59 courses aimed at supporting the personal development of employees, by providing them with skills of a general value. The courses are grouped under the following sub-themes: Romanian language for expatriate employees; leadership skills for supervisors/foremen; Outlook and basic IT skills; English language skills for the local workforce; literacy and numeracy skills; basic leadership skills for employees at all levels; extensive IT training; individualised in-depth training for selected 'role model' employees. In particular, 14 of the courses are addressed to both blue-collar staff and staff in leadership positions ⁽⁸⁾, while 45 courses are addressed only to the latter category of professionals.

The estimated cost of the courses considered non-eligible for aid will be entirely covered by Ford ⁽⁹⁾. Eligible costs for this block amount to EUR 93,13 million, for which aid up to EUR 46,56 million aid could be claimed. In particular, the literacy and numeracy courses, which will be provided to both blue collar employees and staff in leadership positions, are budgeted to cost approximately EUR 22,5 million each.

- Business Fundamentals: 73 courses intended to bring the workforce up-to-speed on European and global business practices. Part of the courses offered under this block, i.e. 20 ⁽¹⁰⁾, cover both blue-collar employees and staff in leadership positions (team leaders, supervisors, specialist staff and managers). The rest of the courses are targeted only at the latter professional categories. Three training areas under this block, i.e. Ford-Specific IT Systems, Ford Business Processes, and Ford Internal Control Processes, comprise courses that are necessary for the efficient operation of the plant, and are therefore not eligible for aid. The rest of the courses are defined as optional, or additional, and their purpose is to take employees to a higher level of experience and skill. These additional areas of training cover general themes such as: Project Management Skills; Functional Expertise (HR,

Purchasing, Finance); Six Sigma (quality improvement); additional individualised training for selected 'role model' employees.

The total eligible costs of this training block are estimated at about EUR 8 million, of which EUR 4 million will be contributed by Ford and the other EUR 4 million are provided as aid. The costs of the company-specific training under this block are entirely borne by the company ⁽¹¹⁾.

- Industrial Skills: 58 courses aimed at conveying in their ensemble a level of industrial skill that goes beyond what is necessary to function on the job, and enabling employees to cope with the challenges of using new technologies in the manufacturing environment in general. Two of these courses, i.e. Engine Assembly and Manufacturing Simulation, are company-specific, and therefore not eligible for aid. The rest of the courses are qualified as additional/optional training, covering various subjects under the broad themes of Electrical/Mechanical Trades and Extended Maintenance. Most of the courses offered under this block are addressed to blue-collar employees and staff in leadership positions alike ⁽¹²⁾.

The total eligible costs of this training block are estimated at approximately EUR 39,1 million, of which about EUR 18,9 million will be borne by Ford, and about EUR 18,2 million could be claimed as aid.

- (15) The company-specific part of the training programme, which will be entirely financed by Ford, is estimated to cost EUR 29,73 million EUR ⁽¹³⁾. For the additional training which is declared eligible for aid, the distribution of eligible costs between the blocks of the training programme and Ford's own contribution are reported in the Table below (in EUR million).

⁽⁸⁾ As following: The Role of Teams in Objective Setting and Policy Deployment; Continuous Improvement; Introduction to the PC with MS Windows XP; MS Excel Fundamentals; MS Word 2003 Fundamentals; Team Building Skills; Valuing Differences, Creating Success – Diversity and Dignity at Work; Train the Trainer; Effective Team Meetings; Literacy Skills; Business Mathematics; Introduction to Scorecards; English Language Training; Product Specialist Leadership Training.

⁽⁹⁾ As following: Task Card Training; Introduction to Scorecards; and Strategies, Objectives and Key Performance Indicators.

⁽¹⁰⁾ Such as: Manufacturing Principles; Root Cause Analysis (5 Why's); Visual Factory Techniques; Error Proofing; Defect Identification and Resolution; Continuous Improvement; Quality Overview; Statistical Process Control; Principles of Corporate Conduct; Manufacturing Systems; etc.

⁽¹¹⁾ Which cover the following company-specific courses: In Station Process Control; Document Management and Retention; The Use of Statistical Process Control in Ford; Corporate Conduct in Ford; Internal Control at Ford; Manufacturing Operating Systems at Ford; Captura Training; Management Accounting in Ford; Financial Accounting and Tax Processes in Ford; Financial Analysis Processes in Ford; Purchasing Processes in Ford; Human Resources Processes in Ford; Purchase and Ordering Systems; Control of Requisitioning and Approvals; Procurement and Requisitioning Systems for Buyers; Non-Production On-Line Order Processing (SNOOPE); Blanket Order Selection.

⁽¹²⁾ Except two Medical Skills courses, i.e. Resuscitation and Treatment for Electric Shock, and Medical Up-Skilling.

⁽¹³⁾ Nominal value.

	Safety	Core Skills	Business Fundamentals	Industrial Skills	Total
Eligible Costs General Training	16,17	93,13	7,94	36,67	153,91
Eligible Costs Specific Training	1,49	—	0,16	0,24	1,89
General Training Aid	8,08	46,56	3,97	18,33	76,94
Specific Training Aid	0,37	—	0,03	0,06	0,46
Total Aid	8,45	46,56	4,00	18,39	77,44
Ford Contribution	9,2	46,56	4,08	18,50	78,39

The total aid and Ford contribution values reported above are indicated at nominal value. Romania and Ford underline that the company decided to cap the total amount of aid to EUR 57 million. The difference between the total aid that the programme would qualify for and the claimed amount of EUR 57 million is covered by the company as its own contribution, which is thus increased to EUR 98,8 million.

- (16) The total number of training days to be offered under the company-specific part of the programme, which is not eligible for aid, is of roughly 200 000 over a period of five years, and the total number of training days to be offered under the eligible part of the programme is of roughly 800 000 over a period of five years. Accordingly, the 9 000 employees should receive on average in total about 111 days of training each, to be distributed over a five-year period. Romania and Ford also provided evidence to show that most of the trainers involved in the programme (up to 90 %) will be recruited from external specialised training centres, and that a good part of the training will be offered at locations external to the factory (see in this sense also recital 18 below, where eligible travel costs for both trainees and trainers are indicated).
- (17) The costs of the training programme were estimated starting from similar costs incurred by Ford for training offered at its plant in Dagenham (UK), which were adjusted to take into account cost levels in Romania, based on initial forecasts (2008 data adjusted for predicted inflation rates for the following years). Accordingly, the following costs were estimated per day of training and per trainee (not including trainee wages):

Categories of Eligible Costs	General Training	Specific Training
Guidance and Counselling	[...] (*) EUR	[...] EUR
Trainer fee (2 days)	[...] EUR	[...] EUR
Trainer travel expenses	[...] EUR	[...] EUR
Trainee travel expenses	[...] EUR	[...] EUR
Depreciation of tools & equipment	[...] EUR	[...] EUR
Rent/depreciation of training facilities	[...] EUR	[...] EUR
Training materials	[...] EUR	[...] EUR
Total	181,00 EUR	265,00 EUR

(*) Business secret.

- (18) The eligible costs claimed for this programme (covering a total of 9 000 employees, and to be provided over a period of four years) are indicated below (nominal values, in EUR million):

	General Training Aid	Specific Training Aid	Total
Trainer Costs	[45-50]	[0,5-1,0]	[45-50]
Trainer Travel Expenses	[10-15]	[0-0,5]	[10-15]
Trainee Travel Expenses	[0-5]	[0-0,5]	[0-5]
Other Expenses Art. 4(7)(c)	[10-15]	[0-0,5]	[10-15]
Depreciation	[0-5]	[0-0,5]	[0-5]
Training Facility	[5-10]	[0-0,5]	[5-10]
Guidance and Counselling	[25-30]	[0-0,5]	[25-30]
Internal Trainer Costs	[0-5]	[0-0,5]	[0-5]
Wage Compensation for Trainees	[40-45]	[0-0,5]	[40-45]
Eligible Costs Excluding Wage Compensation	[110-115]	[1-2]	[115-120]
Maximum Aid	76,96	0,47	77,44
Ford Contribution	76,96	1,42	78,39

The aid

- (19) The aid consists of a direct grant to Ford Craiova of EUR 57 million for a period of five years. The aid is proposed in support of a training project estimated to cost overall EUR 185,5 million (nominal value), of which EUR 155,8 million are qualified as eligible for training aid. Most of the eligible expenditure is associated with general training, i.e. EUR 153,93 million. Only EUR 1,88 million of the eligible costs is linked to specific training. For this project, Romania applied an aid intensity of 50 % for general training measures, and 25 % for specific training measures. Accordingly, the project qualifies for EUR 76,96 million of general training aid, and for EUR 0,47 million of specific training aid — totalling EUR 77,44 million of aid. The beneficiary opted however for limiting the State support to EUR 57 million (see also recital 15 above).
- (20) Romania maintains that, as it would be unrealistic to predict *ex ante* the exact costs by training course for a programme scheduled to last for five years, it becomes necessary to give to the aid beneficiary some flexibility to re-allocate aid between different eligible costs, were the actual costs incurred to vary from the estimated standard costs. This flexibility should allow the beneficiary to optimise the training programme along the way, while the scope of training and overall aid volume and intensities would nevertheless be respected.
- (21) Romania also proposed in its submission of July 2009 that the aid be paid to the beneficiary in advance, at intervals to be determined in agreement with the latter (e.g. on a quarterly basis), and based on standard claimed costs. Expenses actually incurred during each fiscal year should then be audited by the beneficiary's internal auditors, and aid payments adjusted yearly to the applicable intensity ceilings. The rules and conditions for the payment of aid should be stipulated in a specific Romanian legislative act.

3. DECISION TO OPEN THE FORMAL INVESTIGATION PROCEDURE UNDER ARTICLE 82(2) EC

- (22) In the decision to open the formal investigation of 10 September 2008, the Commission expressed doubts concerning the following aspects: the justification of aid, the incentive effect/necessity of aid, the cumulation of regional and training aid, and compliance with the so-called 'Deggendorf principle' (all discussed below).

Incentive effect/necessity

- (23) In particular, the questions raised by the Commission were: (i) whether part of the training declared eligible for aid would not need to be provided by Ford in any event, at least to the existing workforce, in order to be able to operate a plant introducing state-of-the-art manufacturing technology; and (ii) whether parts of the training offered under the Safety block were not actually compulsory for the company to offer under EU and/or Romanian safety regulations. If so, the aid would not be compatible with the internal market under Article 107(3)(c) TFEU, as it would subsidise training that would be undertaken in any event, and consequently would not 'facilitate the development of certain economic activities'.

Justification

- (24) The Commission questioned whether parts of the training proposed for future employees were justified, since Ford had the possibility of recruiting qualified new employees.

Cumulation/Intangible regional handicaps

- (25) The opening decision raised the question whether parts of the proposed training would not in effect address intangible regional handicaps in the form of a shortage of skills in the existing workforce that were already compensated by the regional investment aid granted to the company in 2008 ⁽¹⁴⁾.

Deggendorf principle

- (26) According to established case law ⁽¹⁵⁾, new aid cannot be paid until previously-granted incompatible aid has been fully recovered. The Romanian authorities had not proven at the date of the opening of the formal investigation that the aid linked to the privatisation of the

Craiova plant declared incompatible with the EC Treaty (now TFEU) by the Commission on 27 February 2008 ⁽¹⁶⁾ had been fully recovered.

4. COMMENTS FROM ROMANIA

- (27) Following the opening of the investigation procedure, Romania submitted comments concerning: (i) the legal basis for assessing the compatibility of the aid with the Treaty; (ii) the incentive effect of the aid; and (iii) compliance with the so-called Deggendorf principle.

Legal basis for assessment

- (28) Romania argues that, according to the principle of legal certainty, the aid should be assessed according to the criteria in place at the time of the notification (April 2008). At that time Commission Regulation (EC) No 68/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to training aid ⁽¹⁷⁾ still applied, and the General Block Exemption Regulation ⁽¹⁸⁾ (hereinafter 'the GBER') was published on 9 August 2008, and entered into force on the 20th day following its publication.

- (29) Romania considers that the assessment criteria resulting from the GBER are partially different from those resulting from Regulation (EC) No 68/2001. It also underlines that, for the purposes of the notification, it had taken into account the maximum aid intensities of 50 % for general aid and 25 % for specific aid resulting from Regulation (EC) No 68/2001, whereas the GBER allows intensities of 60 % for general training and 25 % for specific training.

- (30) Romania is also of the view that, starting with its *Ford Genk* ⁽¹⁹⁾ and *GM Antwerp* ⁽²⁰⁾ decisions, the Commission has adopted a rigid approach to the assessment of training aid under the incentive effect criterion which is not consistent with the Commission's overall approach towards training aid and with the objectives of the Lisbon Agenda.

⁽¹⁶⁾ See footnote 4.

⁽¹⁷⁾ OJ L 10, 13.1.2001, p. 20.

⁽¹⁸⁾ Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation) (OJ L 214, 9.8.2008, p. 3).

⁽¹⁹⁾ Commission Decision 2006/938/EC of 4 July 2006 on State aid C 40/2005 (ex N 331/2005) which Belgium is planning to give to Ford Genk (OJ L 366, 21.12.2006, p. 32).

⁽²⁰⁾ Commission Decision 2007/612/EC of 4 April 2007 on State aid C 14/06 which Belgium is planning to implement for General Motors Belgium in Antwerp (OJ L 243, 18.9.2007, p. 71).

⁽¹⁴⁾ See footnote 4.

⁽¹⁵⁾ Joined Cases T-244/93 and T-486/93 *TWD v. Commission* [1997] II-2265, and Case C-355/95 *P TWD v. Commission* [1997] ECR I-2549.

Incentive effect

- (31) Necessity. Romania maintains in essence that, in the absence of aid, the company would provide a less ambitious training programme, choosing instead to offer its employees only the training that is necessary in order to operate the plant (which amounts to roughly 17 % of the proposed programme, and the costs of which will be entirely borne by the company) and much less of the additional training.
- (32) It is argued that Ford would be able to operate the Craiova plant without providing the additional training qualified as eligible for aid, because the existing workforce has experience with car manufacturing, and the new technology to be used at the plant allows for a process of 'learning-by-doing' that was verified at other Ford locations, where indeed such additional training was not provided.
- (33) Romania also provides in-depth explanations regarding the distinction between courses that are necessary in order to operate the plant (and which will be entirely financed by the company) and additional courses ('useful, but not indispensable') for each block of training.
- (34) Safety: most of the courses offered under the four proposed sub-topics (Basic Safety Training for the Workplace, Safe Use of Machinery and Personal Protective Equipment, Pedestrian Safety and Hazard and Risk Identification and Prevention) are considered necessary in order to convey a safety culture at the workplace. Part of these courses will be given to meet obligations resulting from EU and Romanian safety regulations, and part are aimed at meeting internal safety standards at a Ford plant. In relation to the latter, Romania explains that Ford applies internally safety standards which go beyond the minimum requirements resulting from the law. At any rate, both safety courses required by law and those corresponding to company internal safety policy are not considered eligible for aid. Their cost will be borne entirely by the company. The additional safety training, for which aid of EUR 3,2 million is requested, consists of individual coaching to further support awareness and behavioural change, and individualised training for selected 'role model' employees. These types of in-depth training are useful to employees, but not indispensable to the company.
- (35) Core Skills: this training block is aimed at supporting the personal development of individuals, and relates very little to the actual functioning on the job. A good part of the training offered under this block concerns general IT skills, English language training, literacy and numeracy skills, etc. For example, literacy and numeracy training is designed to fill in gaps that were verified in adults working in industrial sectors in all parts of the world, irrespective of their level of education. Literacy and numeracy training is not necessary to function on the job, as the technology used at the plant relies on Visual Factory systems that convey simplified visual work instructions. The literacy and numeracy training is intended to improve the capacity of employees to formulate ideas/concepts and communicate them fluently, and to interpret changes in the surrounding environment in quantitative terms. In a similar way, this block includes training to provide basic leadership skills for employees at all levels. Such skills, Romania argues, are beneficial to all categories of employees, irrespective of their level of education. This sort of training benefits mostly to the employees themselves, improves their quality of life, and generates positive spillovers for the region and society as a whole.
- (36) Business Fundamentals: the broad aim of this training block is to convey general advanced management and functional expertise. Three areas of training convey management skills that are specific to the company (Ford Specific IT Systems, Ford Business Processes, Ford Internal Control Processes), and their costs are entirely borne by the company. The additional training conveys skills which are largely transferable to other companies or industries, on general subjects such as Project Management Skills, HR, Purchasing, Finance, Six Sigma (a methodology for reducing error in repeated processes that is applied in many industries), and individualised training for 'role models', which undoubtedly benefits the company as well, in so far as it improves the working environment by helping to flatten hierarchies, but primarily benefits the trainees themselves and increases their attractiveness on the job market. For this training block aid up to EUR 4,33 million is requested.
- (37) Industrial Skills: again, this block includes training that goes beyond what is necessary to function on the job. The courses that are necessary for performing normal tasks in production, i.e. Launch, Maintenance and Fork Lift Truck, Robotics and Automation, will be entirely financed by the company. Additional training will be offered in two general areas: multiskilling on electrical/mechanical trades (which improves the employability of workers, but is not necessary to function on the job), and extended (in-depth) maintenance, automation and robotics. In both cases, employees learn to use different high technology machinery other than the one relevant for their current job. This block of training is declared eligible for aid up to EUR 18,9 million.

- (38) Furthermore, Romania considers that the incentive effect of the proposed aid must be assessed for the training programme as a whole, and not separately for each of the training themes or individual courses. Assessing training themes and/or courses individually, out of their overall context, is likely to lead to distorted results. Such an individual assessment would fail to take into account the added value of the training programme in its ensemble, which is more than the simple sum of benefits derived from training on specific subjects.
- (39) Justification. Concerning the justification of training to be provided to newly-recruited employees, Romania dissociates the issue of the company's (undisputed) capacity to recruit qualified new employees from the question of whether additional training is justified in their case. The additional training conveys general skills that are not necessary for the functioning on the job, and is therefore justified and beneficial for all categories of employees, irrespective of their educational background.
- (40) Intangible regional handicaps. On the issue of whether the proposed training aid compensates for intangible regional handicaps, in the form of a shortage of skills, that were already compensated by regional aid, Romania argues that regional investment aid and training aid measures have different objectives (and thus address different problems) and cover distinct eligible costs. The objective of regional investment aid is to support investment in the disadvantaged regions of the EU, whereas the purpose of training aid is to remedy under-investment in training, a phenomenon observed across the board in the EU. Furthermore, the 'distribution' of benefits for regional aid is the reverse of the benefits of training aid: while the former benefits primarily the investor, the latter is foremost beneficial to the employees.
- (41) Romania also underlines that the 'intangible' regional handicap resulting from a shortage of local skills is not one of the criteria for selecting the EU disadvantaged regions — criteria include GDP per capita levels, unemployment rates, population density, etc. Moreover, in the past the Commission had approved training aid based, inter alia on the argument that it would play a role in overcoming the competitive disadvantage resulting from the weak qualification of the local workforce (*Webasto* ⁽²¹⁾, *Vauxhall Motors* ⁽²²⁾).
- (42) Furthermore, a line of reasoning according to which projects which received regional investment aid should

not receive training aid would implicitly penalise the Union's disadvantaged regions, by precluding them from the possibility to support training projects.

Deggendorf principle

- (43) Romania submitted documentation showing that the incompatible privatisation aid of EUR 27 million ⁽²³⁾ and accruing interest was reimbursed by Ford Motor Company on 27 June 2008. As a consequence, Romania considers that the notified aid is in compliance with the so-called Deggendorf principle.

5. COMMENTS FROM INTERESTED PARTIES

- (44) Ford submitted comments on 18 December 2008, supporting the facts and arguments presented by Romania, and adding further arguments concerning the incentive effect of the proposed aid.

Significant own contribution

- (45) Ford emphasises that a considerable part of this comprehensive training programme is financed from own resources — up to EUR 128,5 million of the estimated total cost of EUR 185,5 million for the entire project. Moreover, training that is either legally required and/or necessary for the operation of the plant has not been declared eligible for aid, and will be entirely financed by the company. The company-specific part of the training, estimated to cost approximately EUR 29,7 million, has indeed already started to be offered to the existing workforce in 2009.

Reduced distorting effects of aid

- (46) In relation to the potential distorting effects of the aid, Ford underlines that the programme involves for the most part general training, where the employees are the main beneficiaries, and from which the company will benefit only indirectly. Consequently, the distorting effects of the training aid should be only secondary and indirect. Ford considers that, consequently, considerations related to the impact of aid from the perspective of 'the structure of relevant markets' and 'the sector and industry characteristics' are not pertinent in relation to general training, as the projected output and technical capacities as such will not be modified. By contrast, specific training may directly improve the productivity of the company and thus affect its position on the market. However, specific training represents only a minor part of the proposed additional training.

⁽²¹⁾ Commission Decision in State aid case N 653/2005, Training Aid for Webasto Portugal (OJ C 306, 15.12.2006, p. 14).

⁽²²⁾ Commission Decision in State aid case C 23/2007, Training Aid for Vauxhall at Ellesmere Port (OJ C 243, 17.10.2007, p. 4).

⁽²³⁾ See footnote 4.

Necessity of training

(47) On the issue of whether parts of the training notified as eligible for aid might not have to be given at any rate in order to ensure compliance with internal company safety standards, Ford underlines that this line of reasoning would lead to normative distortions of the 'race-to-the-bottom' kind: if only companies with low internal safety standards may benefit from training aid, companies would eventually be discouraged from raising their own internal safety standards. Accordingly, Ford wonders whether proposed training aid that should in any case be granted to the beneficiary should not be determined by reference to internal company standards, but to objective criteria applicable to all companies in a given sector. Moreover, with this investment project Ford will become by 2012 Romania's largest industrial employer. Investments of this kind have a 'lighthouse' function in the economy, and the Romanian government supports Ford's plans to make the Craiova plant a benchmark for other employers and new investors.

(48) Ford also underlines that, in more general terms, the additional training declared eligible for aid is not necessary for the operation of the plant, given the 'lean manufacturing' system nowadays applicable within the Ford group. Car manufactures have moved over time from 'mass manufacturing' towards 'lean manufacturing', an evolution that entails mainly a behavioural change, in the sense of increasing empowerment at all levels of the internal organisation. The non-eligible part of the training programme would be sufficient in order to induce this behavioural change.

Intangible regional handicap

(49) Ford supports the arguments put forward by Romania against the idea of a possible overlap between regional investment aid and training aid in relation to intangible regional handicaps in the form of lower skills, and also considers that the level of skills and education in a region should be taken into account when assessing if a proposed training aid measure has positive externalities.

The counterfactual

(50) Ford presents a comparison between the training programme that it has offered at its plant in Saint Petersburg and the one proposed to be carried out at the Craiova plant. The purpose of the comparison is to demonstrate that it is possible to run a Ford plant efficiently with a less ambitious training programme than the one proposed for the Craiova plant, and as a consequence, that aid for the additional training offered at the Craiova plant has an incentive effect.

(51) Ford considers that a comparison between the two training projects is pertinent, for the following reasons:

— Production: In Saint Petersburg Ford took over a plant that previously produced large engines for ship-building and for the defence industry, while the Craiova plant was previously producing cars. At the Saint Petersburg plant Ford produces only vehicles (as of 2002, variations of the Ford Focus II model, and as of 2009, the Ford Mondeo model), whereas in Craiova it will produce both vehicles and engines. The Saint Petersburg plant does not have a press shop, unlike the Craiova plant, which does have one. Notwithstanding these differences, Ford considers that outset conditions at the Craiova and the Saint Petersburg plants are comparable, because both plants were acquired to introduce new car production lines. Both plants use the same 'Ford Production System' ('FPS'), and production stages are comparable, including in terms of the level of skills required of the workforce.

— Workforce: In Saint Petersburg Ford did not take over the existing workforce. The newly recruited workforce was on average younger, higher qualified and less experienced than the existing workforce at the Craiova plant. Notwithstanding these differences, Ford considers that the two workforces were comparable at the outset. Both workforces were accustomed to working conditions in non-market economies, an initial condition that was reflected, for example, in a different safety culture by comparison to their Western counterparts, and little management and functional experience in a multinational company (irrespective of education levels).

(52) The structure of the training programme offered at the Saint Petersburg plant was similar to the one proposed for the Craiova plant. However, at the Saint Petersburg plant Ford provided only the minimum necessary of training, and staff in leadership positions received more training than blue collar employees. Production was launched in 2002 with only the minimum levels of training necessary in order to reach Ford quality and safety requirements.

(53) Ford simulated the Saint Petersburg training programme if applied for the 9 000 employees of the Craiova plant. The conclusion was that a Saint Petersburg-type of training programme would amount overall to only about 26 % of the training that is proposed to be offered at the Craiova plant. More specifically, such programme would offer only 57 % of the Safety, 2 % of the Core Skills, 30 % of the Business Skills, and 47 % of the Industrial Skills training proposed for the Craiova plant.

6. ASSESSMENT OF THE AID

6.1. Existence of aid

- (54) The measure notified by Romania in favour of Ford Craiova meets the cumulative conditions for qualifying as State aid within the meaning of Article 107(1) TFEU. The measure consists of a direct grant financed by the Romanian State from public resources. The measure is also selective, as it involves *ad hoc* individual financial support to a single beneficiary, Ford Craiova. The beneficiary will derive an advantage from the measure, which relieves it of part of the costs of the proposed training programme. The measure distorts competition by favouring the beneficiary company with respect to competitors not receiving aid for similar purposes. Finally, trade between the Member States is affected, as the beneficiary and its competitors sell their products primarily on EU, but also on EEA and worldwide markets.

6.2. Legal basis for assessment

- (55) Romania asks for approval of the aid under the rules applicable at the time of the notification (April 2008). More specifically, Romania maintains that: (i) the compatibility of the proposed aid with the Treaty should be assessed under the criteria stemming from Regulation (EC) No 68/2001⁽²⁴⁾, which was in place at the time of the notification; (ii) the Commission should not apply retroactively the General Block Exemption Regulation (GBER) (which was published on 9 August 2008 and entered into force twenty days later)⁽²⁵⁾; and on a more general level, that (iii) the overly strict application of the incentive effect criterion starting with decisions such as *Ford Genk*⁽²⁶⁾ and *GM Antwerp*⁽²⁷⁾ is not consistent with the Commission's overall approach towards training aid.
- (56) In the *Freistaat Sachsen v. Commission* ruling⁽²⁸⁾, the ECJ clarified the issues surrounding the application *rationae temporis* of State aid rules for the purposes of assessing the compatibility of notified aid measures. The Court established that, for the compatibility assessment, the Commission must apply the rules, principles and criteria in force at the time of issuing the Decision, which are better adapted to the context of competition⁽²⁹⁾. In this sense, the Court adds, '[...] the notification by a Member State of aid or a proposed aid scheme does not give rise to a definitively-established legal situation which requires the Commission to rule on their compatibility with the internal market by applying the rules in force at the date on which that notification took place. On the contrary, it is for the

Commission to apply the rules in force at the time when it gives its decision, the only rules on the basis of which the lawfulness of the decision it takes in that regard falls to be assessed.'⁽³⁰⁾

- (57) The Court also establishes that, when the compatibility assessment is carried out under new rules, the Commission must give interested parties the opportunity to comment on the compatibility of aid with the latter. Notably, this procedural obligation is not triggered when the new rules do not contain substantial amendments with respect to the previous ones⁽³¹⁾.
- (58) It follows from the above that the Commission must assess the compatibility of the aid with the TFEU under the rules and criteria applicable at the time of its decision. Individual training aid which does not meet the conditions for exemption must be assessed directly on the basis of Article 107(3)(c) TFEU, which stipulates that 'aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest' may be considered compatible with the TFEU. Regulation (EC) No 68/2001 on Training Aid⁽³²⁾ was replaced by the GBER⁽³³⁾ twenty days after its publication on 9 August 2009. Pursuant to recitals 29 and 32 and Article 6(1)(g) of the GBER, individual training aid exceeding EUR 2 million per project, irrespective of whether granted *ad hoc* or under a scheme, should be individually assessed by the Commission, according to the criteria resulting from the applicable Union instruments. To this end, the Commission must rely on the Communication⁽³⁴⁾ setting the criteria for assessing training aid subject to individual notification (hereinafter 'the 2009 Training Aid Communication'), which was published on 11 August 2009 and entered into force on the 20th day following its publication.
- (59) To conclude, in compliance with the *Freistaat Sachsen* principles the Commission must assess the compatibility of the notified aid under Article 107(3)(c) TFEU, against the background of the GBER, and based on the individual assessment criteria set out by the 2009 Training Aid Communication.

⁽²⁴⁾ See footnote 17.

⁽²⁵⁾ See footnote 18.

⁽²⁶⁾ See footnote 19.

⁽²⁷⁾ See footnote 20.

⁽²⁸⁾ Case C-334/07 P, [2008] ECR I-9975.

⁽²⁹⁾ *Idem*, at recital 51.

⁽³⁰⁾ *Idem*, at recital 53.

⁽³¹⁾ *Idem*, recital 56; see also Case C-49/05 P *Ferriere Nord v. Commission* [2008], judgment of 8 May 2008, not reported, pars. 68-71.

⁽³²⁾ See footnote 17.

⁽³³⁾ See footnote 18.

⁽³⁴⁾ Communication from the Commission — Criteria for the analysis of the compatibility of State aid for training subject to individual notification (OJ C 188, 11.8.2009, p. 1).

(60) The Commission considers that assessing the notified aid according to the rules and criteria resulting from the GBER and the 2009 Training Aid Communication does not infringe the procedural rights of the interested parties (see recital 57 above). According to the *Freistaat Sachsen* ruling, the Commission must offer to the interested parties the possibility to comment on the application of the new rules to the notified aid only in so far as the new rules introduce substantive changes with respect to the previous ones.

(61) In this respect, the Commission underlines that it had indicated in the Decision to open the formal investigation of September 2008 that the aid would be assessed by reference to the GBER. The interested parties were thus given the opportunity to present comments on the assessment of the notified aid by reference to the GBER. Indeed, in its comments of November 2008, Romania invoked arguments against the application of the GBER to the present case. Romania argued in particular that the assessment criteria resulting from the GBER are partially different from those previously applicable under Regulation (EC) No 68/2001, especially with respect to the maximum aid intensity permitted for general training, which increased from 50 % of the eligible costs under Regulation (EC) No 68/2001 to 60 % of the eligible costs under the GBER ⁽³⁵⁾.

(62) The Commission also considers that the 2009 Training Aid Communication does not introduce substantive changes with respect to the assessment of aid of the kind envisaged by the *Freistaat Sachsen* ruling ⁽³⁶⁾. The 2009 Training Aid Communication codifies and reinforces long-standing principles and criteria of EU State aid control, such as the market failure/positive externalities rationale, the distinction between general and specific training, the appropriateness of aid as policy instrument, the incentive effect criterion, the proportionality principle and the analysis of the distorting potential of the aid.

(63) Romania and the beneficiary appear to be principally concerned with the alleged overly strict interpretation and application of so-called incentive criterion for the assessment of training aid. The Commission considers however that the spelling out of the incentive criterion in the 2009 Training Aid Communication cannot be

qualified as a substantive change of the assessment rules. The *Ford Genk* ⁽³⁷⁾ and *GM Antwerp* ⁽³⁸⁾ decisions, which Romania invokes as examples of an excessively tight interpretation of the incentive effect criterion, actually date from before the time of the notification. The incentive effect criterion was not explicitly referred to by Regulation (EC) No 68/2001, although its rationale is inherent to the compatibility assessment of any aid measure under Article 107(3)(c) TFEU and was implicit in the reasoning concerning the potential role of aid in remedying market failures, at Recitals 10 and 11 thereof. The earlier 1998 Training Aid Framework ⁽³⁹⁾ had already confirmed the incentive effect criterion as one of the main pillars of the compatibility assessment for this type of aid ⁽⁴⁰⁾. Moreover, in the course of the investigation Romania and the beneficiary provided detailed explanations on the incentive effect of the proposed aid, regarding its necessity and appropriateness, on the distinction between the general and specific parts of the proposed 'eligible' training, and on the (allegedly limited) potential of aid to distort competition.

(64) In light of these considerations, the Commission concludes that conditions are met for the assessment of the aid under criteria stemming from the 2009 Training Aid Communication and the GBER, with the procedural rights of the interested parties being safeguarded. The Commission also notes that in the course of formal investigation it has not received comments from other third parties (competitors of the beneficiary etc.).

6.3. Compatibility of the aid with the TFEU

(65) The 2009 Training aid Communication sets out the criteria for assessing the compatibility with the TFEU of training aid exceeding EUR 2 million, whether granted *ad hoc* or under a scheme, to be granted to individual companies. The compatibility assessment of such measures involves balancing the positive effects of the proposed aid against its negative consequences, so as to evaluate whether the former outweigh the latter.

⁽³⁷⁾ See footnote 19.

⁽³⁸⁾ See footnote 20.

⁽³⁹⁾ Communication from the Commission — Framework on Training Aid (OJ C 343, 11.11.1998, p. 10).

⁽⁴⁰⁾ Points 27-28 of the 1998 Training Aid Framework. Point 28, for example, stated that: 'To determine the incentive effect, the Commission will consider whether training aid has the effect of encouraging firms to do more in the way of training than they would normally do or to spend more than they would normally spend on training. An aid measure which relates to a firm's normal operating costs (standard induction courses for new recruits and so forth), being intended solely to reduce either continuously or periodically the costs which the firm normally has to bear, is not an incentive and cannot as a rule be approved. [...]'. See also Loredana von Buttlar and Salim Medghoul 'The Principle of the Incentive Effect Applied to Training Aid — Some Recent Cases', *Competition Policy Newsletter* No 3, 2008, pp. 85-88, available at http://ec.europa.eu/competition/publications/cpn/2008_3_85.pdf

⁽³⁵⁾ Article 39(2) of the GBER.

⁽³⁶⁾ See footnote 28.

- (66) The positive effects of the proposed aid will be evaluated by reference to: (i) the potential of the proposed aid to remedy specific market failures and generate positive externalities (justification); (ii) the appropriateness of aid as policy instrument; (iii) the incentive effect and necessity of aid; and (iv) whether the aid amount is kept to the minimum necessary in order to achieve its objective (proportionality). The negative effects of aid will be evaluated in terms of its potential to distort competition and intra-Union trade, depending on the characteristics of the aid and of the relevant market(s).

Market failure/positive externalities

- (67) Under Points 5-11 of the 2009 Training Aid Communication, aid shall be considered justified if the Member State demonstrates that it contributes to redressing underinvestment in training – a market failure that is observed across the board in the EU. Companies are often reluctant to invest in the training of their employees unless there are palpable and immediate benefits of the training for the company itself, or the training is at any rate necessary in order to run the company efficiently. However, training may also produce benefits for the economy and society as a whole, especially if the skills acquired by the employees are transferable to other workplaces or produce positive spill-over effects for society. In principle, companies will be less prone to invest in training when the immediate benefits of this training for the company do not exceed its spill-over effects. In short, aid is justified by its potential to redress a specific market failure, i.e. underinvestment in training, which is linked to the positive externalities of training.
- (68) To determine if aid is justified by its potential to redress underinvestment in training, the Commission will first analyse the nature of the training proposed, i.e. whether the training is general or specific within the meaning of Article 38 of the GBER, or a combination of both. The distinction between general and specific training is of importance, as general training is presumed likely to generate more positive externalities than specific training, which benefits first and foremost to the company itself. As a consequence, aid for general training is considered as being more justified in terms of inducing companies to undertake this sort of investment than aid for specific training.
- (69) Article 38(1) of the GBER defines specific training as 'involving tuition directly and principally applicable to the employee's present and future position in the undertaking and providing qualifications which are not or only to a limited extent transferable to other undertakings or fields of work'. General training is defined by Article 38(2) of the GBER as 'involving tuition which is

not applicable only or principally to the employee's present or future position in the company, but which provides qualifications that are largely transferable to other undertakings or fields of work'. While both kinds of training benefit to a certain degree the company itself, as it will in any case reap benefits associated with having a more qualified workforce, the essential distinction between general and specific training lies in the degree of 'transferability' of the skills acquired through training.

- (70) Article 38(2)(a) and (b) of the GBER, and respectively, Point 9.2 of the 2009 Training Aid Communication, list by way of example factors that could be taken as indications that training is of general nature. These include: (i) the training is jointly organised by different companies, or employees from different companies may join the training project; (ii) the training is certified, leads to a recognised diploma, or is validated by public authorities; (iii) the training is offered to categories of employees that are characterised by a high rotation in the undertaking and sector concerned; (iv) training could be valuable for the employees beyond their current job (future occupations in another undertaking, social life, well-being, etc.).
- (71) The Commission first notes that that Romania and Ford have proved convincingly the fourth indicator at Point 9.2 of the 2009 Training Aid Communication, i.e. that the additional 'eligible for aid' training to be offered will be valuable to employees beyond their current job. In particular, Romania and Ford have shown that the additional training to be provided conveys transferable skills which are valuable for employees outside their job, contribute to their well-being, improves their quality of life and their employability in other companies/sectors, and not least, it generates positive spillovers for the economy and society as a whole, and primarily at the level of a disadvantaged region assisted under Article 107(3)(a) TFEU.
- (72) Thus, Romania proposed aid in support of a training project for which most of the claimed eligible expenditure is associated with general training. Of the total costs of EUR 185,5 million budgeted for the whole training project, EUR 113,7 million are declared eligible costs for general training (excluding wage compensation), and only EUR 1,5 million are considered eligible costs for specific training (excluding wage compensation) (see recital 15 above). More specifically, the additional 'specific' training to be offered under the Safety, Business Fundamentals and Industrial Skills blocks is almost exclusively of general nature, whereas the additional training offered under the Core Skills block is exclusively general (see recital 14, but also 34-37 above).

- (73) The Commission considers that Romania and Ford have substantiated the distinction between the general and specific parts of the proposed training programme in a satisfactory manner. In particular, Romania and Ford have shown that the additional 'eligible' general training to be offered under each of the four main training blocks conveys skills that will be valuable for the employees beyond their actual job at the Craiova plant, skills that are 'transferable' within the meaning of the 2009 Training Aid Communication and the GBER. Romania shows that the additional training to be offered under the Core Skills block is aimed at supporting the personal development of individuals, and relates very little to the actual functioning on the job (see recital 35 above). The training offered under this block conveys general knowledge (e.g. general IT skills, English language training, literacy and numeracy skills) which are beneficial to all categories of employees, irrespective of their educational background. The personalised literacy and numeracy training, for example, will improve the capacity of the employees with different education backgrounds to communicate and convey concepts and ideas, and their ability to interpret in quantitative terms changes in the surrounding environment. In a similar way, the block includes personalised leadership training for employees of all categories. Such skills benefit mostly to the employees themselves, improve their quality of life, and generate positive externalities for the economy and society as a whole. These positive externalities will be particularly felt at the level of the region where the Craiova plant is located, which is a disadvantaged Union region assisted under Article 107(3)(a) TFEU.
- (74) The additional general training to be offered under the Business Fundamentals block will convey general skills which are largely transferable to other companies or industrial sectors, on broad subjects such as Project Management Skills, Human Resources, Purchasing, Finance, Six Sigma (reducing errors in repeated processes, a methodology applicable in different industrial sectors) (see recital 36 above). Such general skills are likely to increase the attractiveness of the employees on the job market. In a similar way, the additional general training to be offered under the Industrial Skills block will cover two broad areas: improving skills for electrical/mechanical trades, which improves the employability of the workers, and extended (in-depth) training on maintenance, automation and robotics. In both cases the employees learn to handle different types of machines than the one used on their actual job, and as such, the skills conveyed are transferable.
- (75) In the case of the Safety training block (see recital 34 above), the additional eligible training to be offered, involving partly general training and partly specific training, consists of individualised coaching to further safety awareness and a safety-related behavioural change. Given that the general part of the additional safety training conveys skills that are useful to the employees beyond the performance of their actual job tasks, and of which they may benefit in a different workplace and even in their private lives, such training can be considered to generate the kind of positive externalities associated with general training.
- (76) The Commission therefore concludes that Romania and Ford have shown to a satisfactory level that the skills conveyed by the additional general training should be valuable for the employees beyond their current job, possibly in other future occupations, in their social life, or for their well-being – in the sense of Point 9.2.(d) in the 2009 Training Aid Communication. This finding is reinforced by the evidence submitted by Ford and Romania (see recital 16 above) to show that a good part of the trainers involved in the programme (up to 90 %) will be external trainers from specialised training centres, and that a considerable part of the training will be offered outside the premises of the factory (see also in this sense eligible travel expenses for both trainers and trainees at recital 18 of the Decision).
- (77) At the same time, the Commission must observe that the other 'transferability' indicators listed by way of example in Article 38(2)(a) and (b) of the GBER and Point 9.2(a), (b) and (c) of the 2009 Training Aid Communication do not seem to be met in the present case. In particular, the training project is organised by one single company, and is not open to participation of employees from other companies. Romania and Ford did not submit information as to whether the training will be certified. Since most of the training will likely be carried out with trainers selected from private companies, it is unlikely that the trainees can receive diplomas/certificates recognisable or validated by the public authorities. The interested parties have not presented information concerning the degree of mobility of the employees towards other companies and/or sectors. The Commission therefore considers that the transferability of the skills acquired should be reinforced by the issuing of attendance certificates to the trainees. Although this condition is not sufficient on its own for the fulfilment of Point 9.2(b) of the 2009 Training Aid Communication, it would nevertheless strengthen at implementation stage compliance with the transferability requirement. This issue is addressed by Article 2(5) of this Decision. The Commission considers that the fourth indicator at Point 9.2(d) of the 2009 Training Aid Communication is substantiated. In the light of all the foregoing considerations the Commission finds that the transferability requirement regarding the proposed additional general training is met.

- (78) In the decision to open the investigation, the Commission questioned whether parts of the additional 'eligible' training were indeed necessary for future employees, especially considering that the beneficiary had the opportunity to recruit personnel with higher education qualifications. This doubt was resolved by the considerations previously made with respect to the transferability of the additional general training proposed to be provided and its potential to generate positive externalities in an assisted region and for the economy and society as a whole.
- (79) In light of the above considerations, the justification criterion is considered to be met.

Appropriateness of aid as policy instrument

- (80) Under Points 10-11 of the 2009 Training Aid Communication, the Commission must assess whether State aid is the most appropriate policy instrument to encourage training of the kind that is being proposed. To this end, the Commission must take into account the alternatives to the provision of aid considered by Romania, such as supporting the training through the regional education system, or supporting the individual employees to undertake the training in a different context, outside the company.
- (81) Romania submitted that the training project will rely almost exclusively on external trainers, to be recruited with the help of a specialised company from regional or foreign specialised private companies. The Commission considers that the alternatives of providing (at least part of) the envisaged training by drawing on local public education institutions has not been satisfactorily explored. Notwithstanding this, the Commission accepts Romania's argument that a comprehensive training programme such as the one proposed for the Craiova plant derives added value from the synergies to be generated between the different types of training offered, which goes beyond the mere sum of the values of individual training courses on specific subjects.
- (82) It is therefore concluded that the appropriateness criterion is also met.
- (84) The incentive effect of aid is identified by counterfactual analysis, i.e. by comparing the levels of training to be offered with aid, and respectively, in the absence of aid (Point 13 of the 2009 Training Aid Guidelines).
- (85) To demonstrate the incentive effect of the proposed aid, Ford presented a comparison between the training programme that it had offered to the employees of its car plant in Saint Petersburg and the one proposed for the Craiova plant. For the Saint Petersburg training programme, the company had not received aid. The structure of the training programme offered was similar to that of the training project proposed for the Craiova plant, though the scope of the programme and the degree of content elaboration differed. In Saint Petersburg the company offered only the minimum of training necessary to meet safety requirements and Ford production quality levels. Ford argues that, by comparison, the Saint Petersburg programme offered only 57 % of the Safety, 2 % of the Core Skills, 30 % of the Business Skills and 47 % of the Industrial Skills training that is proposed to be offered at the Craiova plant.
- (86) The Commission is of the view that the comparison between the Saint Petersburg and the Craiova training programmes is not entirely convincing. Outset conditions and the production characteristics of the two plants are not comparable. In Saint Petersburg, Ford took over a plant that previously produced large engines for ship-building and the defence industry, while the Craiova plant previously produced vehicles. In Saint Petersburg Ford did not have to retain the existing workforce. As a consequence, it was able to recruit younger and more qualified, though less experienced employees. The Saint Petersburg plant has a smaller output than the one projected for the Craiova plant. In Saint Petersburg Ford produces only vehicles (as of 2002, the plant produces the Ford Focus II and Ford Mondeo models), while the Craiova plant will produce both vehicles (the multifunctional models B-MAV and ISV) and engines. The former does not have a press shop, while the latter does. As a consequence, the company's training needs in order to operate the plant efficiently and to meet (likely different) regulatory and internal safety and quality standards should be different.

Incentive effect/necessity of aid

- (83) Under Point 12 of the 2009 Training Aid Communication, the proposed aid shall be deemed to have incentive effect when it is demonstrated that it results in changing the behaviour of the beneficiary so as to provide more and/or better training than in the absence of aid. Compliance with the incentive effect criterion is a *sine qua non* condition for the approval of aid (Recital 28 of the GBER).
- (87) Notwithstanding this, the Commission considers that the Saint Petersburg comparison is at any rate evidence of the fact that a Ford car plant may be run efficiently and meet company internal quality and safety standards with considerably less training than that which is proposed for the Craiova plant. This finding supports Romania's argument that, in the absence of aid, the company would limit itself to offer at the Craiova plant only little

more than the training that is necessary for the running of the plant (i.e. the so-called company-specific training, for which the beneficiary committed EUR 29,7 million own funds). Ford indeed specifies that, in the absence of aid, it would offer only the company-specific training (i.e. training that is necessary in order to operate the new technology at the plant and to meet internal safety and quality standards, which was not declared eligible for aid, and the costs of which it shall entirely bear) and only up to 40 % of certain additional training courses (as listed in the documentation submitted in relation to the training project). Furthermore, Ford submitted detailed estimates of training costs, budgets, participants, content and scheduling for the proposed training programme at the Craiova plant, and sufficient equivalent information on the training programme which had been offered at the Saint Petersburg plant – elements which must be verified by the Commission under Point 15(a) of the 2009 Training Aid Communication. The company also submitted extensive evidence making it possible to distinguish between courses which are obligatory to give under the existing EU and/or Romanian regulation — in the sense of Point 15(b) of the 2009 Training Aid Communication. The costs budgeted for the additional, 'eligible' part of the training programme are credible by comparison to the costs allocated for the company-specific (non-eligible) part of the training programme, which was already started in Summer 2009. Thus the criterion laid down at Point 15(c) of the 2009 Training Aid Communication is also considered to be met.

- (88) In the opening decision the Commission questioned whether parts of the training programme notified as eligible for aid were not in fact necessary in order to operate the new technology introduced at the Craiova plant. In such case, the effect of aid would be only to cover operating costs of the company, i.e. costs that the company should have covered at any rate, and as such, the aid would lack incentive effect. Such a situation would be similar to the ones verified in *Ford Genk* ⁽⁴¹⁾, *GM Antwerp* ⁽⁴²⁾ and *DHL Leipzig* ⁽⁴³⁾, where the Commission found the aid incompatible with the internal market for those parts of the training programme linked to e.g. restructuring, the launch of new products, or compulsory to give under the safety regulations. The Commission found that, where aid is destined to finance normal operations that companies must at any rate pay for themselves, the aid does not have a real incentive effect, but simply subsidises operating costs of the beneficiary by alleviating it from costs it should normally have had to provide for itself.

- (89) Romania and Ford underline that the training that is necessary to operate the new technology was clearly

separated from the additional general training, which is not necessary for functioning on the job. Under the Business Fundamentals block, the company shall entirely finance the company-specific training courses offered in the areas of Ford Specific IT Systems, Ford Business Processes and Ford Internal Control Processes. Similarly, under the Industrial Skills block the company will entirely finance courses that are necessary for performing on the job, such as Launch, Maintenance and Fork Lift Truck, Robotics and Automation. Neither is the additional general training offered under the Core Skills block necessary for functioning on the job, or even for being able to follow the more specialised parts of the training programme, because the new technology used at the plant relies on visual instructions which are easy to follow and can be assimilated in a 'learning-by-doing' style. The Commission accepts these arguments, which are consistent with the observation that most of the additional 'eligible' training proposed conveys general and transferable skills that are not directly linked to performance on the job. In this sense, the Commission also notes that the relationship between the additional training to be offered and the business activities of the beneficiary (i.e. the production of vehicles and engines) is less close in the case of courses offered under the Safety, Core Skills and Business Fundamentals blocks (see also recitals 35-36 above) than for the Industrial Skills block (see also recital 37 above). However, the considerations made above concerning the necessity of the training offered under this block for the beneficiary mitigate this concern, and make it possible to conclude that the relationship between the Industrial Skills training and the beneficiary's activity is not of a nature to indicate lack of incentive effect within the meaning of Point 15(d) of the 2009 Training Aid Communication. This finding is reinforced by the fact that Romania and Ford provided evidence indicating that a good part of the training will be offered outside the premises of the factory itself, and by external trainers recruited from specialised external training centres (see recitals 16 and 76 above). This is an additional indication of the fact that the relationship between the training offered and the activities of the beneficiary is less close within the meaning of Point 15(d) in the 2009 Training Aid Communication.

- (90) At the same time, the Commission notes that Romania and the beneficiary have not submitted evidence to substantiate that the beneficiary will not include in the eligible costs those costs that might eventually be recovered by the beneficiary as a consequence of benefiting from the skills acquired by the employees through training — as required by Point 16, last paragraph (with accompanying footnote 1) of the 2009 Training Aid Guidelines. The Commission nevertheless acknowledges that such effects might be difficult to quantify and demonstrate *ex ante* in the particular circumstances of the training programme proposed in this case, where a large part of the additional training proposed is of a general nature, which in principle benefits the beneficiary only indirectly, and the very nature and content of the training proposed excludes the hypothesis that it could be conducted in the context of the current tasks or jobs

⁽⁴¹⁾ See footnote 19 above, recitals 28-38 of the Decision.

⁽⁴²⁾ See footnote 20 above, recitals 43-45 of the Decision.

⁽⁴³⁾ Commission Decision of 2 July 2008 on State aid Case C 18/07 (ex N 874/06) which Germany is planning to implement for DHL (OJ L 312, 22.11.2008, p. 31).

performed by the employees. The Commission nevertheless considers it necessary to request that the beneficiary undertake a commitment on the exclusion of the costs from the eligible costs claimed in the course of implementation of the programme – see in this sense Article 2(6) of this Decision.

- (91) In the opening decision, the Commission also questioned whether parts of the Safety training declared as eligible for aid were not actually necessary for the company to offer, as required by EU and/or Romanian safety regulations, or resulting from internal company safety standards. Romania and Ford submitted documentation to show that the safety training required by regulation will be provided entirely at the company's expense, within the company-specific, non-eligible part of the training programme. Ford also argues that the incentive effect of aid should not be assessed by reference to internal company standards – internal safety standards in this case – because such an approach would have the distorting effect of determining companies to lower (or keep low) their internal standards in order to be considered eligible for aid. The Commission concludes that this question has also been answered in a satisfactory manner.

Proportionality

- (92) Under Point 16 of the 2009 Training Aid Guidelines, the Commission shall verify that the aid amount is limited to the minimum necessary in order to achieve the objective of aid. To this end, the Commission verifies if claimed eligible costs are calculated in accordance with the provisions of Article 39(4) of the GBER and limited to the costs arising from training that would not have been undertaken in the absence of aid, and that the maximum aid intensities established by Article 39(2) of the GBER are respected.
- (93) The categories of eligible costs claimed by Romania for the additional 'eligible' part of the training programme (see recital 18 above) fulfil the conditions of Article 39(4) in the GBER and therefore of Point 16 in the 2009 Training Aid Communication. In particular, Romania and the beneficiary submitted separate cost estimates for the company-specific (non-eligible), and respectively the 'eligible' general and specific parts of the training programme, distinguishing in the latter case between the following categories: trainers' personnel costs; trainers and trainees' travel expenses (including accommodation); depreciation of tools and equipment used exclusively for the training project; guidance and counselling related to the training project; and trainees' wage compensation limited to the hours/days of training foreseen to be undertaken. Furthermore, Romania and Ford provided detailed explanations as to the cost assumptions and forecasts underlying claims by categories of eligible expenditure, for both the general and specific parts of the additional training. The

Commission also notes that detailed explanations were submitted as regards the approximate number of employees to which each specific training course is addressed (distinguishing between present and future employees, and providing separate estimates for the successive years of implementation of the programme), and in close relation, the estimated number of training days/hours to be offered by training course, by block of training, and by year of implementation of the programme. Romania also shows that, for the purposes of this project, maximum aid intensities of respectively 50 % for general training and 25 % for specific training, were applied. Thus, the maximum aid intensity applied in relation to the eligible general training is lower than the one permitted by Article 39(2)(a) of the GBER. Furthermore, Romania shows that the aid amount was actually limited to EUR 57 million by the beneficiary, although even by applying the less permissive Regulation (EC) No 68/2001 maximum aid intensities to the estimated eligible costs, the project would have qualified for EUR 76,96 million of general training aid and for EUR 0,47 million of specific training aid.

- (94) In the decision opening the investigation, the Commission questioned if (at least parts of) the proposed training aid would not actually compensate for intangible regional handicaps, in the form of shortage of skills, that were already compensated by the regional aid amounting to EUR 143 million which was approved by the Commission in April 2008 for investment at the Ford Craiova plant ⁽⁴⁴⁾.
- (95) This question is linked to the issue of compliance with the cumulation rules laid down by Article 7 of the GBER. According to paragraph 3 of this Article, training aid should not be cumulated with any other aid in relation to the same – partially or fully overlapping – eligible costs if such a cumulation would result in exceeding the maximum aid intensity ceiling applicable under Article 39 of the GBER.
- (96) Romania has shown that the notified training aid and the previously-awarded regional aid do not cover overlapping eligible costs. The regional aid approved in April 2008 related to eligible initial investment expenditure (machinery, plant, buildings) in compliance with Point 4.2 of the 2006 Regional Aid Guidelines ⁽⁴⁵⁾. In the present case, the notified eligible expenses cover entirely different categories of expenditure: trainer personnel costs, trainer and trainees' travel expenses,

⁽⁴⁴⁾ See footnote 4.

⁽⁴⁵⁾ Guidelines on National Regional Aid for 2007-2013 (OJ C 54, 4.3.2006, p. 13).

materials and supplies, depreciation of materials and tools used for training, guidance and counselling, wage compensation for trainees exclusively related to the time spent in training. The Commission finds that Romania has substantiated the distinction between eligible costs covered by the regional aid given and the training aid proposed for the Craiova plant.

- (97) Another way to look at the same issue is to ask whether training aid is justified as such to the extent that it would compensate for an intangible regional handicap that was already compensated by regional aid. Romania answers this question by underlining that regional aid and training aid measures have different objectives and cover different eligible costs. The objective of regional aid is to stimulate investment in the Union's disadvantaged regions, whereas training aid aims to remedy underinvestment in training. Regional aid benefits first and foremost the beneficiary company, whereas training aid, especially when linked to general training, benefits primarily the employees, and only secondarily the company. Romania also underlines that EU state aid rules do not prohibit the cumulation of regional and training aid for the same company. Furthermore, as Romania rightfully points out, if companies who received regional aid would not be allowed to receive training aid, the Union's most disadvantaged regions would be *de facto* discriminated against by precluding them from the possibility to provide training aid.
- (98) The Commission concludes from the observations made at recital 94 that, based on the submitted information, it can be considered that the proportionality conditions resulting from Article 39(2) of the GBER (establishing the applicable aid intensities), Article 39(4) of the GBER (defining the categories of eligible costs that may be taken into calculation), and Point 16 of the 2009 Training Aid Communication are satisfied. In particular, as regards the trainees' wage costs, only those costs related to the time spent in training have been taken into consideration, in compliance with the conditions resulting from Article 39(4)(f) of the GBER.
- (99) The Commission nevertheless must observe that the proportionality-related evidence on ensuring the limiting of the aid to the minimum necessary submitted in this case consists almost exclusively of estimates of future costs and projections of future action. This is the case, for example, regarding the total number of employees to be covered by the proposed training project, which includes estimates of a total workforce of 9 000 people by 2012. A similar reasoning applies to estimates of eligible costs by categories of expenditure according to Article 39(4) of the GBER. The Commission recognises that it is justified to accept, for the purposes of a training project of such magnitude like the one at hand, designed to be aimed at 9 000 workers, and covering over 269 different courses to be implemented over a five-year period, the eligible costs considered to be necessary can only be estimates

derived from similar expenses incurred in the past (in relation to training projects offered at other company locations) and taking into account realistic cost projections and forecasts for Romania (see recital 20 above). However, it cannot be excluded *a priori* that the costs which will be actually incurred could eventually be lower than the ones forecasted. It is therefore necessary to introduce additional safeguards to ensure compliance with the proportionality principle during the implementation of the project. This issue is addressed through the conditions laid down in Article 2 of the Decision.

Distortion of competition

- (100) Under Point 17 of the 2009 Training Aid Communication, the Commission should assess in depth the potential distorting effects of aid in those cases where the proposed aid might result in a significant change of behaviour for the beneficiary which is likely to distort competition. The distorting potential of aid may vary depending on the characteristics of the aid and the market(s) affected.
- (101) The Commission notes that the proposed aid is almost exclusively linked to general training, which by its nature is presumed to benefit primarily the employees themselves, and only secondarily the beneficiary (though the latter will reap the benefits associated with having at its disposal a better qualified workforce). It could thus be argued that the aid does not have a substantial impact in terms of quality, quantity of output or pricing – effects of the sort that favour the beneficiary to the detriment of its competitors. Moreover, compliance with the proportionality principle should also limit the distorting effects of aid.
- (102) However, according to Point 18 of the 2009 Training Aid Communication, the selectivity of the aid, the size of aid, and the duration of the aided programme are indicators of likelihood and extent of distortion of competition. The proposed aid is selective (it involves individual *ad hoc* support to a large company), the amount of the aid is unusually high (EUR 57 million), and the aided training programme extends over a five-year period (which moreover coincides with the period for launching two new production projects).
- (103) The Commission is particularly concerned with the impact of the unusually high total amount of aid proposed, i.e. EUR 57 million. Aid of such size, especially if the whole sum were to be paid outright to the beneficiary, would have similar distorting effects to those of an outright cash grant. In this situation the beneficiary could dispose of the sum, at least in the initial stages of implementation of the programme, also for other operational purposes besides covering the costs of an ongoing training programme.

- (104) Another concern is the possible financial advantage that could be derived by the beneficiary from the fact that training aid would partially cover the wage compensation for the employees in relation to the time spent for following the additional, 'eligible' part of the training. According to the information submitted by Romania and Ford, the proposed training project would entail overall an average total of 111 training days per employee (i.e. an average of 22,2 training days per year), comprising both the company-specific (non-eligible) part of the training programme and the additional 'eligible' part of the programme.
- (105) To assess the distorting potential of the proposed aid, the Commission must also take into account the characteristics of the sector and the structure of the market(s) relevant to the aided training project. To examine these aspects, the Commission draws on the relevant product market, relevant geographical market and market share analysis carried out by the Commission in 2008 for the purposes of assessing the regional aid to Ford Craiova ⁽⁴⁶⁾, the conclusions of which are contrasted against recent car sales data from the consultancy Global Insight ⁽⁴⁷⁾, and interpreted against the background of recent information concerning the rates of capacity utilisation in the industry.
- (106) The beneficiary of the training aid is a large company in the motor vehicles production sector. Ford will produce at the Craiova plant two new types of vehicles: B-MAV, a small multifunctional vehicle built on a platform classified by Ford as belonging to the B segment passenger cars, and ISV, a small utility vehicle that may be used for both passenger and commercial transport purposes, built on a platform classified by Ford as belonging to the C segment passenger cars. As of 2011, the Craiova plant will also produce a new line of low CO₂ engines, to be incorporated almost exclusively on Ford vehicles.
- (107) In the regional aid decision of April 2008, the Commission concluded that, in so far as the engines are intermediary products to be incorporated on Ford vehicles, the relevant product and geographic markets for the engines coincide with those defined for the final products (the vehicles). Concerning the relevant product and geographic markets for the B-MAV and IVS vehicles, due to the existence of different systems for classifying the relevant car segments, the Commission took into account different alternative product market definitions. The vehicles produced at the Craiova plant will be sold principally on EU and EEA markets, but the company also intends to export in time to other worldwide destinations. The Commission estimated relevant market shares over the period 2007-2012 at EEA and worldwide levels, and concluded that the highest possible relevant market share reached by Ford was of 16,8 % at EEA level in 2007, with a tendency to slightly decrease over time towards 2013. Companies producing vehicles with very similar characteristics to B-MAV and the IVS vehicles are Renault and Opel, and respectively, Renault, Citroen, Fiat and Volkswagen.
- (108) The European car sector as a whole is characterised by production over-capacity – in 2007, for example, which was considered a good year for car sales in Europe, the producers put on the market 4 million cars more than the market could buy ⁽⁴⁸⁾. ACEA (the European Car Producers Association) reports that registrations of new light commercial vehicles up to 3,5 t decreased by 31,4 % in Europe between July 2008 and July 2009 ⁽⁴⁹⁾.
- (109) The Commission is of the view that the characteristics of the sector (over-capacity in principal) and of the relevant markets (intense competition between few large producers), indicate that the aid has a clear potential for distorting competition. Nevertheless, these considerations must be balanced against the need to encourage the future investment necessary to ensure the long-term viability of the European motor vehicle sector as a whole. In its Communication on 'Responding to the crisis in the European automotive industry' ⁽⁵⁰⁾ the Commission identified a wide range of aid measures to assist the industry in the context of the present crisis, including training aid. Furthermore, it is necessary to recall that, while the aid is large in absolute terms, it represents only about one third of the overall financial commitment to training employees at the Craiova plant. Accordingly, these concerns do not in themselves constitute sufficient ground to refuse the aid. Nevertheless, they suggest that it is necessary to impose certain conditions on the payment of the aid, in order to ensure that it does not provide Ford with excessive short-term liquidity. This issue is addressed through the conditions regarding the implementation of the programme laid down in Article 2 in the concluding section of the Decision.

Balancing of the positive and negative effects of aid

- (110) The Commission concluded that the positive effects of the proposed aid, in terms of (i) inducing the beneficiary to offer additional general training of the kind likely to generate positive spill-over effects for the economy and the society, and particularly at the level of a region

⁽⁴⁶⁾ See footnote 4, recitals 70-129.

⁽⁴⁷⁾ Global Insight data from October 2009 obtained by the Commission services. See <http://www.ihsglobalinsight.com>

⁽⁴⁸⁾ See The Economist of 17 September 2009, 'Small Isn't Beautiful', quoting PWC estimates of over-capacity in the European car industry over the period 2005-2010.

⁽⁴⁹⁾ See ACEA Press Release of September 24, 2009, *New Commercial Vehicles Registrations July & August 2009, EU and EFTA Countries*, available at http://www.acea.be/index.php/news/news_detail/commercial_vehicles_registrations_down_374_eight_months_into_2009

⁽⁵⁰⁾ Communication for the Commission of 25 February 2009, text available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0104:FIN:EN:PDF>

assisted under Article 107(3)(a) TFEU, (ii) appropriateness of the aid as policy instrument and (iii) its incentive effect were demonstrated to a satisfactory degree. The Commission maintains certain concerns with respect to the proportionality of aid proposed on the basis of estimates of future costs and projections of future action, but nevertheless concludes that the *ex ante* evidence on proportionality presented in the case is acceptable. As to the negative effects of aid, associated to its potential to distort competition, the Commission expresses concerns in particular related to the impact of individual aid of this size, *inter alia* considering the characteristics of the sector and of the relevant markets. The Commission considers however that these proportionality and distorting effects-related concerns can be addressed by compliance with certain conditions regarding the implementation of the aided programme, destined to ensure that the aid is paid only in retroactive periodic instalments after the submission by Ford of evidence of the real costs incurred. The Commission therefore concludes that the positive effects of the proposed aid exceed the potential negative effects caused by it. This overall positive balance justifies allowing the aid as compatible with the TFEU under Article 107(3)(c).

Cumulation of aid

- (111) This issue was treated at recitals 96-97 of the Decision. The Commission concluded that the proposed aid satisfies the requirements regarding cumulation of aid resulting from Article 7 of the GBER.

Deggendorf principle

- (112) In light of the documentation submitted by Romania to show that the incompatible privatisation aid of EUR 27 million and accruing interest were reimbursed by Ford on 27 June 2008, the Commission concludes that the proposed aid satisfies the so-called Deggendorf principle.

7. CONCLUSION

- (113) The Commission finds that the training aid measure notified by Romania in favour of Ford Romania SA, located in Craiova, and consisting of an aid totalling EUR 57 million in support of a five-year training programme covering up to a total of 9 000 employees at the Craiova plant, is compatible with the Internal Market pursuant to Article 107(3)(c) TFEU.
- (114) In light of the concerns regarding the proportionality and potentially-distorting effects of the aid exposed at recitals 99, 109 and 110 of the present Decision, the Commission allows as necessary and justified the adoption of a positive decision with conditions under Article 7(4) of the Procedural Regulation⁽⁵¹⁾. These

conditions are destined to ensure proportionality during the implementation of the project (by ensuring that the amount of aid is strictly limited to covering eligible expenses that were actually incurred), to limit the distorting potential of an outright payment of the whole aid amount, and to reinforce the transferability of the skills acquired by the employees through the training received.

- (115) Furthermore, as proposed by Romania itself in its submission of 9 July 2009⁽⁵²⁾, the rules and conditions for the payment of aid should be stipulated in a specific Romanian legislative act.

- (116) Based on these considerations, the Commission hereby,

HAS ADOPTED THIS DECISION:

Article 1

The aid which Romania is planning to implement for Ford Romania SA, located in Craiova, amounting to EUR 57 million, is compatible with the internal market subject to the conditions set out in Article 2.

Article 2

1. The aid shall be paid in periodic *ex post* instalments, at intervals whose length should be established in agreement between the Romanian granting authority and the beneficiary, but which should not at any rate exceed one year. The total sum of the periodic payments shall correspond to costs actually incurred, as declared by the beneficiary to the Romanian granting authority.

2. The Romanian authorities shall inform the Romanian Competition Council, which is entrusted with the monitoring of the implementation of this aid measure, and the competent Commission services, of the terms of the agreement reached on the length of the *ex post* payment intervals.

3. At the conclusion of each year of implementation of the training programme, the beneficiary shall submit to the Romanian monitoring authority and to the Commission independently audited detailed reports concerning the application of the programme and the costs incurred for the reported period. The implementation reports shall contain detailed information on expenses incurred and the training offered. The reports shall classify the categories of eligible expenditure as defined in Article 39(4) of the GBER for each block of training. The

⁽⁵¹⁾ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999, p. 1).

⁽⁵²⁾ See recital 21.

yearly implementation reports shall also list the training courses offered under each block during the reported period, the number of employees who attended the courses distinguishing by category of employees, the total number of training days/hours offered by course and by block of training, and the total number of employees of the company at the end of each year of implementation of the programme (staff headcount). The independent auditor shall be chosen by mutual agreement between the beneficiary and the Romanian monitoring authority.

4. Payments of the instalments for the successive years of implementation of the programme shall be conditional upon the acceptance of the yearly implementation reports by the Romanian monitoring authority and by the Commission, within six weeks from the date when the report submitted is considered complete. Failure to react within the established deadline shall be interpreted as tacit acceptance of the implementation reports.

5. The beneficiary shall issue to each of the employees who attend the training programme attendance certificates, either at the end of the programme or on a yearly basis (as most convenient), listing the courses attended and the number of training days/hours received by course. Such attendance certificates should at any rate be issued at the request of the employee if and when the latter has formalised a request to leave the company. Attendance certificates shall thereby reinforce the transferability of the skills acquired through the training provided.

6. The Romanian authorities shall transpose the conditions laid down in subparagraphs 1-5 above into a legislative act regulating the implementation of the training programme. In addition to reflecting the above-mentioned conditions, the legislative act shall stipulate specific conditions guaranteeing the reimbursement of aid amounts that were disbursed in previous periodic instalments which are found to be in excess of expenses actually incurred and/or in excess of the aid

intensities on the basis of which the aid was approved according to the 'general' or 'specific' qualification of the training to be provided. The legislative act shall also stipulate an obligation for the beneficiary to exclude from the eligible costs claimed those costs that would eventually be recovered as a consequence of benefiting from the skills acquired by the employees through training, in the sense of the last paragraph of Point 16 of the 2009 Training Aid Communication. The legislative act shall be communicated to the Commission within the shortest delay. The aid cannot be implemented before the adoption of this act.

7. The Commission invites representatives of the employees at the Ford Craiova plant to present at the end of each of year of implementation of the training programme written comments regarding the content of the training courses that were provided and attendance at the courses (in terms of number of employees who attend training and the time spent in training).

Article 3

Romania 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 Romania.

Done at Brussels, 2 December 2009.

For the Commission

Neelie KROES

Member of the Commission

COMMISSION DECISION

of 27 January 2010

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

(notified under document C(2010) 172)

(Only the German text is authentic)

(Text with EEA relevance)

(2010/358/EU)

THE EUROPEAN COMMISSION,

State aid case N 426/2005 may have been based on incomplete/incorrect information submitted during the notification procedure.

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

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

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

Whereas:

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

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

1. PROCEDURE

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

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

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

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

(3) During its examination of another notified aid measure for Sovello (State aid case C 21/08 ⁽⁴⁾ — ex N 864/06), the Commission uncovered evidence that the decision on

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

⁽¹⁾ OJ C 253, 4.10.2008, p. 23.

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

⁽³⁾ OJ C 270, 7.11.2006, p. 2.

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

⁽⁵⁾ OJ L 83, 27.3.1999, p. 1.

⁽⁶⁾ See footnote 1.

2. DETAILED DESCRIPTION OF THE AID

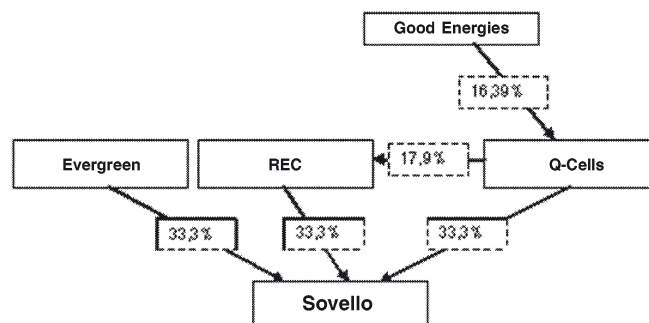
2.1. The project

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

2.2. The beneficiary

- (10) The beneficiary of the notified aid is Sovello. Sovello was established as a joint venture in December 2004 by Q-Cells SE ⁽⁹⁾ (hereinafter Q-Cells) — owning 24,9 % of the shares — and the US firm Evergreen Solar Inc. (hereinafter: Evergreen) — owning 75,1 %. This situation is reflected in the initial master joint venture agreement ⁽¹⁰⁾ dated 14 January 2005 (hereinafter: MJVA1) between Evergreen and Q-Cells. As indicated in the MJVA1, prior to the date of this agreement, Q-Cells acquired Topas 107 V.V. GmbH, a shelf-company, which Q-Cells was to cause to become Sovello (at that time EverQ). The name of the shelf-company was changed to EverQ on 11 February 2005.
- (11) Evergreen is a producer of solar modules and owns a patent on the String-Ribbon technology. Q-Cells is one of the largest producers of solar cells in the world. The aim of the joint venture Sovello was to first test the economic viability of the production of solar modules — based on the String-Ribbon technology brought in by Evergreen, and the cell manufacturing know-how and experience on the German market of Q-Cells — and at a later stage to enable industrial manufacturing of String-Ribbon modules.

- (12) In November 2005, Renewable Energy Corporation ASA (Norway) (hereinafter: REC) joined and took a participation of 15 % (based on a contract for silicon delivery to Sovello), whereas Evergreen and Q-Cells lowered their participation to respectively 64 % and 21 %. This situation is reflected in the second master joint venture agreement dated 25 November 2005 (hereinafter: MJVA2) between Evergreen, Q-Cells and REC. REC is among the world's largest producers of silicon materials for the photovoltaic industry.
- (13) At the time of notification, Q-Cells and REC had a joint shareholder, the venture capital company Good Energies Investment BV (hereinafter: Good Energies). This company held 16 % of the shares of Q-Cells and 39 % of the shares of REC (situation on 7 March 2006). The German authorities informed that no further relationship between Q-Cells, REC and Evergreen existed besides having a share in Sovello.
- (14) Since 19 December 2006, the partners Evergreen, Q-Cells and REC each hold a share of 33,3 % in Sovello (amendment to the MJVA2, dated 29 September 2006).
- (15) On 5 February 2007, Q-Cells announced its plans to take a share of 17,9 % in REC. On the same date, Good Energies announced in a press release that it would sell its share in REC to Q-Cells and Orkla ASA (26 February 2007).
- (16) The current shareholder structure of Sovello is represented in the figure below (situation Q3 2009):



⁽⁷⁾ The String-Ribbon technology is a continuous process whereby long wires unwind from spools, run through a silicon melt and pull a long 'ribbon' of silicon out of this melt. The ribbon is harvested periodically and cut into smaller pieces (solar wafers). The wafers are then cleaned and undergo further processing (POCl₃-diffusion, etching, SiN-antireflexcoating, metallisation and conditioning) into solar cells. The last stage consists in the assembly of the cells into solar modules (panels).

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

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

⁽¹⁰⁾ This MJVA1 is available on Internet: <http://www.seinfo.com/dsvRx.z7n.d.htm>

- (17) Different company documents and shareholder decisions illustrate the development of Sovello. The document titled 'Project "Sovello": Heads of Agreement' (hereinafter: Heads of Agreement), signed by the CEO's of Evergreen and Q-Cells, is anterior to the MJVA1. This agreement outlines a possible transaction between the two companies regarding the establishment and conduct of a joint venture for the development, manufacture and sale of solar products based upon String-Ribbon technology. The text mentions the understanding of the parties that in order to qualify for certain German government subsidies, Q-Cells' ownership of Sovello must be less than 25 %. It also announces the will of the parties to ensure that they both have a shared voice in major company actions, and contains provisions which point to the essential role of Q-Cells for the operability of the joint venture.
- (18) The Articles of Association of Sovello also confer to Q-Cells substantial decisional rights (the Supervisory Board is composed of two persons nominated by Evergreen and one by Q-Cells, but for several strategic decisions the agreement of at least one of each partners' nominees is required).
- (19) The MJVA1 sets the participation of Evergreen in Sovello at 75,1 %, and that of Q-Cells at 24,9 %. It however includes the possibility for Q-Cells to — if this would not result in a decrease of investment grants — increase its ownership interest to 50 %. The MJVA1 foresees additional possible agreements between the parties (on services, technology, and marketing). In reality, the modules produced by Sovello were distributed by Evergreen under the Evergreen brand (until early 2009).
- (20) The MJVA2 sets the following shareholder structure: Evergreen 64 %, Q-Cells 21 % and REC 15 %. It confirms the possibility for Q-Cells to increase its share up to the same level as Evergreen, whereas for REC, the possibility to increase its share to 21 % and to 33,3 % is subject to further silicon supply contracts.
- (21) The timeline representing the development of Sovello along important company documents and decisions is summarized in table I below.

Table I

Development of Sovello

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

2.3. Investment cost and financing of the project

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

Table II

Breakdown of the project costs (in nominal values)

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

(*) Covered by the obligation of professional secrecy.

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

Table III

Financing of the project (in nominal values)

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

2.4. Applicable regional aid intensity ceiling

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

⁽¹¹⁾ OJ C 74, 10.3.1998, p. 9.

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

2.5. Aid amount and aid intensity

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

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

- (26) For SMEs, the RAG 1998 allow to complement regional investment aid by a SME bonus⁽¹⁶⁾. The SME bonus to Sovello was granted as a top-up to regional aid granted lawfully under the German GA scheme.
- (27) To establish whether a firm constitutes a SME, the Commission applies the Commission recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises⁽¹⁷⁾ (hereinafter: the SME Recommendation). In particular, it tests whether the firm concerned meets certain ceilings (staff headcount, turnover, size of balance sheet). In these tests, the corresponding data for linked enterprises (having dominant influence by, mainly, holding the majority of voting rights) are fully taken into account, whereas the data for partner enterprises (holding a minimum of 25 % of shares or voting rights) are taken into account proportionally to their share in the target enterprise.
- (28) In its decision N 426/05 (see above recital 2), the Commission included in its calculation the relevant data for Sovello itself and for Evergreen, but not the data for Q-Cells and REC, since at the time of notification and until the Commission took its approval decision they held less than 25 % in shares or voting rights. On this basis, the Commission concluded that Sovello was an SME and approved the notified aid.

⁽¹³⁾ OJ L 10, 13.1.2001, p. 33.

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

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

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

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

3. GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

3.1. The new information

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

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

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

3.2. Possible consequences of the new information for the assessment

(32) The Commission however took the view that even if Sovello may have met the formal criteria of the SME definition, the Commission had strong indications that these formal criteria were only met by artificially keeping

the participation of Q-Cells in Sovello below 25 %, with the essential purpose to obtain a SME bonus, while the effective influence of Q-Cells in Sovello was stronger. Consequently, the Commission considered that it must be alert to the possibility that the shareholder structure of the beneficiary had been artificially designed in order to circumvent the SME definition.

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

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

4. COMMENTS FROM INTERESTED PARTIES

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

5. COMMENTS FROM THE GERMAN AUTHORITIES

5.1. Legal basis

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

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

- (37) Germany claims that at the request of the Commission (letter dated 30 December 2005, D/57570), it provided the model declaration as annexed to the Commission Communication 'Model declaration on the information relating to the qualification of an enterprise as an SME' ⁽¹⁸⁾ (hereinafter: the Commission Communication on the Model declaration) for Sovello in the context of the notification, stating that Evergreen is a linked enterprise with Sovello and that Sovello is independent from Q-Cells. Germany also submitted a declaration under oath from Q-Cells stating that it is nor a partner to nor a linked company with Sovello.
- (38) Germany argues that it, nor Sovello, have seen any indication in the SME block-exemption Regulation, in the Commission Communication on the Model declaration, or in the information requests of the Commission, which invited them to provide the joint venture agreement in the course of the notification. Therefore, Germany is of the opinion that it has submitted complete information at that time.
- (41) Germany argues that for the sake of legal certainty and equal treatment, the Commission should first publish possible changes (incorporation of new additional criteria) to the SME definition, before applying such changes to individual cases. Moreover, if the European legislator had wished to consider the criterion of 'suffering the typical handicaps of an SME', it would have taken up this criterion in its new SME definition. Whether a company suffers the typical handicaps of an SME should therefore only be verified using the formal SME criteria. Germany adds that the determination of a 25 % threshold for partner enterprises would be obsolete when in practice this threshold would not be applied.
- (42) Germany states that the aim of the new SME definition was to allow for a consistent promotion of SMEs and their control by national administrations and courts on the basis of clear and unequivocal definitions. It deduces that the new SME definition therefore leaves no scope for judgment evaluation or for unwritten conditional elements.

5.1.2. No additional criteria to be considered

- (39) Germany observes that whereas to define SMEs the former SME recommendation of 1996 ⁽¹⁹⁾ refers to thresholds as well as a so-called independency criterion, the actual SME definition solely differentiates between autonomous, partner and linked enterprises. Germany argues that the actual SME block-exemption Regulation, in conjunction with the SME definition, is binding for the Commission, and can certainly not be narrowed by adding unwritten criteria. Neither the Court of Justice nor the Court of First Instance has in its judgements considered such unwritten criteria in cases based on the new SME definition.
- (43) Germany furthermore brings forward that neither the holding structure nor the economic conditions of the companies referred to in the Solar Tech and the Pollmeier Malchow GmbH & Co. KG v Commission ⁽²¹⁾ cases, which are judgments based on the former SME recommendation of 1996, are comparable to the situation of Sovello.
- (40) Germany contests that the independence criteria set out by the Court of Justice in its judgment on case C 91/01 Italy v Commission ⁽²⁰⁾ (hereinafter: the Solar Tech case), based on the former SME recommendation of 1996, remain also valid for cases to be assessed on the basis of the new SME definition. According to Germany, to base an assessment on such unwritten criteria would be incompatible with the objective of revising the SME definition stated in recital 8 of the SME block-exemption Regulation: 'In order to eliminate differences that might give rise to distortions of competitions, in order to facilitate coordination between different Community and national initiatives concerning small and medium-sized enterprises, and for reasons of administrative clarity and legal certainty, ...'.
- (44) In the Solar Tech case, the beneficiary Solar Tech was owned for only 24 % by the Permasteelisa concern (a large company), but the founder and majority shareholder of this concern, being also the manager of Solar Tech, owned 46 % of the capital, and the president of the concern as well as a member of the board of Permasteelisa both owned 15 % of the capital. On the basis of this financial interdependence, the possible influence of Permasteelisa shareholders, and the economic and organisational ties with Permasteelisa, the Commission concluded that Solar Tech did not suffer the typical handicaps of an SME and hence did not fulfil the independence criterion. Germany notes that in the Sovello joint venture however, both shareholders Evergreen and Q-Cells were independent from each other, and the minority shareholder Q-Cells did not have more influence in Sovello than that of a shareholder owning 24,9 % (see also point 5.3 below).

⁽¹⁸⁾ OJ C 118, 20.5.2003, p. 5.

⁽¹⁹⁾ Commission Recommendation 96/280/EC (OJ L 107, 30.4.1996, p. 4).

⁽²⁰⁾ Judgment of the Court of 29 April 2004, Case C 91/01, ECR 2004 Page I-04355.

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

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

5.1.4. No exception for joint ventures

- (46) Germany claims that the Commission in its opening decision of 17 June 2008 (see recital 5) goes beyond its authority in that it seems to assume that a beneficiary is automatically to be treated as one economic entity together with its joint venture partners, and that therefore the financial data and staff headcounts of all the joint venture partners should always be cumulated for the calculation of the SME thresholds.
- (47) Germany states that thus the Commission claims the authority to take out a whole group of undertakings (namely joint ventures) from the application of the legally binding SME definition and to develop and apply particular SME criteria for this group of undertakings. Germany contests that such right could be derived from the case law of the European Courts on the former SME recommendation of 1996 or from any past Commission practice.

5.2. Typical SME handicaps of Sovello

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

5.2.1. SME handicaps related to financing

- (49) Germany claims that without public support Sovello would not have obtained external financing for its investment project in Thalheim. Germany states that

the ratio of external investment financing for the Sovello project (EUR 8 million, i.e. 13 % of the total investment) is typical for SMEs. Germany adds that only [...] of the [...] solicited banks were interested in financing the project, one of which was only willing to provide EUR [...] working capital and bridging finance up to 50 % of the public support. This situation would be typical for SMEs, not for large companies.

- (50) Germany informs that the loan contract for the external financing was only concluded on [...] November 2005. It was not possible to negotiate favourable lending conditions because of the [...] credit rating of Sovello and the [...] financial participation of the shareholders (as well as the [...] financial situation of Sovello). Sovello had difficulties in providing sufficient securities for the loan (as it was not yet owner of the land, machinery and installations had not yet been delivered, buildings were still being constructed and there was no stock). The shareholders could [...] provide [...] securities either.
- (51) Germany argues that the shareholders could only bring in very limited own resources. Until 2006, only Evergreen provided financing exceeding its share capital and capital reserves. Q-Cells was not [...] to bring in such extra capital, as its [...] resources were [...] tied in its own investment projects.

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

5.2.2. SME handicaps related to commercialization

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

5.2.3. SME handicaps related to business and operational organisation

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

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

5.3. Influence of Q-Cells on Sovello

- (55) Germany contests that the influence of Q-Cells on Sovello at the time of notification was higher than the normal influence of a shareholder owning 24,9 % in Sovello. It rather says that such participation percentage is not unusual for similar projects of start-ups in high technology sectors.
- (56) Germany explains that Evergreen took the initiative to start the project. In 10 years Evergreen had spent more than USD [...] million developing the String-Ribbon technology without succeeding in making it profitable. The share price of Evergreen went down from ca. USD 20 in 2000 to about USD 2 in 2003-2004. Evergreen had to keep maximal control on the investment project, in order to ensure a maximum return for its shareholders in case of success, but it could not raise sufficient capital without the financial participation of a business partner. Q-Cells was a good candidate because in addition to finance, it could also bring in its experience in building industrial plants in the photovoltaic sector and its knowledge in solar cells technology. Germany further reports that for these reasons Evergreen decided to choose Q-Cells as joint venture partner and not [...], who was a stronger financial party but wanted more influence.
- (57) At the time of concluding the MJVA1 with Evergreen, Q-Cells had already invested in a large project for the production of conventional solar cells. It had only limited resources available for investment in other projects. According to Germany, the purpose of Q-Cells' participation in Sovello was to gain knowledge in new technologies for the production of solar wafers, cells and modules, as well as to exploit its experience in the development of solar cell plants.
- (58) For the above reasons, Q-Cells accepted a minority participation of 24,9 %. Germany mentions that in the same logic, Q-Cells had taken a similar minority participation (21,19 %) in CSG Solar AG ⁽²³⁾, a company producing solar modules based on the thin-film technology. The level of the participation is not only based on the possible financial contribution but also on the technological input.
- (59) Germany stresses that the participation quotes of the shareholders in Sovello fully represented the real intention and influence of both joint venture partners, and that the voting rights were shared accordingly. This
- resulted in the factual situation that Evergreen could take important business decisions on its own, while Q-Cells did not have this possibility.
- (60) Germany argues that a potential future increase of Q-Cells' participation was agreed but was subject to certain conditions and contribution of corresponding extra capital. One of the conditions mentioned in the MJVA1 was that such a participation increase should not jeopardise the aid granted to Sovello. Germany points out that the aid measure was the reason for the location of the investment project in Germany instead of the USA, and that this is not in contradiction with State aid rules. Germany adds that Q-Cells had no influence on this, and that it is not illegitimate nor a circumvention of the rules if the joint venture partners aim to safeguard the total financing of Sovello.
- (61) Germany is of the view that there is a distinction between influence existing at a certain moment in time and potential future influence based on a possible increase of the participation of Q-Cells. Germany stresses that it was totally uncertain whether this participation increase would take place, and that both parties knew it would not follow quickly and certainly not before the probation of the new technology. In fact, the proposed increase up to 50 % as taken up in the MJVA1 was never realized. Quite to the contrary, on the basis of the second agreement (the MJVA2) dated 22 November 2005, Q-Cells' participation was lowered to 21 %. According to Germany, this clearly shows that there is no 'automatism' allowing to conclude that it was established from the outset that Q-Cells would own more than 24,9 % of Sovello's shares.
- (62) Germany furthermore states that the fact that Q-Cells provided an executive officer for Sovello was only a transitional arrangement (December 2004 until April 2005) which did not reduce the decisive influence of Evergreen, who also provided an executive officer as from the start of the joint venture. Germany adds that based on its majority position in the Supervisory Board, Evergreen had the right to appoint or recall any executive officer.
- (63) Germany contests that the formulation in the Heads of Agreement, saying that Q-Cells' ownership of Sovello must be less than 25 % in order to qualify for certain German government subsidies, would lead to an influence from Q-Cells going beyond its real participation of 24,9 %. Germany rather explains that it only represents what was later taken up in the MJVA1, namely the intention of the parties not to be in breach of any government support conditions. Germany also points to another paragraph in the Heads of Agreement, where it is mentioned that as Sovello operations will

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

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

- (64) Germany contests any possible influence of Q-Cells beyond its participation of 24,9 % which could be derived from agreements with Sovello. It stresses that all such agreements were concluded on market conditions and that no further economic, financial, organisational or other relation exists between Q-Cells and Sovello.
- (65) Germany concludes that the changes to the distribution of ownership after the foundation of Sovello are not based on the original MJVA1, but are linked with the entry of REC into the joint venture, upon the latter's agreement to supply large quantities of silicon to Sovello, in exchange of a participation of 15 % in the joint venture (as agreed in the MJVA2). Following this entry, Evergreen lowered its participation by 11,1 % and Q-Cells by 3,9 %. According to Germany, this proves the primary willingness of Q-Cells to remain a minority shareholder. It was only at a later stage, when REC agreed to supply additional silicon, and after the technological success of the Sovello1 investment was proven, that the participations of the three shareholders were brought to an equal 33,3 % (modification of the MJVA2, dated 29 September 2006, effective as from 19 December 2006).

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

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

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

5.5. Summary

- (68) Germany contests the legal grounds on which the Commission initiated the procedure, arguing that at the time of notification it submitted complete and correct information, and that hence Article 9 of Regulation (EC) No 659/1999 is not applicable. Germany also claims that the Commission should only base its assessment of the SME status of a company on the respect of the formal criteria (staff headcount and financial ceilings) of the SME definition, and not add 'unwritten criteria' to verify whether a company suffers from typical SME handicaps. Germany contests that the SME bonus was obtained by Sovello in breach of the State aid rules, and claims that the Commission's allegations of possible manipulation cannot be maintained.
- (69) Germany states that at the time of notification, Sovello fulfilled the conditions of the SME definition: Q-Cells only held a minority participation of 24,9 % in Sovello, and was nor a partner nor a linked enterprise with Sovello in the sense of the SME definition. Therefore, no data from Q-Cells were to be taken into account for the calculation of the SME thresholds. Germany contests that the influence of Q-Cells on Sovello at the time of notification was higher than that of an investor owning 24,9 % of the shares. Moreover, Germany is of the opinion that Sovello suffered indeed from the typical handicaps of an SME, and that without the State aid including the SME bonus, the investment project would not have been carried out.

6. ASSESSMENT OF THE AID

6.1. Preliminary remarks

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

6.2. Notification requirement, legal basis and applicable law

- (71) Germany notified the SME bonus to Sovello by letter dated 29 August 2005, registered as received on 1 September 2005.
- (72) The SME bonus to Sovello was granted on 21 April 2005 (subject to Commission approval) as a top-up to regional aid granted lawfully under the German GA scheme. This scheme contains a specific provision⁽²⁴⁾ requiring Germany to notify individually any award of SME bonuses which exceeds the individual notification threshold of SME block-exemption Regulation. The SME block-exemption Regulation, applicable at the time of notification, exempts investment aid to be given to SMEs at an intensity of 7,5 % net grant equivalent (NGE) for medium-sized companies and 15 % NGE for small companies anywhere within the EU. Where aid is granted in the assisted areas, the SME block-exemption Regulation also exempts aid up to the amount allowed under the RAG 1998 plus the additional SME bonus. The SME block-exemption Regulation does not exempt aid for certain projects with eligible expenses over EUR 25 million, or any project which will receive gross aid in excess of EUR 15 million. Such aid has to be individually notified.
- (73) To establish whether a firm constitutes a SME, the Commission applies the SME Recommendation.

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

6.3. Assessment of SME status of Sovello

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

- (74) Article 9 of Regulation (EC) No 659/1999 stipulates that 'the Commission may revoke a decision (...) after having given the Member State concerned the opportunity to submit its comments, where the decision was based on incorrect information provided during the procedure which was a determining factor for the decision. Before revoking a decision and taking a new decision, the Commission shall open the formal investigation procedure pursuant to Article 4(4). (...)'.
- (75) Germany contests to have submitted at any stage of the preliminary examination incorrect, or even incomplete information, as (a) it submitted all information required by the Commission Communication on the Model declaration, and (b) none of the relevant Community tests and provisions contained in the Recommendation required to give additional information on the construction of a joint venture and/or the Articles of Association of a company.
- (76) The Commission Communication on the Model declaration however mentions that the use of the declaration is not mandatory, but designed as a possible example, and that such declarations are without prejudice to the checks or investigations provided for under national or EU rules. In the course of the preliminary investigation, the Commission requested Germany to either submit a declaration under oath from Q-Cells that this shareholder did not fulfil any of the conditions of Article 3(3)(a-d)⁽²⁵⁾ of the Annex to the SME Recommendation, or, if this was not possible, to provide a copy of the Articles of Association of Sovello. On 28 October 2005, the German authorities submitted such declaration under oath from Q-Cells. As the shareholder structure of Sovello was modified in the course of the preliminary examination of the notified aid by incorporating a third joint venture partner (REC), the German authorities also submitted a declaration under oath from this new shareholder (on 4 April 2006). The decision N 426/05 was taken after a preliminary examination on the basis of the information submitted by Germany.

⁽²⁵⁾ Article 3(3)(a-d) of the Annex to the SME Recommendation states: 'Linked enterprises' are enterprises which have any of the following relationships with each other:

- an enterprise has a majority of the shareholders' or members' voting rights in another enterprise;
- an enterprise has the right to appoint or remove a majority of the members of the administrative, management or supervisory body of another enterprise;
- an enterprise has the right to exercise a dominant influence over another enterprise pursuant to a contract entered into with that enterprise or to a provision in its memorandum or articles of association;
- an enterprise, which is a shareholder in or member of another enterprise, controls alone, pursuant to an agreement with other shareholders in or members of that enterprise, a majority of shareholders' or members' voting rights in that enterprise.

- (77) The relevant question to be examined by the Commission was whether the beneficiary company was an SME. If at the time of the preliminary examination documents exist which explicitly reflect in writing that the shareholder structure of a joint venture is designed in order to comply with the SME definition, or which show clear intentions to change the company structure, as soon as a SME bonus is secured, it cannot be argued that such information is not at least relevant to assess the SME status of the joint venture in question and would not constitute a determining factor for the Commission decision.
- (78) Therefore, as the Commission did not receive any of these documents (Heads of Agreement, Articles of Association, MJVA1 and MJVA2), it had an incomplete view of the relevant factual situation at that time, and hence took its initial positive decision on the SME bonus for Sovello on the basis of incomplete, and thus incorrect information.
- (79) The Commission considers that Germany was under an obligation to submit all information which was available at the time and which was relevant for the decision N 426/05. Therefore, the Commission concludes that the information Germany provided was incomplete and thus incorrect. Consequently Article 9 of Regulation (EC) No 659/1999 is applicable, as it is an objective procedure, which allows the Commission to withdraw wrong decisions.
- (80) Under the provisions of the national German rules, Germany was obliged to verify whether any circumvention of the SME definition existed. Indeed, the text of the German scheme⁽²⁶⁾ on the basis of which the SME bonus was granted explicitly states that the SME status is excluded — even if the formal criteria of the SME definition are fulfilled — in cases where larger enterprises have factual control, or in the case of economic entities which economically speaking cannot be considered an SME.
- (26) 33. Rahmenplan der Gemeinschaftsaufgabe 'Verbesserung der regionalen Wirtschaftsstruktur' (GA): 'Zur Ermittlung der Schwellenwerte für eigenständige Unternehmen, Partnerunternehmen bzw. verbundene Unternehmen gelten die in der KMU-Empfehlung der EU-Kommission enthaltenen Berechnungsmethoden. Diese Beurteilungskriterien dürfen nicht durch solche Unternehmen umgangen werden, die die Voraussetzungen für die Eigenschaft als kleine und mittlere Unternehmen zwar formal erfüllen, jedoch tatsächlich durch ein größeres oder mehrere größere Unternehmen kontrolliert werden. Es sind sämtliche rechtliche Gebilde auszuschließen, die eine wirtschaftliche Gruppe bilden, deren wirtschaftliche Bedeutung über die eines kleinen und mittleren Unternehmens hinausgeht.'
- 6.3.2. *Admissibility of 'additional criteria' for the assessment of the SME status*
- (81) Germany argues that as in the SME Recommendation no other than the formal criteria concerning the thresholds are clearly defined, these formal criteria for the determination of the SME status of an enterprise should be decisive, in order to ensure legal certainty and calculability of the Commission State aid control policy. Germany further argues that possible additional criteria could only be envisaged in the context of a review of the SME definition, and not in the context of individual cases.
- (82) For the definition of partner enterprises, the Commission Recommendation does indeed not foresee any other criteria than the 25 % threshold in shares, respectively voting rights. It also does not contain a specific anti-circumvention clause. However, the Commission enjoys a degree of discretionary power in the field of State aid, with a view to protect the internal market against not justifiable distortions of competition.
- (83) The Commission acknowledges the need for legal certainty and transparency in the application of the State aid rules. Therefore, an assessment which goes beyond that of the application of the formal criteria should in any event be limited to very exceptional cases that can be clearly qualified as circumvention.
- (84) Nevertheless the Commission does not add 'additional criteria' to the SME definition, but simply goes beyond a purely formal analysis which must be possible if the Commission has to take an individual decision based on Article 6 of the SME block-exemption Regulation. By doing so the Commission makes sure that the SME bonus is only granted to genuine SMEs for which size truly represents a handicap and not to enterprises which through linked and/or partner enterprises have access to funds and assistance not available to competitors of equal size. In order to ensure that only genuine SMEs are included, there has to be a way of eliminating legal arrangements in which the SME definition is circumvented. Such an approach is in conformity with the findings of the jurisprudence (Solar Tech and Pollmeier cases, see footnotes 20 and 21), where the Courts of the European Union have accepted that the Commission shall refuse the SME bonus where this would lead to circumvention. It is therefore inherent in the definition of an SME that it does not apply where such a risk exists and the criteria are only formally respected.
- (85) The argumentation of Germany that the situation of Sovello is different from that of Solar Tech and

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

overall structure of the joint venture, this Agreement, the shareholdings in VentureCo, the Articles of Association and the Concurrent Agreements in order to ensure that the maximum amount of Government Investment Grants available for small and medium size enterprises will be secured by VentureCo; and to obtain the funds necessary to fund to VentureCo the amounts specified in Section 2.4 (b) and 2.4 (c) when due.’ (Underlining added)

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

6.3.3. Company documents and factual situation

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

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

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

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

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

‘The Parties shall use reasonable best efforts to obtain the Government Investment Grant Approval as soon as reasonably practicable following the Closing Date, including, but not limited to, making changes to the

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

⁽²⁷⁾ ‘JVCo’ stands for EverQ (Sovello), ‘Q’ stands for Q-Cells, and ‘E’ stands for Evergreen.

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

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

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

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

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

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

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

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

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

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

and that:

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

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

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

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

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

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

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

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

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

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

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

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

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

- (i) If it is possible under the applicable grant regulations, as demonstrated by a written confirmation of the relevant grant authority (the "Grant Impunity Notice"), that Q increases its ownership interest in VentureCo to 50 %, without such increase of Q's ownership interest in VentureCo possibly resulting in an application for Government Investment Grants being turned down, in part or in full, or Government Investment Grants already obtained being reclaimed, in part or in full, by the competent authorities, then Q shall be offered in writing to provide such amount of an Additional Financing to enable it to increase its ownership interest in VentureCo to a level equal to (but not in excess of) the percentage then held by E (...).' (Underlining added)
- (102) As a conclusion, upon careful analysis of different company documents, the Commission considers that at the time of the original notification, the formal ownership and decisional structure of Sovello, including both the 24,9 % share of Q-Cells and substantial influence of Q-Cells on Sovello decision making, was indeed deliberately and essentially designed to enable Sovello to obtain the SME bonus, whilst at the same time it was always the objective of the two strategic partners to establish the partnership on equal terms, once the SME bonus was obtained.
- (103) Germany argues also that the participation of Q-Cells is based on German company law. Germany argued in particular that the successful development of the Sovello joint venture was of such importance for the economic success of Evergreen that Evergreen wanted to keep a maximum of decisional rights and influence on Sovello, and therefore did not accept, for the first phase of development of Sovello, to have shares and voting rights which did not exceed 75 %. This argument can only be understood to mean that Evergreen was not prepared to give shares and voting rights to Q-Cells which would have exceeded 25 %.
- (104) To understand and assess the credibility of this line of argumentation, the Commission verified the provisions of the German GmbH Statute which is the applicable national law since Sovello AG was at the time EverQ GmbH, and fell under its provisions.
- (105) The German GmbH Statute creates certain statutory minority rights in several paragraphs, in particular in §§ 50, 61, 66, and 53. The minority rights contained in §§ 50, 61, and 66 refer to rights of shareholders exceeding 10 % of votes, and are therefore irrelevant for the present assessment, since they are acquired by Q-Cells. Only § 53 contains a minority right which is not obtained by statute by Q-Cells by virtue of its share of 24,9 %. According to § 53, a minority of more than 25 % of the voting rights is entitled to block a modification of the Articles of Association of the limited company. By sole application of the law, Evergreen, as majority shareholder with voting rights exceeding 75 % could thus indeed take all important business decisions, including on changes to the Articles of Association. If the decisional rights included in the provisions of the Articles of Association and the MJVA did not contain additional decisional rights in favour of Q-Cells, the argument brought forward by Germany that Evergreen needed a share exceeding 75 % was credible, and the 24,9 % share of Q-Cells could be justified as the consequence of strict application of statutory rights, and could therefore be considered not to reflect an artificial corporate architecture aimed at circumventing the SME definition.
- (106) However, under German company law, and notwithstanding the respect of the statutory provisions, freedom of contract applies, and the company's articles of association may contain provisions that give protection exceeding that foreseen by statute.
- (107) This is exactly the situation of Sovello where the parties laid down in the Articles of Association that both of them have to agree to all important decisions, especially to a modification of the articles. If unanimity — like in the present case — is agreed, then the rule above does not apply, because it shall only protect the rights of a minority shareholder, but not restrict his rights. On the other hand, nothing of course would have restricted the parties' freedom to insert the same clause in the Articles of Association, if they had not agreed on a share of 24,9 %, but on a different share for Q-Cells. Therefore, in the case at hand the argument referring to the blocking rights of minority shareholders is not relevant. The German statements are therefore contradictory in itself; the statutory rights of a majority shareholder with a majority exceeding 75 % are an irrelevant argument when the substantial decisional rights given by that majority are limited by contract. In view of the above, the Commission concludes that under German company law there is no reason to choose a percentage of 24,9 %. The temporary reduction of Q-Cells shares following the entry of REC into the joint venture which was only upheld until three months after the initial approval of the SME bonus by the Commission, does not change this analysis.
- (108) Germany argues that in November 2005 (with the entry of REC acquiring 15 % of the shares), and thus before the Commission took the decision N 426/05 on the SME bonus, both (1) the MJVA1 was abolished and replaced by the MJVA2, and (2) the participation of Q-Cells was lowered to 21 %.

- (109) In general, the Commission assesses a case on the basis of the facts as they exist at the moment of the notification, unless the Member State explicitly modifies the notification. However, in a case where a company is already not an SME (even if the SME thresholds were formally respected) at the time of the original notification, and in a context of possible circumvention of the SME definition, the Commission would be particularly vigilant in checking subsequent changes which were communicated to the Commission after the original notification. In any event, in the present case, the modifications of the shareholder structure communicated to the Commission after the original notification cannot change the legal assessment. Indeed, the alleged intention to artificially keep the ownership of Q-Cells below 25 % was not altered by the later changes to the company structure (before the decision N 426/05 on the SME bonus), and the strong role of Q-Cells in Sovello is maintained in the MJVA2.
- (110) The fact that the role of Q-Cells in the initial joint venture exceeded its 24,9 % share is also confirmed by the MJVA2, which provides that if part of the grants will have to be reimbursed, the three partners will lend the amount to be repaid to Sovello based on the following arrangement: REC will make a loan in proportion to its ownership percentage and the rest of the loan will be split evenly between Evergreen and Q-Cells.
- (111) The rules after REC joined the joint venture are set out in the MJVA2. The MJVA2 provides that following an Additional Financing request, be it linked to capacity expansion or otherwise, Q-Cells may increase its participation up to the same level as Evergreen (Art. 3.5.c). Subject to a further silicon supply contract signed before [...], REC may increase its shares up to 21 %, obtaining 6 % from Evergreen (Art. 3.4). In the case of Additional Financing, and still subject to a further silicon supply contract, REC will be entitled to increase its shareholding in Sovello to 33,3 % (Art. 3.5.d), i.e. the same level as Evergreen and Q-Cells. The internal company decision to expand its capacity was taken end June 2006. Equal participation of the three partners was agreed about three months after the initial Commission approval of the SME bonus, when both Q-Cells and REC increased their participation to 33,3 % (amended MJVA2).
- (112) The rules on the appointment of directors and the decisional procedures in the supervisory board are largely maintained: under the MJVA2, both Q-Cells and REC have the right to appoint one director (two, once their participation exceeds 30 %), and decisions are taken by the majority of directors, with the proviso that at least two of the three owner firms must agree. Again, this goes beyond the decisional powers a minority shareholder may expect in a normal company situation (although maybe less unusual in a joint venture).
- (113) Furthermore, it was Q-Cells who brought REC into the joint venture. Q-Cells had close customer and supplier relationships with REC and its subsidiaries ScanModule AB, Glava, Sweden ('ScanModule'), ScanCell AS, Narvik, Norway ('ScanCell'), and ScanWafer ASA, Høvik, Glomfjord, Porsgrunn, Norway. Indeed, REC supplied silicon and was the main wafer supplier to Q-Cells, and Q-Cells sold an important part of its cell production to ScanModule. The cells produced by ScanCell were sold on the market by Q-Cells. Moreover, in 2004 a verbal agreement was concluded between Q-Cells and REC with regard to sales and marketing support services on the part of Q-Cells in Norway. In addition, clear links also exist through M. Brenninkmeijer, who was member of the supervisory board of both Q-Cells and REC, and also managing director of Good Energies, the company which held 16 % of the shares of Q-Cells and 39 % of the shares of REC (see point 2.2). A similar structure was created for CSG Solar, where both Q-Cells and REC were minority shareholders and Q-Cells' CEO as well as M. Brenninkmeijer were members of the supervisory board.
- (114) As a consequence of the above considerations the Commission considers that both at the time of notification and the time of the decision N 426/05, the formal ownership and decisional structure of Sovello was deliberately designed to enable Sovello to obtain the SME bonus (by keeping the participation of Q-Cells below 25 %), whilst at the same time it was always the objective of the two, later three strategic partners (REC ensuring the availability of silicon) to establish the partnership on equal terms, once the SME bonus was obtained. Indeed, three months after the Commission approval of the SME bonus, an amendment to the MJVA2 conferred equal participation (33,3 % each) to the three partners.
- 6.3.4. *Calculation of the SME threshold assuming that Q-Cells holds 25 %*
- (115) According to Article 2 of the Annex to the SME Recommendation, small and medium-sized enterprises are defined as enterprises which
- have fewer than 250 employees, and
 - have an annual turnover not exceeding EUR 50 million, and/or
 - an annual balance-sheet total not exceeding EUR 43 million.

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

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

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

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

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

Q-Cells into account, as it considers that the participation of Q-Cells was artificially kept below this threshold.

6.4. Lack of necessity of the SME bonus

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

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

6.5. Conclusion

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

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

HAS ADOPTED THIS DECISION:

Article 1

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

Article 2

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

Article 3

1. Germany shall recover the aid referred to in Article 2 from the beneficiary.
2. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiary until their actual recovery.
3. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ⁽²⁹⁾.
4. Germany shall cancel all outstanding payments of the aid referred to in Article 2 with effect from the date of notification of this decision.

Article 4

1. Recovery of the aid referred to in Article 2 shall be immediate and effective.
2. Germany shall ensure that this decision is implemented within four months following the date of notification of this Decision.

Article 5

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

- (a) the total amount (principal and recovery interests) to be recovered from the beneficiary;
- (b) a detailed description of the measures already taken and planned to comply with this Decision;
- (c) documents demonstrating that the beneficiary has been ordered to repay the aid.

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

Article 6

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 27 January 2010.

For the Commission

Neelie KROES

Member of the Commission

⁽²⁹⁾ OJ L 140, 30.4.2004, p. 1.

IV

(Acts adopted before 1 December 2009 under the EC Treaty, the EU Treaty and the Euratom Treaty)

COMMISSION DECISION

of 28 October 2009

on State aid C 59/07 (ex N 127/06 and NN 13/06) implemented by Italy for Ixfin SpA

(notified under document C(2009) 8123)

(Only the Italian text is authentic)

(Text with EEA relevance)

(2010/359/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 ⁽¹⁾ pursuant to the provisions cited above and having regard to their comments,

Whereas:

I. PROCEDURE

- (1) On 18 November 2005 Italy adopted a decree on the basis of which the granting of a rescue aid guarantee to Ixfin SpA (hereinafter 'Ixfin' or 'the company') was envisaged. Following notification from the Italian authorities on 23 February 2006, the Commission initially registered the case as N 127/2006. Once it was ascertained that the aid had already been granted as from December 2005, in breach of the standstill clause, the case was reregistered under number NN 13/2006.
- (2) By letter dated 5 April 2006, the Commission requested further information, which Italy supplied by letter registered as received on 29 May 2006. A meeting with the Italian authorities took place on 9 June 2006. At this meeting, Italy informed the Commission that a restructuring plan would be submitted.
- (3) By letter registered as received on 13 June 2006, Italy informed the Commission that, following a request from Ixfin to increase the aid amount up to EUR 17,3 million, the Italian authorities had expressed their provisional

agreement, subject, however, to a favourable opinion by the Commission. By letter dated 19 June 2006, the Commission requested further information, which Italy supplied by letter registered as received on 26 June 2006.

- (4) On 5 July 2006 the Commission sent a reminder concerning the restructuring plan that had been announced.
- (5) By letter registered as received on 9 August 2006, Italy submitted further information confirming that the company had been declared bankrupt by the Naples Court (hereinafter referred to as 'the Court') on 5 July 2006. Following a request by the Commission for further information dated 29 November 2006, Italy submitted part of the requested information by letter dated 7 December 2006. The Commission sent a reminder on 22 December 2006 requesting Italy to submit the missing information while specifying in more detail which information would be needed. In particular, the Commission asked whether the company might foreseeably be liquidated, involving the cessation of all business activities, at the end of the insolvency proceedings or whether there was any possibility that the company's business activities might be continued in any form, for instance as the result of a sale as a going concern.
- (6) By letter dated 14 March 2007, Italy replied confirming the cessation of all activities. In the same letter, however, Italy explained that it was not possible at that point to indicate whether the business activities of the company could potentially be resumed due to difficulties in gathering the relevant information. On 14 June 2007 the Commission asked Italy to keep it updated about any further measures in the insolvency proceedings while specifying which information would be deemed crucial.
- (7) In October 2007 the Commission learned in the press about the possibility of Ixfin receiving restructuring aid.

⁽¹⁾ OJ C 30, 2.2.2008, p. 21.

- (8) On 11 December 2007 the Commission adopted a decision to open the formal investigation procedure⁽²⁾ (hereinafter referred to as 'the opening Decision') as well as issuing an information request asking the Italian authorities a series of questions to be answered in one month, and inviting third parties to submit their comments. On 7 January 2008 Italy asked for an extension to the time limit for comments on the opening Decision. An extension until 12 February 2008 was granted the same day. Italy provided only partial information by e-mails of 15 January 2008, 12 March 2008 and 25 March 2008.
- (9) On 25 March 2008 the Commission received third-party comments from the special administrator appointed in the insolvency proceedings (hereinafter 'the Administrator') which were forwarded to Italy on 18 April 2008 together with a request for information. On 24 April 2008 Italy replied to this request and commented on the third-party observations.
- (10) On 20 October 2008 the Commission asked for further information, which Italy provided by letter dated 30 October 2008. The Italian authorities forwarded the Commission's request to the Administrator. The Administrator submitted further information on 18 November 2008.
- (11) Until 1999 it was a subsidiary of the Olivetti Group and its output was sold under the Olivetti brand. In 1999 Olivetti decided to divest all its production activities and Ixfin was sold to Finmek SpA.
- (12) Since 2003 Ixfin has been controlled by Maxfin Srl, which, in turn, is controlled by Pufin Srl. Pufin Srl, which operates in business services (commercial, administrative, logistic), is the parent company of the Pufin Group, owned by the Pugliese family.
- (13) Ixfin controls directly and indirectly four other companies, namely Nicofin Srl (99 %), Uni.com Partecipazioni Srl (100 %), Uni.com SpA. (100 %) and Uni.com Ricerche Srl (100 %).
- (14) The origin of Ixfin's difficulties lay, among other causes, in the fact that the company acted essentially as a subcontractor for third parties and was therefore dependent on their orders. In the last decade the electronics market has suffered a general crisis, which the companies belonging to this market segment have overcome either by raising efficiency through economies of scale or by relocating production to low-labour-cost countries.

II. DETAILED DESCRIPTION OF THE MEASURE

II.1. Beneficiary

- (11) Ixfin is a large company based in Marcianise (Caserta), in the Campania Region.
- (12) Ixfin is an Italian company active in the contract manufacturing sector, producing and assembling disks and other electronic products, as well as in call centres and logistics.
- (13) As soon as Ixfin began to experience serious difficulties it was sold in March 2004 to an investor willing to provide the resources necessary to re-launch the company's activities. The investor's plan was not implemented, however, with the result that as of September 2004 the company encountered solvency problems. In December 2004 the company, with an additional loss of EUR 20 million, was sold back to the Pufin Group. The transaction was carried out for a purely symbolic price. In December 2004 it ceased its activities.
- (14) Ixfin's financial position at the time when aid was granted is outlined in the table below.

Table 1

(in EUR)

	Turnover	Net profit/(loss)	Tax arrears	Social Security arrears
31.12.2003	104 000 000	11 000	9 000 000	20 800 000
31.12.2004	75 000 000	(2 000 000)	14 800 000	26 100 000
31.5.2005	3 000 000	(**)	16 000 000 (*)	27 700 000 (*)

(*) August 2005.
(**) No information available.

⁽²⁾ See footnote 1.

II.2. Aid measure

- (19) On 18 November 2005 the Ministry of Economic Development (hereinafter 'the Ministry') issued a decree on the basis of which it envisaged the granting of a rescue aid guarantee to Ixfin. Financing was to come from funds established on the basis of Decree Law No 35 of 14 March 2005⁽³⁾ (the '*decreto competitività*'), as later amended by Article 11 of Law No 80 of 14 May 2005⁽⁴⁾ and clarified by Decision No 101 of the *Comitato Interministeriale per la Programmazione Economica* (Interministerial Economic Planning Committee) of 29 June 2005, which stipulates that any such support must be given solely by way of a guarantee and for the purpose of rescuing a company in difficulty.
- (20) The guarantee was given to cover a loan from BancApulia (hereinafter 'the Bank') for EUR 15 million, at the EURIBOR 3-month rate plus 1,25 p.p., i.e. an initial interest rate of 3,591 %. The duration of the loan was six months beginning from 30 December 2005.
- (21) The aid was used mainly to pay a part of the company's debts. Italy claimed that these payments were urgent since some of the creditors had already begun court proceedings to enforce their claims.
- (22) The Italian authorities, moreover, informed the Commission that Ixfin had asked for the amount covered by the guarantee to be raised to EUR 17,3 million.

II.3. Ixfin's insolvency

- (23) On 5 July 2006 the company was formally declared bankrupt and liquidation proceedings (hereinafter referred to as '*procedura fallimentare*' or '*fallimento*') were opened⁽⁵⁾.
- (24) In March 2007 the Ministry, which had its claim registered under the bankruptcy proceedings, asked the relevant court to have the *fallimento* proceedings changed into extraordinary administration proceedings, a court-

administered procedure which, when complete, may allow the undertaking concerned to continue to operate (hereinafter '*amministrazione straordinaria*')⁽⁶⁾, a measure established by the Legislative Decree No 270 of 8 July 1999 (hereinafter 'Legislative Decree No 270/1999').

- (25) Moreover, the Commission, before opening the formal investigation procedure, learned in the press that Ixfin could possibly be admitted to *amministrazione straordinaria* thanks to an agreement for the industrial regeneration of the Caserta area ('*Protocollo d'intesa per la reindustrializzazione della Provincia di Caserta*', hereinafter 'the *Protocollo*'). This agreement, signed by the Italian institutions, the unions and the employers' organisation Confindustria, allowed, by way of various measures, for an investment amounting to between EUR 40 million and EUR 60 million. According to the information available to the Commission at that stage, it appeared that this agreement was aimed at restoring production and preserving employment at the industrial sites in the province of Caserta.

III. DOUBTS EXPRESSED BY THE COMMISSION WHEN INITIATING THE ARTICLE 88(2) PROCEDURE

- (26) In its decision initiating the procedure, the Commission, on the basis of the information available at that stage, expressed doubts regarding the compatibility of the rescue aid with the Community guidelines on State aid for rescuing and restructuring firms in difficulty⁽⁷⁾ (hereinafter 'the Guidelines').
- (27) The Commission asked Italy to provide further information to demonstrate Ixfin's eligibility for the aid and, in order to show that the difficulties were too serious to be dealt with by the group itself, the balance sheets for Pufin and Maxfin.
- (28) As regards the compatibility of the rescue aid with the Guidelines, the Commission questioned whether point 25(d) of the Guidelines was met. In order to fulfil that condition, the amount of rescue aid should be limited to the minimum required to keep the firm in business for the period during which the aid is authorised. In this respect, Italy was asked to provide more information on the suitability of the amount of rescue aid, among other points, confirmation that the guarantee was limited to a EUR 15 million loan and not to be increased to EUR 17,3 million as requested by the company.

⁽³⁾ Italian OJ 62 of 16.3.2005.

⁽⁴⁾ Italian OJ 111 of 14.5.2005.

⁽⁵⁾ The Commission understands from the Italian legislation that '*procedura fallimentare*' is a court-administered bankruptcy procedure, which is initiated when a company is deemed to be insolvent. A bankruptcy judge oversees the proceedings, whereas the '*curatore*' (administrator) deals with the allocation of the debtor's assets, and a creditors' committee represents all creditors. Under this procedure, the priority of claims is established according to the rules contained in the Italian Civil Code in order to meet creditors' claims by disposing of the company assets, which usually leads to the liquidation of the company.

⁽⁶⁾ The Commission understands from the Italian legislation in force that '*amministrazione straordinaria*' constitutes a form of administration proceedings that applies to large insolvent companies (normally with more than 1 000 employees) based on 'restructuring plans', so as to avoid bankruptcy. It is thus focused on corporate reorganisation rather than liquidation of the company. See Commission Decision of 4.7.2006 in case NN 16/06, *CIT* (OJ C 244, 11.10.2006, p. 14).

⁽⁷⁾ OJ C 244, 1.10.2004, p. 2.

- (29) The Commission, moreover, emphasised that the rescue aid could not be essentially aimed at delaying insolvency but must be channelled towards restructuring. Still, it appeared to the Commission that the purpose of the rescue aid seemed to be solely to reschedule debt repayments and thereby to save the company from insolvency. The Commission asked, among other things, for evidence that Ixfin was attempting to draw up a restructuring plan during this period.
- (30) The Commission also questioned whether the aid abided by point 25(c) of the Guidelines, which stipulates that the Member State must communicate, not later than six months after the first implementation of a rescue aid measure, a restructuring plan or a liquidation plan or proof that the guarantee has been terminated.
- (31) The Commission further expressed doubts if the 'one time, last time' principle as stipulated in points 72 *et seq.* of the Guidelines was complied with.
- (32) Moreover, in the opening Decision the Commission expressed doubts whether Ixfin benefited from additional aid (see recital 25 of the present Decision) in order to facilitate the outcome of the bankruptcy proceedings. The Commission noted that, even if such aid had been granted under Law No 181 of 1989 (or its later prolongations), it would not make it compatible with the Commission Decision in case N 214/2003, since the authorisation was allegedly based on the exclusion pursuant to Article 9 of companies in difficulty. Ixfin is, however, clearly a company in difficulty on the basis of point 10(c) of the Guidelines since it is the subject of bankruptcy proceedings. Therefore, the Commission observed that any such support can only be considered compatible as restructuring aid if it complies with the conditions stipulated in points 31-51 of the Guidelines.
- (33) However, the Commission did not receive any restructuring aid notification nor was it informed of any restructuring plan, which might have enabled the aid to fulfil the basic conditions required for authorisation as restructuring aid under the Guidelines. In particular, the Commission had serious doubts as to whether, had a restructuring plan existed, it would have been capable of restoring the operational and financial profitability of the company.

IV. COMMENTS FROM THE ITALIAN AUTHORITIES

- (34) On 15 January 2008 the minutes of the meeting of 9 January 2008 on Ixfin held at the Ministry were forwarded to the Commission. It transpired from those minutes that the Ministry had decided to lodge an appeal

against the court's decision not to admit Ixfin to *amministrazione straordinaria*.

- (35) On 12 March 2008 the Italian authorities informed the Commission by email that they had had difficulties obtaining the information requested and asked for an interim solution. On 25 March 2008 the Italian authorities confirmed that the alleged restructuring aid, amounting to EUR 40 million, had indeed not been granted to Ixfin.

V. COMMENTS FROM THIRD PARTIES

- (36) By letter dated 27 March 2008, the Commission received comments from the Administrator of Ixfin.
- (37) As regards the insolvency of Ixfin, the Administrator explained that at that time Ixfin was still the subject of *fallimento* proceedings. For *fallimento* proceedings to be transformed into *amministrazione straordinaria* proceedings, there were indeed procedural and substantive requirements. By its order of 4 January 2008, the Court ruled that that the conditions to restore the economic equilibrium of the company were lacking and thus the *fallimento* proceedings could not be replaced by *amministrazione straordinaria* proceedings. That ruling was challenged by the Ministry before the Naples Court of Appeal (hereinafter 'the Court of Appeal').
- (38) Moreover, the Administrator explained that, since the company was still engaged in *fallimento* proceedings, its economic activity had ceased.
- (39) As for the *Protocollo*, the Administrator explained that that agreement was adopted by the Prime Minister's Office on 20 June 2007. On 25 October 2007, a coordination group met which was supposed to draw up a more precise investment programme. However, as is apparent from the Administrator's comments, especially from the Court's ruling, there was no concrete follow-up on the investment programme, which remained an abstract document containing no indications of the projects to be supported or any funds which might be used. The Administrator further emphasised that no other public resources, apart from the rescue aid, were granted for the rescue and/or restructuring of Ixfin.

- (40) The Administrator also indicated that on 23 June 2006 Ixfin submitted a draft restructuring plan to Sviluppo Italia SpA, which had not been acted upon in view of the company's bankruptcy. The Administrator forwarded a copy of the draft restructuring plan, drawn up by a consultant, to the Commission.

(41) With respect to the adequacy of the amount of rescue aid, the Administrator passed on to the Commission the applications for rescue aid which were submitted by Ixfin to Sviluppo Italia SpA on 30 September 2005 and 11 November 2005.

(42) Since the Commission had asked for the balance sheets of Pufin and Maxfin for the years 2004, 2005 and 2006, the Administrator submitted copies of them.

(43) As for the execution of the state guarantee, the Administrator stated that on 3 July 2006 the Bank had asked the Ministry to repay the guaranteed loan.

VI. ITALY'S COMMENTS ON THE THIRD-PARTY OBSERVATIONS

(44) The Italian authorities commented on the third-party observations. They stated, among other things, that they were now in a better position than before to respond to the allegations contained in the Decision to open the formal investigation procedure.

(45) As regards the state guarantee on the EUR 15 million loan from the Bank, the Italian authorities clarified the following points.

(46) First, the Italian authorities confirmed that the guaranteed was limited to a EUR 15 million loan and was thus not raised to EUR 17,3 million. They emphasised, moreover, that the amount of rescue aid had been calculated according to the formula contained in the Annex to the Guidelines.

(47) Second, the Ministry, by its submissions dated 21 April 2008 and 30 October 2008, informed the Commission that the Bank had called the guarantee on the EUR 15 million loan plus relevant interest, for a total amount of EUR 15 154 457,72, on 3 July 2006. The Italian authorities also forwarded a letter of 20 September 2006, on the basis of which the Ministry of the Economy and Finance paid the Bank on 27 September 2006. By this payment, the Ministry obtained the rights as creditor for that amount in respect of Ixfin.

(48) Third, the Italian authorities submitted a copy of a letter of 30 November 2006 by which the Ministry asked the competent authorities (the Naples public prosecutor's office) to submit a request for it to be added to the list of creditors, in accordance with Article 93 of Legislative Decree No 270/1999.

(49) As regards Ixfin's *fallimento* proceedings, the Italian authorities stated that from the declaration of bankruptcy

on 5 July 2006, the company had remained subject to *fallimento* proceedings and confirmed the information submitted by the Administrator in that respect. Furthermore, the Italian authorities confirmed that the appeal against the court's ruling was still pending.

(50) As for the *Protocollo*, the Italian authorities annexed a copy of it and stated that it does not provide for any aid for Ixfin.

(51) The Italian authorities, moreover, sent the Commission a copy of the draft notification of the restructuring plan, which, however, as they stated, was not subsequently sent to the Commission since the Court had officially declared Ixfin insolvent.

(52) The Italian authorities also submitted a copy of the loan agreement between the Bank and Ixfin, from which it transpires that the loan was granted on 30 December 2005 at an interest rate of 3,591 % (see recital 20 of this Decision) and not 3,752 %, as indicated in point 15 of the opening Decision on the basis of the information initially available.

VII. EVENTS SUBSEQUENT TO THE OPENING OF THE FORMAL INVESTIGATION PROCEDURE

(53) By its order of 4 June 2008, notified on 15 July 2008, the Court of Appeal upheld the ruling of the Court and thus the conclusion that the substantive conditions did not exist to replace the *fallimento* proceedings by *amministrazione straordinaria* proceedings. The Ministry has lodged an appeal against the ruling with the Supreme Court of Cassation, which has yet to give its final ruling on the case.

(54) In this regard the Commission observes that pursuant to Articles 66 to 68 of the Notice from the Commission — Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid⁽⁸⁾ — national authorities are allowed to support the continuation of the economic activity of the beneficiary only as far as it allows immediate and effective recovery of aid.

VIII. ASSESSMENT OF THE AID

VIII.1. Existence of State aid

(55) Article 87(1) of the EC Treaty stipulates that any aid granted by a Member State or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between Member States, incompatible with the common market.

⁽⁸⁾ OJ C 272, 15.11.2007, p. 4.

(56) The guarantee for Ixfin was granted by the Italian State with its own funds, as Ixfin did not pay any premium for it. It enabled Ixfin to obtain a loan, which, as a company in severe financial distress, it could not have obtained without the state guarantee. Therefore, by providing a guarantee for the loan, a selective advantage was conferred on Ixfin through state resources.

(57) Rescue and restructuring aid is regarded as being among the most distortive types of State aid since it makes it possible to sustain a company which, without state intervention, would exit the market. Ixfin was active in the production and distribution of electronic components for both the automotive and the telecommunications sectors. These products are traded within the EU and the relevant market is supranational, as pointed out in the decision from the Italian competition authority⁽⁹⁾. Moreover, at the time of receiving the aid, Ixfin planned to resume its production activity. Thus, the advantage it obtained through the guarantee enabled it to take measures to rescue the company and eventually continue the economic activity for a certain period. Therefore, it can be concluded that the aid in question distorts or is likely to distort competition and affect trade between Member States, by favouring certain undertakings.

(58) Moreover, point 3(2)(a) of the Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees⁽¹⁰⁾ (hereinafter 'the Notice') sets out a number of requirements to exclude from a public guarantee any element of State aid: the beneficiary must not be in financial difficulties, the guarantee must not cover more than 80 % of the outstanding loan, and a market-oriented premium must be paid. In the present case the guarantee covers the totality of the loan, no premium has been paid and, as will be shown below in Section VIII.2.1, the beneficiary is a company in difficulty.

(59) The measure therefore constitutes State aid within the meaning of Article 87(1) of the EC Treaty.

VIII.2. Compatibility of State aid with the common market

(60) The exemptions pursuant to Article 87(2) of the EC Treaty do not apply in the present case. As for the exemptions pursuant to Article 87(3) of the EC Treaty, since the primary objective of the aid is to restore the long-term viability of the company, only the exemption in Article 87(3)(c) of the EC Treaty, which allows for State aid to be granted to facilitate the development of

certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest, can be applied. The aid can only be considered compatible with the common market on the basis of Article 87(3)(c) of the EC Treaty if the conditions laid down in the Community Guidelines on State aid for rescuing and restructuring firms in difficulty are respected.

VIII.2.1. Eligibility of the company in difficulty for State aid

(61) According to point 9 of the Guidelines, the Commission considers a firm to be in difficulty where it is unable, whether through its own resources or with the funds it is able to obtain from its owner/shareholders or creditors, to stem losses which, without outside intervention by the public authorities, will almost certainly condemn it to go out of business in the short or medium term. Point 11 of the Guidelines indicates that the usual signs of a firm in difficulty are increasing losses, diminishing turnover, growing stock inventories, excess capacity, declining cash flow, mounting debt, rising interest charges and falling or nil asset value. Table 1 shows that debts were increasing, cash flow was declining and turnover went from EUR 104 million to EUR 3 million in just 17 months.

(62) According to point 10(c) of the Guidelines a firm is also regarded as being in difficulty where it fulfils the criteria under its domestic law for being the subject of collective insolvency proceedings. In the present case, signs of insolvency, namely the inability of the company to fulfil its obligations in a timely manner, appeared as early as September 2004. Moreover, Italy claimed that it granted rescue aid before the notification due to urgent liquidity needs of the company. Finally, the bankruptcy of Ixfin was declared by the competent court on 5 July 2006.

(63) Based on the above, the Commission considers that Ixfin is a firm in difficulty within the meaning of points 10 and 11 of the Guidelines.

(64) It should, however, be noted that, according to point 13 of the Guidelines, companies that are part of a group are as a rule not eligible for restructuring aid, except where it can be demonstrated that the firm's difficulties are intrinsic and are not the result of an arbitrary allocation of costs within the group, and that the difficulties are too serious to be dealt with by the group itself.

⁽⁹⁾ Autorità Garante della Concorrenza e del Mercato – Decision No 11479, *Pufin/Finmek Automotive-Nicofin*, of 5.12.2002.

⁽¹⁰⁾ OJ C 155, 20.6.2008, p. 10.

(65) Ixfin is part of the Pufin group. It should first be noted that Ixfin has debts of EUR 3,7 million towards its parent company Maxfin. Second, after the opening of the formal investigation, the Italian authorities submitted to the Commission the balance sheets of Maxfin of 30 April 2005, 30 April 2006 and 30 June 2006 and balance sheets of Pufin of 30 June 2004, 30 June 2005 and 30 June 2006. The financial results of Pufin and Maxfin from 2003 to 2005 are shown in Table 2. Table No 2 demonstrates that neither the financial situation of Maxfin nor that of Pufin was such as to enable them to grant Ixfin the resources required on a scale comparable to the rescue aid granted by Italy. Third, the financial means of Ixfin's subsidiaries are not such as to have enabled them to free up there sources necessary to save Ixfin. It can be thus concluded that neither Pufin, nor Maxfin nor Ixfin's subsidiaries were able to finance the rescue of Ixfin and thus that Ixfin's difficulties were too serious to be dealt with by the group itself.

Table 2

(in EUR)

	2003	2004	2005
Maxfin	20 037 975	2 529 725	(997)
Pufin	12 710 759	(148 361)	(24 349)

(66) In order to dispel the Commission's doubts as to whether the company's difficulties were intrinsic and not the result of an arbitrary allocation of costs within the group, the Italian authorities first provided information which indicates that the difficulties of the company were due to several factors: a decrease in orders, mainly from its principal clients, and an increase of debts, in particular after the company was managed by the investor between March and December 2004 (as indicated in recital 17 of this Decision). Second, the Italian authorities pointed out that the parent company, after having bought back Ixfin, did not carry out any transaction which would amount to an arbitrary allocation of costs within the group.

(67) Therefore the Commission, basing itself on the information at its disposal, considers that Ixfin complies with the conditions laid down in point 13 of the Guidelines.

VIII.2.2. Compatibility of the rescue aid with the common market

(68) Rescue aid must meet the conditions set out in point 25 of the Guidelines in order to be compatible with the common market.

(69) According to point 25(a) of the Guidelines, rescue aid must consist of liquidity support in the form of loan guarantees or loans; in both cases, the loan must be granted at an interest rate at least comparable to those observed for loans to healthy firms.

(70) First, in the present case the rescue aid consists of liquidity support (see recital 20 of this Decision). As far as the interest rate is concerned, the Commission has to review its preliminary finding that this seemed to correspond to the rate normally applied to healthy companies. In fact, since the interest rate actually applied to the guaranteed loan was 3,591 %, compared to the Commission's reference rate for Italy of 4,08 %, the Commission concludes that it is not comparable to that normally applied to healthy companies. The Commission therefore considers that the rescue aid granted to Ixfin does not comply with the criteria of point 25(a) of the Guidelines.

(71) As regards, in the present case, the conditions in point 25(b) of the Guidelines, the Commission considers that they have been met, since the rescue aid is aimed at mitigating serious social difficulties, while it has no unduly adverse spillover effects on other Member States.

(72) According to point 25(d) of the Guidelines, rescue aid must be restricted to the amount needed to keep the firm in business for the period during which the aid was authorised; the amount necessary should be based on the liquidity needs of the company stemming from losses. The Commission observes that, although the amount of aid complies with the formula set out in the Annex to the Guidelines for determining the liquidity needs of the company, it amounts to over EUR 10 million and the Italian authorities have not provided sufficient elements to explain why this amount corresponded to what was specifically required by Ixfin in order to remain afloat. Therefore, the Commission considers that it has not been sufficiently proven that the amount of aid received constitutes the minimum necessary to keep the company in business in the rescue period as required by point 25(d) of the Guidelines.

(73) According to point 25(e) of the Guidelines, aid must be granted in accordance with the 'one time, last time' principle as stipulated in points 72 *et seq.* of the Guidelines. The Italian authorities have submitted that the 'one time, last time' principle has been complied with, i.e. that the company did not benefit from any rescue or restructuring aid in the last ten years. The Commission, therefore, on the basis of the information at its disposal, considers that the criterion in point 25(e) of the Guidelines has been met.

- (74) In the present case, the period of six months during which rescue aid can be granted according to point 25(c) of the Guidelines started on 30 December 2005 and elapsed on 30 June 2006. According to the last clause of point 25(a) of the Guidelines, any loan must be reimbursed and any guarantee must come to an end within a period of not more than six months after the disbursement of the first instalment to the firm. Moreover, the last clause of point 25(c) stipulates that 'in the case of non-notified aid the Member State must communicate, no later than six months after the first implementation of a rescue aid measure, a restructuring plan or a liquidation plan or proof that the loan has been reimbursed in full and/or that the guarantee has been terminated'. An exception to the six-month rule exists pursuant to point 26 of the Guidelines, if the Member State submits a restructuring plan or a liquidation plan within the six-month period. Neither restructuring plan nor liquidation plan was submitted to the Commission within the aforementioned period. Further, the guarantee was called on 3 July 2006 and Ixfin did not reimburse the loan at all. Therefore, the rescue aid to Ixfin must be considered as incompatible with the common market.

VIII.2.3. *Restructuring aid*

- (75) The Commission cannot consider the rescue aid as a restructuring measure. First, no restructuring plan was submitted to the Commission. Second, the rescue aid does not comply with the requirements of points 31 *et seq.* of the Guidelines, which lay down the conditions of compatibility of restructuring measures with the common market. The Commission does not therefore possess any more elements that would allow it to regard the rescue aid as compatible as a restructuring measure.
- (76) As regards the presumed granting of restructuring aid, on the basis of the information submitted to the Commission in the course of the formal investigation procedure, any doubts as to whether restructuring aid (see recital 32 of this Decision) was granted to Ixfin were dispelled. Therefore, since the existence of the restructuring aid has not been confirmed, assessing its compatibility with the common market has become irrelevant.

IX. CONCLUSION

- (77) The Commission terminates the formal investigation procedure initiated by the Decision of 11 December 2007 concerning the unlawfully granted rescue aid and a presumed restructuring aid measure.
- (78) The Commission concludes that the State aid in the form of a guarantee on a loan amounting to EUR 15 million unlawfully granted by Italy to Ixfin SpA, in breach of Article 88(3) of the EC Treaty, is incompatible with the

common market. Italy must recover the incompatible aid from the company.

- (79) In quantifying the amount of aid, the Commission would refer to paragraph 4.1(a) of the Notice, where it is stated that 'for companies in difficulty, a market guarantor, if any, would, at the time the guarantee is granted charge a high premium given the expected rate of default. If the likelihood that the borrower will not be able to repay the loan becomes particularly high, this market rate may not exist and in exceptional circumstances the aid element of the guarantee may turn out to be as high as the amount effectively covered by that guarantee'.
- (80) In the light of the severe financial difficulties of Ixfin at the time the guarantee was granted, the Commission considers that it was highly unlikely that the company would have been able to obtain a bank loan on the market without the state intervention; therefore, the Commission concludes that the amount of aid corresponds to the totality of the amount of the loan.

- (81) The formal investigation regarding the presumed restructuring aid is closed since, during the course thereof, the granting of restructuring aid to Ixfin was not confirmed,

HAS ADOPTED THIS DECISION:

Article 1

The State aid in the form of a guarantee, unlawfully granted by Italy in breach of Article 88(3) of the EC Treaty, to cover the loan granted by BancApulia on 30 December 2005 to Ixfin, is a State aid measure and is incompatible with the common market.

Article 2

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

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

3. This interest should be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ⁽¹⁾.

4. Italy shall cancel all outstanding payments of the aid referred to in Article 1 with effect from the date of adoption of this Decision.

⁽¹⁾ OJ L 140, 30.4.2004, p. 1.

Article 3

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

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

Article 4

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

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

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

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

2. Italy shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 1 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and interest already recovered from the beneficiary.

Article 5

This Decision is addressed to Italian Republic.

Done at Brussels, 28 October 2009.

For the Commission

Neelie KROES

Member of the Commission

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