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II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 25 April 2001

on the aid granted by Italy to Istituto Poligrafico e Zecca dello Stato and its subsidiaries

(Notified under document number C(2001) 1177)

(Only the Italian text is authentic)

(Text with EEA relevance)

(2002/345/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) thereof,

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

Whereas:

(3) The Commission received comments from three interested parties. It forwarded them to Italy, which was given the opportunity to react.

(4) The Italian authorities submitted their observations by letter of 1 February 1999. The Commission requested additional information by letters of 9 February and 27 August 1999.

(5) The Italian authorities provided the requested information by letters of 26 March, 27 May, 20 August and 29 November 1999 and by letter of 13 March 2000. Meetings were held with the Italian authorities on several occasions. In particular, detailed information was provided during the meeting held in Rome on 21 January 2000.

I. PROCEDURE

(1) By letter dated 4 August 1998, the Commission informed Italy of its decision to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid granted to Istituto Poligrafico e Zecca dello Stato (hereinafter 'Poligrafico') and to some of the companies controlled by it.

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

(6) During the course of the procedure, the Commission was informed of a new aid measure granted by Italy in the context of a larger restructuring plan. On 3 May 2000 it decided to extend the procedure to this new aid measure. This decision was communicated to Italy by letter of 5 July 2000.

(7) The Commission decision to extend the procedure was published in the *Official Journal of the European Communities*. The Commission called on interested parties to submit their comments on the aid in question.

⁽¹⁾ OJ C 133, 13.5.1999, p. 1; OJ C 272, 23.9.2000, p. 17.

- (8) The Commission received no comments from third parties.
- (9) The Italian authorities submitted their observations by letter of 3 August 2000.
- (12) Law No 154 of 1978 assigned the following additional objectives (among others) to Poligrafico:
- minting of coins to serve as legal tender (both in Italy and abroad),
 - minting of artistic and collectors' coins.

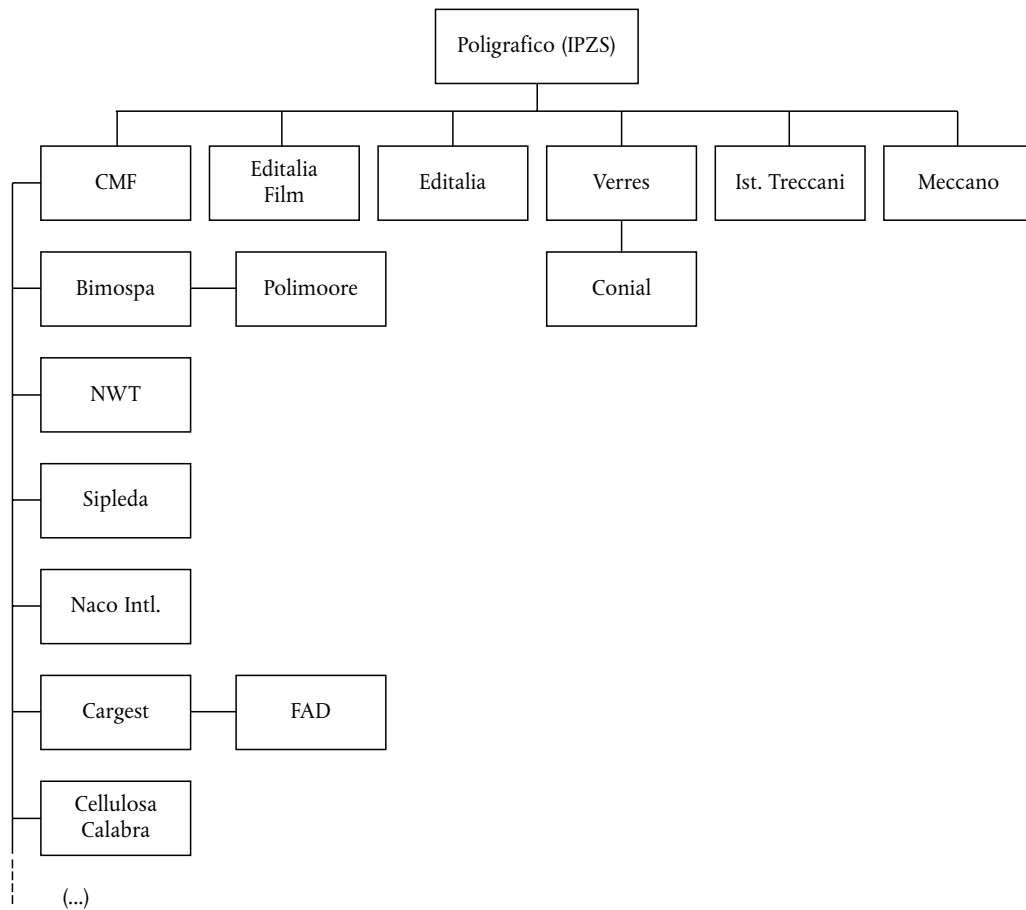
II. DESCRIPTION OF THE MEASURES

- (10) Poligrafico was set up under Law No 2744 of 1928 in order to bring together under a single body the production of banknote paper and normal paper destined for use by the State. It was defined in Article 1 of that Law as an *ente pubblico economico* (public undertaking) under the control of the Ministry of Finance. Law No 559 of 1966 redefined its nature and its financial structure, transferring control from the Ministry of Finance to the Ministry of the Treasury; its objectives were set as follows:
- production of paper (normal and for banknotes),
 - publication of all the official documentation of the State,
 - publication of cultural and literary works of national interest,
 - management of paper production plants.
- (11) From the financial point of view, Poligrafico was entrusted with ownership of the properties, plants and goods which had been used by the previous undertaking and received ITL 3 billion in new capital; the rent which it was obliged to pay to the State for the use of these assets (4 % of their value) was abolished. At the same time, it was required to transfer 90 % of its annual profits to the State as dividends.
- (13) In 1980 Poligrafico was authorised to acquire a majority shareholding in Cartiere Miliani di Fabriano SpA. (hereinafter 'CMF'), a large pulp and paper producing firm.
- (14) Lastly, Law No 266 of 1988 confirmed Poligrafico as an *ente pubblico economico*. Being a public undertaking under the control of the Ministry of the Treasury, it enjoys financial autonomy vis-à-vis the State. Its management is appointed by the Italian Government.
- (15) At the time the procedure was initiated, the Poligrafico group was headed by Istituto Poligrafico e Zecca dello Stato, operating both as a commercial company and as a financial holding. It controlled directly CMF (97,3 %), Verres SpA (hereinafter 'Verres') (55 %), Editalia SpA (hereinafter 'Editalia') (71,8 %) and Editalia Film Srl (71,4 %). In addition, it held minority shares in Istituto Enciclopedia Italiana Treccani SpA (10 %) and Meccano SpA (0,6 %). As a whole, the group comprised 27 controlled companies and 7 affiliated companies.
- (16) At the time the procedure was initiated, CMF in turn controlled several undertakings including among others Cellulosa Calabra SpA (hereinafter 'Cellulosa Calabra'), Naco International SpA (hereinafter 'Naco'), NWT SpA (hereinafter 'NWT') and FAD SpA. The structure of the Poligrafico group at the time the procedure was initiated is shown in Figure 1.

Figure 1

Poligrafico group

(main companies) as at 31 December 1996



(17) Under the Civil Code and Laws No 559/66 and No 154/78, Poligrafico was not obliged to prepare a consolidated balance sheet. At the request of the Ministry of the Treasury, the undertaking has, however, prepared consolidated accounts since June 1996 (see Figure 2).

(18) Poligrafico generates most of its turnover from supplying products and services to the State, as provided for in Law No 559/66. Under this law, it is required to supply normal paper and security paper to the public administration, to publish the Official Gazette and the official collection of all legal acts of the Italian Republic, to mint coins of the State and to manufacture

marks of the State and all items with characteristics which safeguard public confidence ⁽²⁾.

(19) In 1998 Poligrafico's consolidated turnover was as follows:

— 'security paper'	ITL 260 billion (EUR 133 million)	30 %
— normal paper	ITL 278 billion (EUR 143 million)	31 %
— licence plates	ITL 78 billion (EUR 40 million)	9 %
— publishing	ITL 140 billion (EUR 72 million)	16 %
— coins and medals	ITL 127 billion (EUR 65 million)	14 %

⁽²⁾ Article 2 of Law No 559/66, as modified by Article 2 of Legislative Decree No 166 von 1999.

- (20) Poligrafico's consolidated profit and loss account is shown in Figure 2.

Figure 2

Poligrafico's consolidated profit and loss account

(ITL billion)

	1995	1996	1997	1998
Turnover	1 053	998	977	883
— Operating costs ⁽¹⁾	(1 050)	(1 004)	(1 307)	(898)
Operating margin	3	(6)	(330)	(15)
— Financial charges and earnings	13	19	2	(8)
— Extraordinary charges and earnings	—	—	(286)	(150)
— Income taxes	(11)	(8)	—	(17)
Net result	5	5	(614)	(190)

⁽¹⁾ Also includes asset write-downs and write-offs (ITL 232 billion in 1997 and 62 billion 1998).

- (21) CMF is Poligrafico's largest subsidiary in terms of turnover and production. It produces normal paper and security paper. Its key economic and financial data are shown in Figure 3 below.

Figure 3

Consolidated profit and loss account of CMF

(ITL billion)

	1993	1994	1995	1996	1997	1998
Turnover	284	347	462	404	348	350
— Operating costs	(257)	(332)	(414)	(359)	(362)	(349)
Operating margin	27	15	48	45	(14)	(1)
— Financial charges and earnings	(34)	(36)	(45)	(43)	(37)	(20)
— Extraordinary charges and earnings	—	22	—	(1)	(136)	(156)
— Income taxes	—	—	(1)	—	—	(3)
Net result	(7)	1	2	1	(187)	(180)

- (22) In its decision to initiate the procedure, the Commission referred to various aid measures granted by the State to Poligrafico and its subsidiaries. These included two

capital increases of ITL 54 billion (EUR 28 million) and ITL 250 billion (EUR 125 million) granted by Poligrafico to CMF in 1996 and 1998 respectively and overpayments by the State to Poligrafico for its products and services.

- (23) After the procedure had been initiated, the Italian Government adopted Decree-Law No 116 of 21 April 1999, which required Poligrafico to undertake a broad restructuring programme aimed at changing it from a public undertaking (*ente pubblico economico*) into a joint stock company (*società per azioni*) by 31 December 2001. To that end, Poligrafico was also required to carry out a three-year restructuring plan with the objective of restoring the group's profitability and financial soundness.
- (24) As part of the procedure, the Italian Government informed the Commission that Law No 144 of 17 May 1999 gave Poligrafico a yearly grant of ITL 80 billion (EUR 40 million) over the next twenty years to repay the principal and the interest on loans taken out by Poligrafico to finance the restructuring plan.

- (25) The Italian authorities also gave details of the financial resources granted to CMF by Poligrafico:

— 1996: capital increase of ITL 54 billion (EUR 28 million),

— 1998: transfer of debts of ITL 227 billion (EUR 116 million) and capital contribution of ITL 30 billion (EUR 15 million),

— 1999: capital contribution of ITL 89 billion (EUR 46 million).

- (26) Of these resources, CMF transferred ITL 272 billion to Cellulosa Calabra, ITL 25 billion to NWT and ITL 5 billion to Naco.

- (27) In addition, the Italian authorities informed the Commission that in 1998 Poligrafico granted capital contributions to Editalia for a net amount of ITL 49 billion (EUR 25 million) to reconstitute the share capital eroded by losses.

- (28) All these sums granted by Poligrafico to its subsidiaries were then recovered by Poligrafico by means of the yearly grant given to it by the State. For the purposes of this procedure, the aid measure to be assessed is that granted to Poligrafico by Law No 144 of 17 May 1999 (ITL 80 billion for twenty years).

III. COMMENTS FROM THIRD PARTIES

- (29) France submitted comments to the effect that the 'Direction des monnaies et médailles' had not participated in the calls for tender concerning minting services in India and Algeria mentioned by the Commission in its decision to initiate the procedure.
- (30) France also affirmed that Verres' activities on foreign markets were rather limited in 1997 and 1998 since it did not take part in any of the calls for tender in which the 'Direction des monnaies et médailles' had participated.

have been sold to private investors, while NWT has been wound up.

- (34) As regards point (ii), the Italian authorities argue that Poligrafico, in granting the funds in question, acted as a private investor, in that it provided the funds necessary to restructure one of its subsidiaries, so as to safeguard the value of its investment.
- (35) As regards point (iii), the Italian authorities argue that, should the Commission consider these measures as State aid, they should nevertheless qualify for the derogation under Article 87(3)(c) since they were aimed at restructuring a firm in difficulty.

IV. COMMENTS FROM ITALY

- (31) In its reply, the Italian Government argues that:

— as far as the two capital increases granted by Poligrafico to CMF are concerned, (i) they do not constitute State aid since they have not provided any economic benefit to the recipient, (ii) Poligrafico acted as a private investor in a market economy, and (iii) in any event, any aid would be compatible with the common market under Article 87(3)(c),

— as far as the alleged commercial advantages granted to Poligrafico are concerned, they do not constitute State aid since the State has never overpaid Poligrafico for its products and services.

- (32) As regards point (i), the Italian authorities maintain that the funds granted by Poligrafico to CMF were not caught by Article 87(1) in that they did not provide an economic benefit to the recipient. They argue that the two capital increases were transferred in their entirety by CMF to its subsidiaries Cellulosa Calabria, Naco and NWT to finance their restructuring. Since the funds were transferred to Cellulosa Calabria, Naco and NWT, CMF has not, according to the Italian authorities, derived any economic benefit from such funds, having acted merely as intermediary.

- (33) The Italian Government maintains that the resources granted by CMF to Cellulosa Calabria, Naco and NWT did not constitute State aid since these companies have never been active on the market and therefore were not in a position to distort competition and trade between Member States. In any case, Cellulosa Calabria and Naco

- (36) As regards the alleged commercial advantages granted to Poligrafico in the form of overpayment for products and services, the Italian authorities dispute the very existence of the measures and explain that the price of products and services sold to the State is fixed by a commission set up within the government stationery office (Provveditorato Generale dello Stato), which is responsible for supplying all public administration offices.

- (37) According to the Italian authorities, the price set by the commission takes into account, on the one hand, the price of similar products and services on the market and, on the other hand, the production costs incurred by Poligrafico. Consequently, Italy claims that no overpayment in favour of Poligrafico is possible.

- (38) As regards the funds allocated to Poligrafico by Law No 144 of 17 May 1999, which were not included in the decision to initiate the procedure, the Italian Government argues that they are part of an extensive restructuring plan for Poligrafico as a group and that they therefore constitute aid which is compatible within the meaning of Article 87(3)(c).

- (39) Finally, as regards the funds granted by Poligrafico to Editalia, the Italian Government claims that they are aimed at restructuring the company and are, therefore, to be regarded as aid compatible with the common market within the meaning of Article 87(3)(c) of the EC Treaty.

- (40) The same arguments were adduced by the Italian authorities with respect to the extension of the procedure.

V. ASSESSMENT OF THE AID

(41) In the case under assessment, it has to be established whether the funds granted to Poligrafico and its subsidiaries and the alleged commercial advantages:

- are granted by the State or through State resources,
- are capable of distorting competition by favouring certain undertakings or the production of certain goods, and
- affect trade between Member States and therefore constitute aid within the meaning of Article 87(1).

Use of State resources

(42) The funds granted by Law No 144 of 17 May 1999 to Poligrafico stem directly from the State budget and, as such, clearly constitute State resources within the meaning of Article 87(1).

Favouring of certain undertakings

(43) The Commission takes the view that any financial measure granted by the State to an undertaking which, in various forms, would mitigate the charges normally included in the accounts of the undertaking has to be considered as State aid within the meaning of Article 87.

(44) The funds provided by Law No 144 of 1999 to Poligrafico (ITL 80 billion for twenty years) will allow the company to repay the principal and the interest due on loans it has taken out to finance its restructuring. In practice, Poligrafico is placed in a position in which it obtains loans for which it will pay back neither the principal nor the interest. The amount in loans that Poligrafico can obtain without having to ensure repayment can be estimated at about ITL 1 100 billion (EUR 568 million).

(45) Loans are a necessary form of financing in the life of a company as they can be used to finance running costs, investments or extraordinary transactions, such as acquisitions. However, the fact that companies have to repay the principal and a market interest rate on their loans forces them to require higher returns from their investments in order to be able to repay the loans and secure a sufficient return for shareholders.

(46) In this case, Poligrafico is to receive a loan without having to repay it since the State will repay it over the next twenty years. It is clear that the measure in question reduces the charges that Poligrafico would have incurred if it were a normal commercial undertaking without any State support.

(47) Accordingly, the funds provided by Law No 144 of 1999 to Poligrafico favour the undertaking vis-à-vis its competitors not benefiting from the same measure and provides an economic benefit within the meaning of Article 87(1) of the Treaty.

(48) The Italian authorities argue that Poligrafico will use part of the loan to repay the debts it has incurred in order to provide financial resources to CMF (ITL 370 billion — EUR 190 million) and Editalia (ITL 49 billion — EUR 25 million). CMF in turn has used most of the funds received to inject capital into some of its subsidiaries, i.e. Cellulosa Calabria (ITL 272 billion), Naco (ITL 5 billion) and NWT (ITL 25 billion). Therefore, according to the Italian authorities, the resources granted to Poligrafico did not constitute State aid as they were simply transferred to CMF, which in turn transferred them to Cellulosa Calabria, Naco and NWT. As these latter companies had a very limited turnover, if any, no distortion of competition can be detected.

(49) The Commission cannot concur. Poligrafico operates as an integrated group that produces directly or through subsidiaries. As a result, although CMF is a separate entity from Poligrafico, it forms part of the group and has to be considered, for the purposes of this procedure, as part of a single economic group. It operates in fact as a subholding of Poligrafico with shareholdings in more than fifteen companies, as well as being an integrated production company.

(50) The measures granted to Poligrafico are to be regarded as being intended for the whole group, regardless of whether they benefited certain products or services provided by Poligrafico directly, by CMF or by any other subsidiary.

(51) Consequently, in assessing whether the measures under examination have provided an economic benefit to the recipients within the meaning of Article 87 the

Commission has to apply the market economy investor test to the funds granted by the State to Poligrafico since they also comprise those granted by Poligrafico to its subsidiaries to finance their restructuring.

- (52) In this connection, it is necessary to examine whether the funds received by Poligrafico have been granted according to the principle of the private investor operating under normal market economy conditions (market economy investor principle) ⁽³⁾. If this is not the case, these measures produce an economic benefit for the recipient. The recipient may, in fact, use these resources to finance expenditure and investments without needing to obtain loans from financial institutions or to provide an adequate return on the resources received.
- (53) According to the market economy investor principle, a financial transaction between a State and a public undertaking involves aid when it would have not been carried out by a private investor operating under normal market economy conditions. In particular, State aid can be presumed where 'the financial position of the company and particularly the [...] volume of its debts, is such that a normal return (in dividends or capital gains) cannot be expected within a reasonable time from the capital invested' ⁽⁴⁾.
- (54) As can be seen from Figures 2 and 3, both Poligrafico and CMF were in a difficult economic situation at the time they received the funds from their respective shareholders. As regards Poligrafico, Figure 2 shows that the company had been facing a serious downturn in its economic situation: its operating margin became negative in 1996 and worsened appreciably in 1997. Even leaving aside the outright write-offs in 1997, the operating margin (which may be likened to the economic performance of 'industrial' activities) was negative to the tune of some ITL 100 billion. Despite a significant improvement in 1997, the operational viability of the company remained negative.
- (55) Furthermore, in both 1997 and 1998 Poligrafico had negative equity. In normal conditions, companies with negative equity cannot operate.
- (56) The same reasoning can be applied *mutatis mutandis* to CMF. As shown in Figure 3, the company suffered a sudden downturn in its turnover and saw its operating

margin become negative in 1997 and 1998. Over the same period, it incurred heavy losses which completely wiped out its share capital. It was only thanks to the capital contributions received from Poligrafico that the company was able to remain in operation. It is clear therefore that, on the basis of the past performance of the company, its financial structure and its economic prospects, Poligrafico could not expect a return on its investment which would have been acceptable to a private investor.

- (57) In such circumstances, the State could not reasonably expect a normal market return from its investment in the undertaking. Accordingly, the provision of financial resources to Poligrafico has to be regarded as conferring an economic benefit on the recipient within the meaning of Article 87 and could therefore constitute State aid within the meaning of Article 87 of the EC Treaty if they were to affect trade between Member States.

Effect on Community trade

- (58) The third condition to be met for State measures to be caught by Article 87 is that they have a real or potential effect on trade between Member States. In the case in question, it is necessary to assess the effect on intra-Community trade since, as the Commission pointed out in its decision to initiate the procedure, Poligrafico and its subsidiaries operate in various sectors, pulp and paper production, minting and publishing, which are open to competition and in which intra-Community trade is significant.
- (59) Moreover, in initiating the procedure, the Commission clearly stated that in the abovementioned sectors actual or potential trade between Member States exists. In particular, it referred to the minting service, the provision of paper for administrative use and to publishing services. As regards the effect on trade, the Commission reiterates its view that the State aid measures granted to Poligrafico or to its subsidiaries distort or threaten to distort trade between Member States.
- (60) In addition, the Commission would point out that, according to the Court of Justice, for a State measure to be caught by Article 87, a direct impact on the actual trade between Member States is not necessary. It is sufficient that the measures strengthen the position of

⁽³⁾ Commission communication on the application of Articles 92 and 93 of the EC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector (OJ C 307, 13.11.1993, p. 3, Section III).

⁽⁴⁾ See aforementioned communication, paragraph 16.

the recipient compared with other undertakings which are competitors in intra-Community trade ⁽⁵⁾. This is the case for Poligrafico's competitors but also for other companies operating in the minting, publishing and printing sectors.

- (61) It can therefore be concluded that the measures under examination also meet the third criterion spelt out in paragraph 31, and therefore constitute State aid within the meaning of Article 87(1).

Compatibility with the common market

- (62) Having confirmed that the measures in question constitute State aid within the meaning of Article 87(1), the Commission has to assess whether they can be declared compatible with the common market under the relevant provisions of the EC Treaty.

- (63) Article 87(2) can be excluded as the measures do not have a social character, are not granted to individual consumers and are not intended to make good the damage caused by natural disasters.

- (64) As for Article 87(3)(a) and the part of Article 87(3)(c) regarding regions, the aid does not appear to be intended to promote the development of specific regions, given the variety of locations in which Poligrafico as a group is present. Nor is it aimed at promoting 'the execution of an important project of common European interest' remedying 'a serious disturbance in the economy of a Member State' within the meaning of Article 87(3)(b).

- (65) Given the nature of the measures in question, Article 87(3)(d) does not seem to be applicable either.

- (66) In conclusion, the aid measures in question qualify only for the derogation in Article 87(3)(c). In such cases, the Commission assesses the compatibility of aid measures on the basis of the guidelines for rescuing and restructuring firms in difficulty ⁽⁶⁾ as the procedure was initiated in 1998 in respect of the aid granted up to that

moment. According to those guidelines, if the Commission is to approve measures to restructure a firm in difficulty, the following conditions must be satisfied:

- (i) the measures must restore the long-term viability of the firm;

- (ii) they must avoid undue distortions of competition;

- (iii) they must be in proportion to the costs and benefits of restructuring;

- (iv) the restructuring plan must be fully implemented;

- (v) the implementation of the restructuring plan must be monitored by the Commission.

- (67) Only if all of these criteria are met can the Commission declare the effects of the aid not to be contrary to the Community interest and approve it under Article 87(3)(c).

- (68) To this end, the Italian authorities submitted a comprehensive restructuring plan for Poligrafico as a group and for CMF in particular that had three main aspects:

— focus on Poligrafico's 'core' business as product and service provider for the public administration and hence termination of its 'external' activities,

— privatisation/liquidation of most of Poligrafico's subsidiaries, CMF and most of CMF's subsidiaries,

— reduction in costs by increasing internal efficiency and restructuring.

- (69) Poligrafico reckons to restore sound profitability in 2002, while satisfactory cash flows are already expected in 1999 and 2000 (see Figure 4 below).

⁽⁵⁾ Case 730/79 Philip Morris v Commission [1980] ECR 2671.

⁽⁶⁾ OJ C 368, 23.12.1994.

Figure 4

Poligrafico's restructuring plan

(ITL billion)

	1998	1999	2000	2001	2002	Reference year ⁽¹⁾
Turnover	870	850	800	760	752	752
— Operating costs	(850)	(820)	(740)	(680)	(650)	(640)
Operating margin	20	30	60	80	102	112
Ordinary result	(30)	(21)	9	20	40	48
Cash flow	2	12	35	55	n.a.	n.a.

⁽¹⁾ Excludes minting of euro coins.

(70) The above results will be obtained by drastically reducing the company's operating costs, in particular staff costs, by almost 50 %, carrying out a wide range of internal reorganisation measures and discontinuing the production of several products and services intended for the market. For example, the plants producing normal paper and envelopes are already being dismantled. In terms of turnover (in 1997), this represents a decline of some ITL 170 billion (around EUR 87 million) per year.

(71) On completion of the restructuring plan, Poligrafico will concentrate production on two product categories:

— products and services destined for the public administration for which the authorities impose specific quality and security requirements in terms of non-reproducibility, public confidence, etc. (category (a)). This category includes products such as passports, personal identification documents, lottery tickets, government bonds and the Official Gazette as well as minting operations on behalf of the Central Bank. It is estimated that, on completion of the plan, these products will account for 85 % of the company's turnover. It is clear that, because of their very nature, the competition for these products is fairly limited,

— products destined for the public administration but not necessitating the same strict security requirements as category (a) above, such as tax documents, voting cards, etc. (category (b)). On completion of the restructuring plan, these products should provide the remaining 15 % of Poligrafico's turnover.

(72) As Poligrafico is to terminate production of all its current 'commercial' products, the plan provides for the

closure of all existing plants in order to concentrate production in a single new plant that will permit greater efficiency and improved product quality. A separate plant will be necessary only for minting operations.

(73) In addition, the plan provides for the sale of all Poligrafico's subsidiaries except for Verres and Editalia. Verres will continue to produce the materials necessary for the minting operations, while Editalia is important for the publishing side of the business, which may be useful for Poligrafico's core business. The plan also provides for the possibility of selling these subsidiaries at a later stage.

(74) The restructuring plan envisages a significant reduction in the prices paid by the public administration for Poligrafico's products and services. It is estimated that, on the basis of the 1997 production figures, this will reduce the company's turnover by some ITL 90 billion at the end of the plan.

(75) From an organisational point of view, the restructuring plan aims to bring about a reduction in Poligrafico's workforce from 5 302 in 1997 to 2 650 in 2002 and to 2 550 in the reference year, when production will be concentrated at a single site. It also seeks to lower staff unit costs by modifying some legal aspects of the employment contract and by replacing older and more expensive employees with young and less expensive workers. The combined action on staff numbers and on unit costs will allow the company to reduce its overall staff costs from about ITL 475 billion (EUR 244 million) in 1997 to ITL 228 billion (EUR 117 million) in the reference year.

(76) By 30 June 2000 the workforce had already been cut by about 1 850 to 3 130, i.e. at a faster rate than envisaged in the plan.

(77) The plan puts the total cost of the above measures at around ITL 1 400 billion (EUR 720 million) over the period 1999 to 2002. Of this figure, ITL 600 billion is to be used to restructure Poligrafico's financial situation, ITL 430 billion to relocate the production facilities to a single plant and ITL 370 billion to cover the social costs of redundancies. Poligrafico will contribute some ITL 300 billion to the financing of the plan, including ITL 120 billion from the sale of assets and subsidiaries, ITL

- 100 billion from cash flows for the period and ITL 80 billion from the reduction in working capital.
- (78) As explained in recital 44, the remaining ITL 1 100 billion will be in the form of loans on which the State will repay the principal and the interest.
- (79) Lastly, Poligrafico will implement an analytical accounting system which will make it possible to separate the costs and revenue relating to products sold exclusively to the public administration from those relating to any products sold on the market. This will prevent any risk of cross-subsidisation between the business for which Poligrafico operates as a supplier to the public administration and those for which it decides to compete on the market.
- (80) The main component of Poligrafico's restructuring will be the reduction in its operating costs (ITL 200 billion over the period concerned), which will be achieved by redundancies, production rationalisation and other organisational measures. Implementation of these measures depends on the will of the company's management and not on favourable market developments.
- (81) As far as Poligrafico is concerned, it can be seen from Figure 4 that the measures envisaged in the restructuring plan will allow the company to restore sound viability as from 2001. Already in 2000, the company will have a reasonable cash flow which will enable it to finance some of the remaining restructuring measures. It is also worth noting that these results will be achieved entirely by means of internal restructuring measures, without relying on favourable market assumptions. Condition (i) is therefore met.
- (82) In parallel with the restructuring of Poligrafico, the plan submitted by the Italian authorities provides for a radical restructuring of CMF with a view to privatising it as soon as possible. As CMF is the largest subsidiary, its restructuring prior to privatisation should be analysed.
- (83) CMF's restructuring plan is based on the following measures, which are to be carried out within three years:
- shifting of the product range to products with higher value added, such as banknote paper,
 - closure of the carbonless copy paper business,
 - restructuring of the current power supply plants, which account for a large percentage of the operating costs,
 - reorganisation of the commercial and marketing areas,
 - reduction of staff numbers.
- (84) The plan also envisages the sale of most of CMF's subsidiaries and of non-strategic assets. With regard to the companies to be sold, CMF has already completed the sale of Cellulosa Calabria, a heavily loss-making subsidiary. As mentioned in recital 48, the Italian authorities maintain that aid granted to this company, as well as to Naco and NWT, should be assessed separately. The Commission, for the reasons given above, considers that these companies, each with a very low turnover and production, if any, have to be considered as forming part of CMF's paper and pulp production activities.
- (85) However, CMF's difficulties are attributable primarily to Cellulosa Calabria, Naco and NWT. In particular, Cellulosa Calabria, which received 90 % of the funds given by CMF to its subsidiaries, was to become a site in Calabria, a disadvantaged region under Objective 1 for the production of paper using a special process requiring the use of fewer trees and capable of reducing the polluting effects of chlorine-based production processes. Despite huge investments and a large workforce, the company never achieved significant production levels, limiting itself to production and marketing tests. Its turnover during the first half of 1998, just before privatisation, was only ITL 140 million (EUR 72 000). It was sold by means of an open and transparent procedure to a group of investors which dismantled all its paper production plants and used the industrial site to produce electricity. There is, therefore, no need to examine any restructuring plan for Cellulosa Calabria.
- (86) The same reasoning can be applied to Naco and NWT. Both companies were engaged in developing new processes for producing paper and paper-like products. Naco's turnover in 1997, before privatisation, was only ITL 170 million (EUR 86 000), while NWT's turnover in 1998 was a little under ITL 1 500 million (EUR 770 000). Both subsidiaries have also already been sold by means of open and transparent procedures to private

investors. The proceeds, 8 % and 2 % of the funds given by CMF to its subsidiaries, were used to offset earlier losses.

(87) Under CMF's plan, the sale and closure of most of its subsidiaries will continue. For example, in addition to the abovementioned sales of Cellulosa Calabria, Naco and NWT, CMF has already sold Polimoore SpA and FAD SpA, while Cargest SpA and Cogest SpA have been put into liquidation.

(88) Similarly, the Cerreto Castello plant, owned by Fabriano Soft, has already been sold and CMF's carbonless copy paper production line has been shut down.

(89) In addition, the plan envisages various measures aimed at repositioning the company in terms of products and distribution channels, as well as raising efficiency to the level of that of its competitors. One of these measures is to reduce the company's workforce from its current size of 970 to around 600 (-40 %).

(90) These measures should turn the company around. CMF should be able to achieve an operating profit of some ITL 60 billion (EUR 31 million) in 2002 (compared with an ITL 1 billion (EUR 0,5 million) loss in 1998), as Figure 5 shows.

Figure 5

CMF's restructuring plan

(ITL billion)

	1997	1998	2000	2001	2002
Turnover	348	350	...	...	418
— Operating costs	(362)	(351)	...	...	(358)
Operating margin	(14)	(1)	...	...	60
Net result	(187)	(181)	...	...	34

(91) As part of the plan, CMF is to be privatised in accordance with the restructuring plan of its shareholder Poligrafico. To this end, the sale procedure has already started.

(92) As mentioned in recital 67, the Commission has to assess whether the restructuring plan submitted by the Italian authorities fulfils the five conditions laid down in the relevant guidelines.

(93) The first condition is that the measures must restore the long-term economic and financial viability of the recipient within a reasonable time scale and on the basis of realistic market assumptions.

(94) The Commission also notes that, as far as CMF is concerned, the restructuring measures are expected to return the company to sound profitability in 2002, the reference year, when CMF will have an estimated cash flow of around ITL 60 billion, sufficient to cover the company's investment and operating needs. Restructuring will be made possibly largely as a result of the measures envisaged by CMF to increase its efficiency and reduce its operating costs. For example, staff costs are estimated to fall from ITL 75 billion in 1997 to ITL 45 billion in 2002 (-40 %). These measures are largely dependent on the company's management and not on external market conditions.

(95) In addition, the Commission takes note of the Italian authorities' commitment to privatise CMF as soon as possible as part of Poligrafico's restructuring plan. It considers that the presence of private investors will underpin the company's profitability prospects.

(96) In this respect, it has to be noted that Poligrafico has already selected the adviser for the sale of CMF and that the privatisation procedure is about to start.

(97) The Commission takes note of the Italian authorities' commitment to implement in full the above restructuring plan according to the timetable indicated and to submit half-yearly progress reports starting from 30 June 2001.

(98) The second condition requires the avoidance of undue distortions of competition. Generally speaking, any aid granted by a State to a firm causes undue distortions of competition since it places that firm in a more favourable economic situation compared with its competitors. This effect therefore has to be offset by reductions in production capacity.

(99) In the present case, the restructuring plan shows that Poligrafico will significantly reduce its production capacity. In particular, as mentioned above, it will

terminate all its current production destined for the commercial market and limit itself to products and services for the public administration. This implies, at 1998 values, a loss of production of some ITL 170 billion, out of a total turnover of ITL 977 billion (17 %).

- (100) Moreover, Poligrafico will sell most of its subsidiaries, and in particular CMF, which is by far the largest in terms of production capacity and turnover. As shown in Figure 4, Poligrafico's turnover will fall to ITL 752 billion in 2002, from ITL 998 billion in 1996 and, most importantly, from a consolidated figure of ITL 1 530 billion that same year. This represents a reduction of about 25 % in terms of Poligrafico itself and of some 50 % in terms of the consolidated group. Even when it is borne in mind that Verres and Editalia will remain within the group, the reduction in capacity is still large and significant.
- (101) As mentioned above, Poligrafico will close its three plants and concentrate production at a single new facility. This may also result in a significant reduction in the group's available production capacity.
- (102) The Commission notes that CMF will significantly reduce its workforce (-40 %) and restructure its production facilities, resulting thereby significantly cutting back its production capacity. In particular, the company will close the new Rocchetta plant, which was built between 1991 and 1993 with a potential capacity of 150 000 to 200 000 tonnes. CMF will use the facility as a logistics terminal and gradually scale down its actual production: this will further reduce its potential production capacity.
- (103) Consequently, the Commission considers that, on the basis of the plan submitted by the Italian authorities, Poligrafico has already reduced and will substantially reduce its production capacity, both by concentrating production and selling off most of its subsidiaries, in particular CMF. In its view, therefore, the aid granted to Poligrafico will not unduly distort competition, provided that the measures in the restructuring plan are implemented as envisaged. Condition (ii) is therefore met.
- (104) Condition (iii) requires that aid be in proportion to the costs and benefits: if State aid is to be declared compatible, it must be limited to the strict minimum needed to finance the return to economic and financial viability and must not therefore be used for aggressive, market-distorting activities, except to the extent necessary to restore the firm to profitability.
- (105) As explained in paragraph 77, the restructuring plan envisages total financial costs of ITL 1 400 billion. Poligrafico will contribute significantly to the funding of the plan by means of the cash flow (ITL 100 billion over the whole period) generated by the rationalisation measures, by the sale of its assets and subsidiaries (ITL 120 billion) and the reduction in its working capital.
- (106) From the information provided by the Italian authorities, it appears that the funds received by Poligrafico will be used to reduce the company's financial debts, to reconstitute its net equity, to finance the restructuring of operations and to cover the social costs of redundancies.
- (107) At the end of 1998 Poligrafico had a negative equity of about ITL 600 billion (EUR 308 million) as a result of its 1997 and 1998 losses. These losses were due largely to inventory and assets write-offs and to the need to allocate financial resources to its subsidiaries, CMF in particular. The Commission considers that the amount granted by the State to Poligrafico is limited to the strict minimum necessary to cover the costs of its financial, organisational and industrial restructuring.
- (108) As mentioned above, Poligrafico will use the resources granted by the State, together with its own resources, to cover the social costs of redundancies (ITL 370 billion), to restructure its production sites (ITL 430 billion - EUR 221 million) and to reconstitute its equity (ITL 600 billion - EUR 308 million). At the end of the plan, Poligrafico will have a sound financial structure with a normal level of debt relative to its equity.
- (109) The Commission therefore considers that the aid to be granted to Poligrafico is in proportion to its restructuring costs and does not provide surplus resources which could be used to finance aggressive commercial practices. It also notes in this respect that Poligrafico will implement a separate accounting system which will separate the costs and revenues relating to products sold exclusively to the public administration from those relating to products sold to private sector customers. This will subsequently help to ensure that no

aid will spill over into the (limited) commercial activities that will remain once the plan has been implemented.

- (110) The Commission takes the view, therefore, that the aid granted did not bring Poligrafico and CMF any additional liquidity which was unrelated to the process of restructuring and might have helped to finance aggressive commercial activities or new investment not necessary for the restructuring.
- (111) With regard to condition (iii), it has been Stated above that the recipients will make a significant contribution to the financing of restructuring operations. As far as Poligrafico is concerned, it has been shown that the company will participate fully in its restructuring by providing some ITL 300 billion (EUR 154 million) of internal resources from the sale of assets, subsidiaries and industrial plants, as well as from the cash flow resulting from the rationalisation of its operations.
- (112) As far as CMF is concerned, the Commission notes that the company is to use for restructuring purposes, about ITL 150 billion (EUR 77 million) of internal resources out of an estimated future requirement of ITL 200 billion (EUR 103 million). CMF will also sell most of its subsidiaries (as mentioned earlier, several of them have already been sold or are being sold) and use the proceeds to finance its own restructuring.
- (113) The Commission considers that both companies will make a significant contribution to the financing of their respective restructuring plans. Condition (iii) is therefore met.
- (114) Lastly, the Italian Government has undertaken to ensure that the restructuring plan is fully implemented and to submit half-yearly reports on the economic and financial situation of Poligrafico and on the progress of the company's restructuring measures, in order to enable the Commission to monitor the implementation of the restructuring plans submitted. Conditions (iv) and (v) are therefore met.

VI. CONCLUSIONS

- (115) The Commission finds that Italy has unlawfully implemented the aid measures described above, in breach of Article 88(3) of the Treaty. However, it considers that the aid granted to Poligrafico is compatible with the common market under Article 87(3)(c) of the Treaty, subject to full implementation of the restructuring plan submitted to the Commission as part of this procedure,

HAS ADOPTED THIS DECISION:

Article 1

The aid which Italy has granted to Istituto Poligrafico e Zecca dello Stato, amounting to ITL 80 billion a year for the next twenty years (equivalent to ITL 1 100 billion at present value), is compatible with the common market subject to the conditions set out in Article 2.

Article 2

Italy shall implement the restructuring plan of Istituto Poligrafico e Zecca dello Stato and shall submit half-yearly reports on the progress of the restructuring plan, starting on 1 July 2001.

Article 3

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

Article 4

This Decision is addressed to the Italian Republic.

Done at Brussels, 25 April 2001.

For the Commission

Mario MONTI

Member of the Commission

COMMISSION DECISION

of 17 October 2001

on the State aid granted by Germany to Deckel Maho Seebach GmbH

(Notified under document number C(2001) 3062)

(Only the German text is authentic)

(Text with EEA relevance)

(2002/346/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

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

Whereas:

the aid. At the same time, it issued an information injunction pursuant to Article 10(3) of Council Regulation (EC) No 659/1999 of 22 March 1999 ⁽²⁾.

- (3) Germany reacted to the initiation of proceedings and the information injunction by letter dated 14 July 2000.
- (4) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* ⁽³⁾. The Commission called on interested parties to submit their comments on the measures.
- (5) The Commission received comments from interested parties. It forwarded them to Germany, which was given the opportunity to react; its comments were received by letter dated 10 August 2001.

1. PROCEDURE

- (1) On 12 February 1998, Germany notified a guarantee and a loan to be awarded to Deckel Maho Seebach GmbH ('DMS'). The complete notification was received on 27 February 1998. The notification also contained information concerning other measures already awarded, and the case was therefore registered as unnotified and the Commission sent Germany several sets of questions on 16 April 1998 and 14 August 1998. Germany replied on 30 June 1998 and 17 September 1998. A first meeting to discuss the case took place on 15 October 1998 between representatives of Germany and of the Commission. On 23 December 1998, the Commission sent Germany a reasoned outline of its concerns and requested that Germany respond. On 5 March 1999, Germany submitted a reply and tried to withdraw its notification concerning the guarantee and loan. On 23 September 1999, a meeting was held to discuss the case again. Further information was submitted on 2 November 1999.
- (2) By letter dated 17 May 2000, the Commission informed Germany that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of

2. DETAILED DESCRIPTION OF THE AID

2.1. The beneficiary of the aid

- (6) Article 87(1) of the EC Treaty refers to the concept of undertaking in defining the beneficiary of aid. As confirmed by the Court of Justice ⁽⁴⁾, an undertaking for the purposes of that provision does not have to be single legal entity, but may encompass a group of companies. The key criterion in determining whether there is an undertaking within the meaning of that provision is whether an 'economic unit' is involved. An economic unit may be composed of several legal persons. In the present case, the legal entity which is the beneficiary of the different financial measures is DMS. However, several elements indicate that the relevant undertaking is not confined to the legal person of DMS alone.

⁽²⁾ OJ L 83, 27.3.1999, p. 1.

⁽³⁾ See footnote 1.

⁽⁴⁾ Case 323/82 Intermills v Commission [1984] ECR 3809.

⁽¹⁾ OJ C 217, 29.7.2000, p. 20.

2.1.1. *Setting up and ownership of DMS*

(7) DMS is based in Seebach, Thuringia. It was established on 6 June 1994 under the legal vehicle 'Vermögensverwaltung SIDEED GmbH' and originally had its registered office in Frankfurt am Main. On 11 May 1995, the name of the company was changed to Deckel Maho Seebach GmbH and the registered office was transferred to Seebach.

— Deckel Maho Geretsried GmbH, Geretsried (100 % owned by Gildemeister AG),

— DMS, Seebach (62,5 % owned by Gildemeister AG),

— DMG Vertriebs und Service GmbH Deckel Maho Gildemeister, Bielefeld (100 % owned by Gildemeister AG),

(8) DMS was initially a subsidiary of Deckel Maho GmbH in Pfronten, which since the end of 1994 had belonged to Gildemeister AG. DMS took over essential economic assets from a company in liquidation, MAHO Seebach GmbH i.L. (MS). MS was a subsidiary of a company in bankruptcy, Deckel MAHO Aktiengesellschaft i.K (DM). MS was not itself in bankruptcy, but belonged to the bankruptcy estate of its parent company. The acquisition of the economic assets of MS by DMS occurred under the control of the bankruptcy administrator of DM and an independent auction company valued the goods.

— A & f Stahl und Maschinenbau GmbH, Würzburg (51 % owned by Gildemeister AG).

(12) In addition, there are a further six distribution and service companies in Germany, nine in the rest of Europe, seven in Asia and three in the United States. There are also five companies providing various 'technical services'.

(9) In October 1996, the Thüringer Industriebeteiligungsgesellschaft GmbH & Co. KG (TIB) took a stake amounting to DEM 6 million in DMS within the framework of a capital increase and became the second shareholder of the company with 37.5 % of the shares. In December 1998, Gildemeister AG acquired over 62.5 % of the shares in DMS, which became a direct subsidiary of Gildemeister AG.

(13) Until 1997, DMS was fully dependent on other companies of the Gildemeister group. It did not carry its own marketing and distribution activities. According to the Commission's information, it did not enter into contracts with parties outside the Gildemeister group. It acted as an extended work bench of Deckel MAHO GmbH Pfronten within the framework of supply and performance contracts. According to Germany, DMS goods were sold at arm's length.

2.1.2. *Integration of DMS into the Gildemeister group*

(10) Since its creation, DMS has belonged to the Gildemeister group. The Gildemeister group companies are ultimately owned by Gildemeister AG, which is based in Bielefeld, Germany. The Gildemeister group designs, manufactures and exports precision machine tools. It was involved in a restructuring process until the end of 1997. In the context of this restructuring, the group received state aid, which the Commission decided on in its decision of 18 November 1997 (hereinafter the 1997 decision) ⁽⁵⁾. In 1998, it employed 2 500 people and had a turnover of over DEM 1 billion.

(14) One of the measures planned and implemented as part of the restructuring of the Gildemeister group was the reorganisation of the Deckel MAHO companies into independent profit centres. DMS was given more independence at the end of 1997. However, the information contained in the group's 1998 annual report shows that DMS is still very much economically integrated into the Gildemeister group.

(11) According to the group's own company report for 1998, the group consisted of Gildemeister AG and the following companies and their subsidiaries:

— Gildemeister Drehmaschinen GmbH, Bielefeld (100 % owned by Gildemeister AG),

— Deckel Maho GmbH, Pfronten (100 % owned by Gildemeister AG),

(15) The Gildemeister group's annual report describes the group as composed of four production facilities, one of them being DMS. DMS is also described as a production facility for turning and milling machines together with Deckel Maho Geretsried GmbH and Gildemeister Drehmaschinen GmbH. According to the report, all companies are strictly managed as profit centres in order to achieve maximum performance output. To allow the companies to fully concentrate on their core activities, Gildemeister relies on an integrated and as far as possible uniform EDP structure for all administrative work. Interdisciplinary key functions are handled by centralised agencies. This includes controlling and finance functions as well as personnel management and marketing.

⁽⁵⁾ OJ C 181, 12.6.1998, p. 4.

(16) Moreover DMS is described as supplying the other plants of the Gildemeister group with high-quality products at marketable prices and as securing the group's know-how in the machining sector. The group is organised according to the concept of insourcing of specific quantities. This shows that although functioning as an independent profit centre, DMS is very much integrated in the Gildemeister group. Moreover, all profits and losses of DMS are directly transferred to Gildemeister AG in accordance with an agreement for the transfer of profits.

(17) In light of the above, the Commission concludes that the whole Gildemeister group must be regarded as the beneficiary of the aid. In view of the ownership structure and the economic integration of DMS into the Gildemeister group, DMS cannot be considered to be an autonomous economic unit. Rather, the Gildemeister group forms a single economic unit. DMS cannot be considered in isolation due to its integration into the group. Therefore the beneficiary of the measures has to be defined as the whole of the Gildemeister group. This is consistent with the Commission's 1997 decision.

2.1.3. *The economic situation of the aid recipient*

(18) The financial situation of the Gildemeister group from 1994 to 1999 can be summarised as follows:

Table 1

(DEM million)

	1994	1995	1996	1997	1998	1999
Total turnover	482	732	830	875	1 141	1 369
Personnel costs	167	237	238	248	285	285
Operating result	-42	-6,6	14	34	71	91
Financial result	-16	-22	-20	-22	-20	-23
Net income/loss	-41	-23	7,6	12,5	32	64

(19) As from 1991, the Gildemeister group felt the effects of the deep crisis experienced by the machine-tool industry. In 1992, the Gildemeister group recorded losses of over DEM 70 million, its losses in 1991 having amounted to DEM 29 million. Its turnover was DEM 378 million in 1992 and DEM 254 million in 1993. In 1993, the group was still making losses, and a pool of banks, including one of Gildemeister AG's shareholders, the Westdeutsche Landesbank (WestLB), waived claims and granted new loans to the Gildemeister group. These measures in favour of the whole Gildemeister group were the subject of the Commission's 1997 decision. The restructuring period to which that decision relates was from 1994 to 1997. Germany has confirmed that the restructuring ended at the end of 1997 as planned. The Commission can therefore already conclude that the

Gildemeister group can be regarded as a company in difficulty until the end of 1997, since it was involved in restructuring.

(20) From 1998 onwards, the group can no longer be regarded as a company in difficulty. The restructuring was successful and has led to the restoration of the viability of the company.

2.1.4. *The restructuring of the group*

(21) As already presented in the 1997 decision, the restructuring plan of the Gildemeister group aimed at concentrating activities and production programmes, sites and companies and at making drastic staff cutbacks. The following objectives were to be achieved:

— trimming of production,

— combining of various production sites into a single lathe production at Bielefeld,

— restructuring of marketing,

— closure of production capacity in certain plants,

— substantial reduction in the workforce.

(22) The plan provided for three stages. During the first stage of the consolidation strategy, lathe production at the Hanover site was halted and the production plant closed. As a result, some 20 000 m² of production plant and some DEM 90 million in turnover were eliminated from the market. At the beginning of 1993, the heavy machinery division was sold, under a management buy-out, to the previous leading manufacturer of such products. As a result, the profit-and-loss account of Gildemeister AG for 1992 was able to avoid outgoings of some DEM 4 million. The remaining lathe activities of the Gildemeister group were transferred to a newly established firm, Gildemeister Drehmaschinen GmbH. At the same time, production capacity and personnel were substantially reduced.

(23) In November 1992, Gildemeister AG sold the shares it had in the company Witzig & Frank Turmatic GmbH (WFT) GmbH. This sale achieved a revenue of DEM 25 million, which was used to finance the restructuring.

(24) In addition to the abovementioned measures, Gildemeister established a new distribution firm, Deckel Gildemeister Vertriebs GmbH, together with Friedrich Deckel AG.

(25) The second stage of the restructuring programme comprised the implementation of the following measures:

- optimisation of manufacturing processes within the firm, with a switch to a modern process-oriented type of team organisation,
- renewal of the product range,
- production, organised as 'profit centre assembly' for the relevant product groups, was made more efficient, slimmed down and brought closer to the market,
- further cost reduction was achieved through the optimisation of procurement and logistics.

(26) The third stage of the restructuring process comprises the reorganisation of the data-processing system, further measures related to logistics and the sale of unneeded assets in 1997.

(27) The restructuring of the Gildemeister group also comprised the reorganisation of the Deckel Maho subgroup. In particular, DMS was organised as an independent profit centre with its own product area and separate accounting.

(28) The restructuring of the Gildemeister group involved a substantial reduction in the group's production capacity. All in all, the surface area required for lathes was reduced from 42 500 m² to 29 400 m² (a 31 % reduction). The consolidation measures have been accompanied by a substantial cutback in the workforce. Total employment in lathe production was reduced; compared with 1991, the reduction in capacity for the production of lathes amounts to more than 75 %.

(29) The restructuring of the Gildemeister group was completed at the end of 1997 as planned.

2.2. Description of the State measures

2.2.1. Aid for MS ('Measure A')

(30) At the time of the initiation of proceedings, the Commission did not have any information as to the nature, level and source of the cash injections received by MS. In its reply to the initiation of proceedings and to the information injunction, Germany explained that these cash injections were made by the parent company of MS, Deckel MAHO AG, in the form of several capital increases.

(31) Germany confirmed that MS did not receive any other State aid in addition to investment aid covered by approved aid schemes.

2.2.2. Aid for DMS

(32) The relevant measures were taken by the TIB and the Thüringer Aufbaubank (TAB) ⁽⁶⁾, both state bodies. There are two categories of measures: the measures already taken between 1994 and 1996 when the Gildemeister group was undergoing restructuring (the 'restructuring measures') and the 'new' measures, planned by Germany as a replacement for and extension of the 'restructuring measures'. It is to be noted that measures B and C consist of extensions of two loans granted by the TAB in 1994 and assessed by the Commission as not being aid in its 1997 decision. The relevant measures are:

(33)

Table 2

'Restructuring measures'				
	Form	Source	DEM million	Conditions
B	Extension of loan of 31 August 1994	TAB	8,5	<ul style="list-style-type: none"> — extended annually since 1995 — interest rate: (6,5 % — 8 %) — secured through: <ul style="list-style-type: none"> — first mortgage on the company land, assignment as security of the production machinery and a letter of intent from Gildemeister AG — purpose: financing of the purchase price of equipment and stocks

⁽⁶⁾ The TAB's and TIB's activities are currently being examined by the Commission under the following case numbers: N 529/99 for the TAB and C 17/99 (ex NN 120/98, N 804/97) for the TIB.

'Restructuring measures'				
	Form	Source	DEM mil- lion	Conditions
C	Extension of loan of 30 November 1994	TAB	15,0	<ul style="list-style-type: none"> — extended annually since 1995 — interest rate: (6,5 % — 8 %) — secured through: same as B — purpose: financing of investment (purchase price of land and buildings)
D	Loan and extension	TAB	5,0	<ul style="list-style-type: none"> — granted on 13 June 1995 — extended annually since 1995 — to finance working capital — interest rate (6,5 % — 8,5 %) — secured through: same as B
E	Loan and extension	TAB	3,5	<ul style="list-style-type: none"> — granted on 15 August 1995 — extended annually since 1995 — to finance working capital — interest rate: (6,5 % — 8,5 %) — secured through: same as B
F	Loan and extension	TAB	2,0	<ul style="list-style-type: none"> — granted on 30 November 1995 — extended annually since 1995 — interest rate: (6,5 % — 7,75 %) — secured through: same as B — to finance working capital
G	Cash contribution	TIB	6,0	<ul style="list-style-type: none"> — made in June 1996 — cash for a 37,5 % holding in DMS
H	Loan	TIB	4,0	<ul style="list-style-type: none"> — granted in June 1996 — sleeping partnership — interest rate: 6,5 %

(34) As shown in Table 2, the TAB granted loans in the amount of DEM 34 million in the years 1994/1995. According to Germany, they were granted on market conditions and their extension was also based on market conditions. Germany indicated that DMS has already paid to TAB interest in the amount of DEM 13.4 million and that, at the time of extension, transaction processing fees on market terms were imposed on DMS.

(35) As far as the TIB measures are concerned, Germany wrote that the reason for the application by DMS for a TIB holding in DMS was the liquidity shortage due to the greater working capital requirement during the building-up of activity. Before taking a holding in DMS, the TIB asked a consultancy to report on the viability of the company and on the prospects attaching to a holding. PME Projekt Management Eschbach GmbH

(PME) produced a report in June 1996. According to the report, DMS faced several difficulties due to its new creation and a lack of economic autonomy. In particular, PME noted that essential functions enabling the company to be independent were missing. A condition for a good economic return on the holding was the setting-up of a sufficiently independent undertaking. According to PME, if the shareholders of DMS committed themselves to transforming DMS into an independent profit center and if they could guarantee that they would have the right to decide on the essential aspects of the company, such as product development, the conditions for a holding by a third party in the company could be deemed to be fulfilled. According to Germany, these conditions were fulfilled, since from the end of 1996 several measures were undertaken to transform DMS into an independent undertaking.

(36) In addition to the 37,5 % holding in DMS, the TIB acquired a sleeping partnership in DMS in the amount of DEM 4 million. The interest rate is of 6,5 % per

annum and the TIB also has a participation in the profit of the company as long as it is over DEM 500 000.

(37)

Table 3

'New measures'				
	Form	Source	DEM mil- lion	Conditions
I	Loan	Consortium	10,0	<ul style="list-style-type: none"> — granted in 1998 — three sources: TAB (3.4), Deutsche Genossenschaftsbank (3.3), Landesbank Hessen-Thüringen (3.3) — term: 5 years — interest rate: 7,5 % p.a. — security: same as B — purpose: financing of further expansion of turnover and building-up of distribution network
J	Loan	Consortium	34,0	<ul style="list-style-type: none"> — to replace measures B-F — three sources: Deutsche Genossenschaftsbank (15); Landesbank Hessen Thüringen (15) and TAB (14) — same conditions as B — not yet granted
K	Guarantee	TAB	35,2	<ul style="list-style-type: none"> — 80 % of DEM 44 million for measures I and J — application withdrawn on 17.7.2000

(38) According to Germany, loan I was granted on market conditions. The partners in the consortium have concluded a security pool contract in order to secure the loan. The mortgage amount serving as security was increased from DEM 35 million to DEM 45 million.

(39) Measure J is intended to replace the TAB loans amounting to DEM 34 million. The total amount of the TAB loans is to be replaced on the same conditions as measure I. This replacement is supposed to lead to a decrease in the above-average interest rate on the TAB loans granted in 1994 and 1995. According to Germany, DMS/Gildemeister AG accepted this high interest rate only because of this new financing possibility.

(40) The application for measure K was withdrawn on 17 July 2000.

(41) In addition to these measures, DEM 8.3 million was granted to DMS in the form of investment grants and investment allowances on the basis of approved aid schemes (7).

(7) Gemeinschaftsaufgabe 'Verbesserung der regionalen Wirtschaftsstruktur' (Joint Federal Government/Länder programme for improving economic structures). Sonderprogramm 'Aufschwung Ost' (Special programme for economic recovery in eastern Germany). Thüringen Förderprogramm für Forschung (Thuringia research aid programme).

2.3. The relevant market

(42) The relevant product market is that for the development and production of milling and drilling machinery. The relevant geographic market is worldwide and thus extends across all the Member States.

(43) The machinery and equipment sector has to contend with sharper cyclical fluctuations than most other branches of industry. That is due to its high degree of dependence on the investment activity of enterprises, which react very sensitively to developments in the economy as a whole.

(44) The vigorous investment boom of 1989 to 1990 was followed, from 1991 to 1993, by a marked falling-off in investment, in the course of which demands for machinery was down sharply. The recession in mechanical engineering, which came to an end in 1993, hit the industry heavily. In order to survive, the industry has undergone rationalisation in order to reduce costs, particularly through automation.

(45) From 1994 onwards, market conditions improved. Investment activity recovered outside Europe from 1993. From the beginning of 1994 onwards, demand also stabilised in the Member States and in the rest of western Europe, with the result that total new orders for machinery and equipment rose again.

(46) However, in the second half of 1995, the propensity to invest and also to consume fell off surprisingly sharply in most Member States and orders from the Community began to decline. At the same time, the growth in demand for machinery from third countries slowed appreciably. The process of rationalisation was pursued at the end of the 1990s, with the manufacturers of machinery and equipment looking increasingly towards automated solutions.

(47) Germany states that in 1998 the market on which DMS operates was characterised by a growing price war and that in the first part of 1997 the market underwent a mild recession.

2.4. Grounds for initiating the proceedings

(48) Despite several requests for information, Germany had failed to submit satisfactory information enabling the Commission to decide on the nature of the financial measures in support of DMS. In particular, several points remained open on the identity and financial condition of the beneficiary and on the measures granted to MS and DMS.

(49) In particular, it appeared to the Commission that DMS might not be the entire relevant undertaking in this case, both because of its relationship to a previously founded legal person, MS, and because of its relationship with other parts of the Gildemeister group.

(50) As the full extent of the relevant undertaking was unclear, it was also unclear to what extent data concerning the performance of DMS alone could be taken into account as evidence of the state of the relevant undertaking as a whole. On DMS, moreover, the information was only limited and selective.

(51) The Commission had also doubts as to the compatibility of the different measures with the common market. The information concerning the measures granted to MS and DMS was incomplete. The purpose and terms of the measures was often not specified and it was not always clear whether these measures had already been granted or not.

(52) The Commission concluded that on several points assessment of the measures was difficult because of inadequate information submitted by Germany. Several items of information submitted by Germany led the Commission to believe that the beneficiary of the measures may have been in difficulties at the relevant time and that aid may be involved. The Commission

therefore decided to initiate proceedings against measures A to K and sent an information injunction to Germany.

3. COMMENTS FROM INTERESTED PARTIES

(53) The Commission received a letter from Gildemeister AG on 24 August 2000 commenting on the initiation of proceedings. DMS's parent company referred to the comments by Germany and wished to recall certain facts about DMS, its economic situation and the measures in support of it.

(54) Concerning DMS, Gildemeister AG wrote that the company was legally independent from both MS and Deckel Maho AG i.K. Gildemeister AG believes that no notifiable aid was granted to DMS.

(55) Gildemeister AG pointed out that DMS had made losses only when it started its activity. After two years, it was already showing some profits, and in 1998 it had a turnover profitability of 8 %.

(56) According to Gildemeister AG, only DMS benefited from the various measures and no other company of the Gildemeister group. All the companies of the group are organised as independent profit centres with independent accounting. Cross-subsidisation for the benefit of Gildemeister AG is therefore excluded.

(57) Gildemeister AG stressed the fact that the TIB acquired a holding in DMS only after having checked the profitability of the investment. The TAB loans were granted on market conditions, and since the company has to be considered as not being in difficulties, these measures do not constitute aid.

4. COMMENTS FROM GERMANY

(58) In its comments of 14 July 2000 on the initiation of proceedings, Germany insisted that DMS should be regarded as a newly created company. It gave details on the creation and development of DMS as well as on its legal links with MS, Deckel Maho Pfronten GmbH and Gildemeister AG. It also provided data on DMS's economic situation and concluded that DMS was not a company in difficulties.

- (59) At the Commission's request, Germany provided an explanation of the various measures in support of MS and DMS. According to Germany, the measures by the TAB and the TIB in support of DMS do not constitute state aid, since they were granted on market conditions to a company which was not in difficulties. Germany also gave details on the interest already paid by DMS to the TAB and to the TIB.
- (60) Germany recalled that, at the time of the new creation of DMS, Gildemeister AG was in restructuring. The Commission decided at the time that the restructuring aid for Gildemeister was compatible with the common market. Germany confirmed that the restructuring ended at the end of 1997 as planned.
- (61) Germany emphasised that any spillover effect of the financial measures in support of DMS to other companies of the Gildemeister group could be excluded. According to Germany, the public measures in support of DMS could only benefit DMS since they were applicable to undertakings in Thuringia. The Thuringia authorities had taken the necessary measures to ensure that the purpose of the measures was complied with. Moreover, as DMS gradually gained in independence, all the transactions between DMS and other companies of the Gildemeister group were carried out on market conditions. All companies of the Gildemeister group are organised as independent profit centres.
- (62) Finally, Germany wrote that the success of DMS had been made possible only thanks to the strong commitment of the Gildemeister group. Between 1994 and the end of 1999, the Gildemeister group invested DEM 41,3 million in DMS and participated significantly in the development of the business plan and in the development of new products.

5. ASSESSMENT OF THE AID

5.1. Are any of the measures A to K aid within the scope of Article 87(1) of the Treaty?

- (63) 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 shall, in so far as it affects trade between Member States, be incompatible with the common market'.

5.1.1. 'Aid granted through State resources'

- (64) Measure A consisted of cash injections made by Gildemeister AG into MS. Since this measure does not derive from State resources it is not aid within the meaning of Article 87(1) of the EC Treaty.
- (65) Measures B to F and measures G and H were granted by the TAB and the TIB, which are both State-owned. Measure I was granted by a consortium of banks. The TAB and the Landesbank Hessen-Thüringen (the Landesbank) are public financial institutions. The Deutsche Genossenschaftsbank (DG Bank) has been a stock corporation since 1998. For the time being, the shares are not traded or quoted on the stock-exchange. More than 90 % of DG Bank's share capital is directly or indirectly in the hands of cooperative undertakings or holding companies. The loan granted by DG Bank cannot therefore be deemed to derive from state resources. Measure J is to be granted by the same consortium. Out of DEM 34 million, DEM 29 million derive from State resources.
- (66) The application for measure K was withdrawn and is therefore no longer the subject of this decision.

5.1.2. 'Distorts or threatens to distort competition by favouring certain undertakings' and 'affects trade between Member States'

- (67) The beneficiary of the aid has to be defined as the whole Gildemeister group, since the group appears to be a modular construct with no part functioning as a stand-alone economic unit.
- (68) In order to decide whether the measures granted by the TIB, the TAB and the Landesbank favour their beneficiary within the meaning of Article 87(1), it is necessary to examine the economic situation of the beneficiary at the time of the grant. The Commission notes that although the TIB, the TAB and the Landesbank are State bodies, they can act as private investors. A key issue in deciding whether they acted as such is whether the undertaking receiving the measures was in difficulties. If it was in difficulties, a measure can be deemed to be aid. If the recipient was not in difficulties, then a measure is aid only to the extent that it deviates from market conditions.
- (69) From 1994 until 1997, the Gildemeister group was undergoing restructuring. It made losses in 1994 and 1995. Although it achieved a profit from 1996 on, the group has to be regarded as being in difficulties as long as its restructuring financed partly through state aid had not been completed, i.e. until the end of 1997. As from

1998, the group can be regarded as no longer being in difficulties.

- (70) As far as trade between Member States is concerned, such trade is likely to be affected since the Gildemeister group is active on a market extending across borders.

5.1.2.1. Measures B to F

- (71) Measures B and C are extensions of two loans originally granted in 1994. The original loans amounted to DEM 23,5 million. Their interest rate was 8 % and they were secured through the land and production equipment of the company. They were due to be paid back on 31 March 1995. In its decision to initiate proceedings against State aid for Gildemeister AG ⁽⁸⁾ (1996 decision), the Commission took the view that the original loans were not aid, but in line with private investor behaviour. Germany asserts that the extension of the original loans as well as the granting of additional loans (measures D to F) are also in line with private investor behaviour.

- (72) Although the loans extended under measures B and C were held by the Commission in its 1996 decision not to be aid, the extension of the term of these loans may constitute an additional economic benefit going beyond that of the original loan. If this additional benefit is provided by a state body without appropriate commercial return then the extension may constitute aid even though the original loans may not have been aid. Similar considerations apply to the granting of additional loans.

- (73) Measures B to F amount to DEM 34 million. They have all been extended annually since 1995. No reason was stated by Germany to explain why the two original loans had to be extended and why additional loans had to be granted. Germany only mentioned that the loans were granted to finance investment, to finance working capital and to finance the creation of a distribution structure and that they were seen as long-term loans. Despite the extension and the additional financial resources granted to the beneficiary, the terms of the loans and in particular the interest rate remained similar with an interest rate between 6,50 % and 8,50 %.

- (74) Measures B to F were granted to DMS at a time when the beneficiary was in difficulties and embarked on

restructuring. The terms of these loans correspond to market conditions applied to healthy companies. The Commission notes that, in accordance with the Commission notice on the method for setting the reference and discount rates ⁽⁹⁾, to exclude the presence of aid, the reference rate should be increased by at least 4 % in the case of companies in difficulty.

Table 4

	Interest rate		Reference rate
Measure B	8 %	from 31.8.1994	7,62 %
	7,50 %	from 1.10.1995	6,99 %
	6,50 %	from 1.1.1996	6,99 %
	7,75 %	from 1.1.1998	5,94 %
Measure C	8 %	from 30.11.1994	7,62 %
	7,50 %	from 1.10.1995	6,99 %
	6,50 %	from 1.1.1996	6,99 %
	7,75 %	from 1.1.1998	5,94 %
Measure D	8,50 %	from 23.6.1995	8,28 %
	7,50 %	from 1.10.1995	6,69 %
	6,50 %	from 1.1.1996	6,99 %
	7,75 %	from 1.1.1998	5,94 %
Measure E	8,50 %	from 26.8.1995	6,99 %
	7,50 %	from 1.10.1995	6,99 %
	6,50 %	from 1.1.1996	7,33 %
	7,75 %	from 1.1.1998	5,94 %
Measure F	7,50 %	from 20.11.1995	6,99 %
	6,50 %	from 1.1.1996	7,33 %
	7,75 %	from 1.1.1998	5,94 %

- (75) As Table 4 shows, the interest rates of the loans were below or just above the reference rate for healthy companies. The Commission cannot conclude that a market economy investor would have provided such financial support even on market conditions to a company in difficulties. In view of the economic situation of the beneficiary, it must be concluded that measures B to F were not granted in line with market investor behaviour and therefore favour their beneficiary. They therefore constitute aid within the meaning of Article 87(1) of the EC Treaty.

⁽⁸⁾ OJ C 101, 3.4.1996, p. 7.

⁽⁹⁾ OJ C 273, 9.9.1997, p. 3.

5.1.2.2. Measures G and H

- (76) Both measures G and H were granted by the TIB. When the TIB acquired a holding in DMS and granted the beneficiary a cash contribution of DEM 6 million and a loan of DEM 4 million in June 1996, the relevant undertaking was in difficulties. In its decision of 8 August 1994 approving programme N 183/94 on the TIB's activities, the Commission concluded that holdings in companies in difficulty constitute State aid within the meaning of Article 87(1) of the EC Treaty. Such aid can be considered compatible with the common market if certain conditions are fulfilled. In the case of DMS, Germany failed to fulfil its obligation of providing prior notification of holdings in large companies. These aid measures and their compatibility with the common market must therefore be assessed ad hoc.
- (77) Germany submitted a report drawn up by PME, intended to examine the profitability of a holding in DMS. According to Germany, this report shows that DMS was not a company in difficulty within the meaning of the Community guidelines on State aid for rescuing and restructuring firms in difficulty⁽¹⁰⁾ (1994 guidelines) and that the TIB behaved as a private investor with the aim of obtaining profits.
- (78) The Commission notes that the report by PME only looked at DMS and its then parent company Deckel Maho Pfronten. It did not consider in detail the overall situation of the Gildemeister group. However, in highlighting the difficulties faced by DMS, PME stressed the fact that DMS was not an independent and autonomous undertaking and that one of its problems was its lack of independence and its vulnerability caused by the difficulties faced by the other group companies. These difficulties had to be added to the intrinsic difficulties faced by DMS itself. In particular, it concluded that acquiring a holding in DMS would be a sound economic decision only if the guarantee was there that DMS would be able to decide on its own development.
- (79) The conclusion of this report reinforces the Commission's analysis according to which DMS cannot be seen in isolation from the Gildemeister group and that it has therefore to be regarded as being in difficulty at the time the TIB acquired a holding in its capital.

5.1.2.3. Measures I and J

- (80) Measure I was granted in 1998 at time where the beneficiary was not in difficulties. The terms of this loan are in line with market conditions since its interest rate is above the reference rate for 1998 and since the loan can be deemed to be sufficiently secured through the land and equipment of the company. The Commission can therefore conclude that the beneficiary did not derive any advantage and that this measure does therefore not constitute State aid within the meaning of Article 87(1) of the EC Treaty.
- (81) Measure J has not yet been granted. Its conditions are similar to the conditions of I and the interest rate has remained above the reference rate. Since the beneficiary is no longer a company in difficulty, it may be concluded that the public banks in the consortium are acting as private investors and that measure J is therefore not aid within the meaning of Article 87(1) of the EC Treaty.

5.2. Derogation under Article 87(3)(c) of the EC Treaty

- (82) The aid falls to be assessed as ad hoc aid by the Commission. Article 87(2) and (3) of the EC Treaty provide for exceptions to the general ban on aid laid down in Article 87(1).
- (83) The exemptions in Article 87(2) of the EC Treaty do not apply in the present case because the aid measures do not have a social character and are not granted to individual consumers, nor do they make good the damage caused by natural disasters or exceptional occurrences, nor is the aid granted to the economy of certain areas of the Federal Republic of Germany affected by its division.
- (84) Further exemptions are provided for in Article 87(3)(a) and (c) of the EC Treaty. As the primary objective of the aid is not regional, but concerns the restoration of long-term viability of an undertaking in difficulty, only the exemptions of Article 87(3)(c) of the EC Treaty apply. Article 87(3)(c) provides for the authorisation of State aid granted to promote the development of certain economic sectors, where such aid does not adversely affect trading conditions to an extent contrary to the common interest. For its assessment of rescue and restructuring aid, the Commission has issued special guidelines. Following examination, the Commission

⁽¹⁰⁾ OJ C 368, 23.12.1994, p. 12.

considers that none of the other Community guidelines, such as those for research and development, the environment, small and medium-sized enterprises, or employment and training, could apply here.

- (85) In accordance with point 101 of the Community guidelines on State aid for rescuing and restructuring firms in difficulty ⁽¹¹⁾ (1999 guidelines), the Commission will examine the compatibility with the common market of any rescue and restructuring aid granted without its authorisation 'a) on the basis of these guidelines if some or all of the aid is granted after their publication in the *Official Journal of the European Communities*; b) on the basis of the guidelines in force at the time the aid is granted in all other cases.' Since, according to the information available, all the aid was granted before the publication of the 1999 guidelines, the 1994 guidelines apply.
- (86) The aid to DMS was granted in the context of the restructuring of the whole Gildemeister group, the plan for which was submitted by Germany in 1996.

5.2.1. Restoration of viability

- (87) The granting of restructuring aid requires a feasible, coherent and far-reaching restructuring plan capable of restoring the long-term viability of the firm within a reasonable time span and on the basis of realistic assumptions. Restructuring aid should normally only need to be granted once.
- (88) The Commission already concluded in its 1997 decision that the plan was capable of restoring the long-term viability of the group. The restructuring was based on internal as well as external measures as described in point 2.1.4. The information received through the annual reports submitted by Germany confirms the full and successful implementation of the restructuring plan. The financial measures provided for in the plan were confirmed by the actual results which have been achieved since the restructuring was successfully completed at the end of 1997. The Gildemeister group is now making profits.

5.2.2. Avoidance of undue distortion of competition

- (89) The restructuring must contain measures taken to offset as far as possible adverse effects on competitors,

otherwise the aid involved is contrary to the common interest and not eligible for exemption pursuant to Article 87(3)(c) of the EC Treaty.

- (90) If the undertaking operates on a Community market on which an objective assessment of demand and supply shows that there is a structural excess of production capacity, the restructuring plan must make a significant contribution, proportionate to the amount of aid received, to the restructuring of the industry serving the relevant market by irreversibly reducing or closing capacity.
- (91) The machine-tools industry went through a recession in the course of the nineties and was characterised by slight over-capacity. The restructuring of the Gildemeister group involved a substantial reduction in the group's production capacity.
- (92) The Commission concluded in its 1997 decision that the aid measures in support of the Gildemeister group would not result in an undue distortion of competition. The 1997 decision concerns the restructuring of the whole of the Gildemeister group, including DMS. The capacity reduction which was assessed in the 1997 decision concerns the reduction of the capacity of the whole group. It can therefore be concluded that the finding of the 1997 decision is not altered by the additional aid measures, in view of the important capacity reduction resulting from the restructuring.

5.2.3. Aid limited to the minimum

- (93) The amount of aid must be limited to the strict minimum required to enable restructuring to be undertaken in the light of the existing financial resources of the company and its shareholders. In addition, the beneficiary must make a substantial contribution to the restructuring costs from its own resources or external financing at market conditions. Moreover, the way in which the aid is granted must be such as to avoid providing the company with surplus cash which could be used for aggressive, market-distorting activities not linked to the restructuring process.
- (94) In its 1997 decision, the Commission identified the following measures as being aid:

1. a guarantee granted by the *Land* of North-Rhine Westphalia on loans of DEM 20 million was deemed to fall under a previously approved scheme,

⁽¹¹⁾ OJ C 288, 9.10.1999, p. 2.

2. the financing by the *Land* of Bavaria of a one percentage point interest rate reduction on a 9,25 % interest rate on a DEM 15 million subordinated five-year loan⁽¹²⁾ granted by the Bayerische Landesanstalt für Aufbaufinanzierung ('LfA') and
3. guarantees provided by the LfA and by the TIB to WestLB in respect of its placement guarantee for Gildemeister AG's October 1994 DEM 34 million capital increase.

88(3) of the Treaty. However, in view of the foregoing, the Commission concludes that, since the aid complies with the 1994 guidelines, it is compatible with the common market,

HAS ADOPTED THIS DECISION:

Article 1

(95) In addition to these measures, the following measures were identified as aid in the course of the proceedings:

1. extension of existing loans and grant of additional loans by the TAB in the amount of DEM 34 million (measures B to F), and
2. cash contribution and dormant equity holding of the TIB in the amount of DEM 10 million (measures G and H).

1. The loan amounting to DEM 10 million (referred to as measure I above), which Germany granted in 1998 to Deckel Maho Seebach GmbH (DMS), does not constitute aid within the meaning of Article 87(1) of the EC Treaty.

2. The loan amounting to DEM 34 million (referred to as measure J above), which Germany intends to grant to DMS, does not constitute aid within the meaning of Article 87(1).

(96) The 1997 decision concluded that since the restructuring was financed essentially by financial resources raised by the group itself, the aid received was limited to the minimum needed. Among the financial resources raised by the Gildemeister group, the 1997 decision identified a private investor contribution in the amount of DEM 126 million⁽¹³⁾. After adding the additional aid measures in the amount of DEM 44 million to the aid measures already assessed under the 1997 decision, the total aid amounts to DEM 98,4 million. Consequently, the additional measures do not change the assessment made in the 1997 decision, since the private contribution to the restructuring can still be estimated at more than 55 % of the total financing.

3. The aid consisting of the following measures and amounting to DEM 44 million, which Germany granted to DMS, is compatible with the common market pursuant to Article 87(3)(c):

(a) the extension (referred to as measure B above) of the loan of DEM 8.5 million granted by the Thüringer Aufbaubank to DMS on 31 August 1994 to cover operating costs;

(b) the extension (referred to as measure C above) of the loan of DEM 15 million granted by the Thüringer Aufbaubank to DMS on 30 November 1994 to finance a purchase price;

(c) a loan of DEM 5 million (referred to as measure D above) granted by the Thüringer Aufbaubank to DMS on 13 June 1995 to finance working capital;

(d) a loan of DEM 3,5 million (referred to as measure E above) granted by the Thüringer Aufbaubank to DMS on 15 August 1995 to finance working capital;

(e) a loan of DEM 2 million (referred to as measure F above) granted by the Thüringer Aufbaubank to DMS on 30 November 1995 to finance working capital;

(f) a cash contribution of DEM 6 million (referred to as measure G above) made by the Thüringer Industriebeteiligungsgesellschaft to DMS in June 1996;

5.2.4. Full implementation of the restructuring plan

(97) A company in receipt of restructuring aid must fully implement the plan submitted and approved by the Commission. Germany has submitted annual reports to the Commission and has confirmed that the restructuring was successfully completed at the end of 1997.

6. CONCLUSION

(98) The Commission finds that Germany has unlawfully implemented the aid in question in breach of Article

⁽¹²⁾ The aid element is to be estimated at some DEM 361 500.

⁽¹³⁾ For further details, please refer to the 1997 decision.

(g) a loan of DEM 4 million (partiarisches Darlehen) (referred to as measure H above) granted by the Thüringer Industriebeteiligungsgesellschaft to DMS in June 1996.

Done at Brussels, 17 October 2001.

Article 2

This Decision is addressed to the Federal Republic of Germany.

For the Commission
Mario MONTI
Member of the Commission

COMMISSION DECISION**of 21 November 2001****on the tax-free provisions introduced by France for setting up establishments abroad**

(Notified under document number C(2001) 3451)

(Only the French text is authentic)**(Text with EEA relevance)**

(2002/347/ECSC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

Having called on interested parties to submit their comments pursuant to the provisions cited above ⁽²⁾ and having regard to those comments,

Whereas:

1. PROCEDURE

- (1) In connection with the procedure initiated under Article 6(5) of Decision No 2496/96/ECSC with regard to Article 34 of Spanish Law No 43/1995 ⁽³⁾, an intervening party drew the Commission's attention to the tax provisions on the setting-up by French firms of establishments abroad contained in Articles 39gA and D of the French General Tax Code (CGI).
- (2) By letters of 3 May and 14 June 2000 the Commission invited France to inform it whether any ECSC firms had benefited under the provisions and to send it all relevant information enabling it to assess the measures under Article 4(c) of the ECSC Treaty.
- (3) By letter of 28 November 2000 the Commission informed France of its decision to initiate the procedure provided for in Article 6(5) of Decision No 2496/96/ECSC in respect of the aid.

⁽¹⁾ OJ L 338, 28.12.1996, p. 42.⁽²⁾ OJ C 160, 2.6.2001, p. 12.⁽³⁾ OJ C 329, 31.10.1997, p. 4.

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

(5) The Commission received comments from the UK authorities which it forwarded to France for further comment.

2. DETAILED DESCRIPTION OF THE AID

- (6) Articles 39gA and D of the CGI enable a firm temporarily to deduct from its tax base either the losses incurred by its subsidiaries or certain establishments located abroad, which losses in the case of commercial or service investments are restricted to the amount of the investment and subject to a possible ceiling or, in the case of industrial or agricultural investments, part of the investments made by those subsidiaries and establishments.
- (7) In the case of commercial investments, the foreign operation's business must be the marketing abroad of goods produced principally by the French firm in France; eligibility is automatic. In the case of agricultural, industrial or service investments, the firm must obtain approval.
- (8) All countries fall within the scope of the scheme except, in the case of industrial or agricultural establishments, Member States of the European Union.
- (9) For Article 39g to apply, the parent company merely needs to hold 10 % of the subsidiary's capital in the case of an industrial or agricultural establishment, or one third in the case of a commercial or service establishment.

⁽⁴⁾ See footnote 2.

- (10) The losses or investments are expressed as provisions, but have to be reincorporated once the foreign subsidiary or establishment becomes profitable again or, in any event, after 10 years.
- (11) The amount of the provision is equivalent to half the capital injected by the parent into its subsidiary in the case of an industrial or agricultural establishment, whilst in the case of commercial or service establishments it varies according to the losses incurred by the subsidiary but must not exceed the capital injection. In addition, in the case of service establishments, the amount of the investment giving entitlement to the provision is limited to FRF 20 million. Banking, financial, insurance and real estate establishments are not eligible.
- (12) When it initiated the procedure, the Commission took the view that the scheme constituted State aid that was not compatible with the ECSC Treaty.
- (17) Thirdly, all businesses in French territory are eligible for this scheme since the setting-up of a subsidiary has a direct impact on the parent's volume of business. The fact that the financial and real estate sectors are excluded is due to the fact that their establishments abroad are set up differently from the economic structure of the scheme; an increase in the financial or market value of a firm's assets due to its location is not regarded as a relevant criterion of economic impact. As regards the approval needed for industrial or service investments to qualify for the scheme, according to the French authorities, the legal text does not give the Ministry of Economic and Financial Affairs any discretionary powers: it allows it to carry out a prior check, in the case of major projects, of the merits of applying the measure, as the courts may be required to check the legality of decisions relating to approval.

3. COMMENTS FROM INTERESTED PARTIES

- (13) By letter of 26 June 2001 the United Kingdom authorities stated that they shared the Commission's reservations regarding the compatibility of the aid with the steel aid code.
- (18) Furthermore, from a procedural standpoint, the French authorities consider that the Commission should have applied the procedure in force for existing aid since the Commission has already decided on two occasions that the scheme did not involve State aid.

4. COMMENTS FROM FRANCE

- (14) By letter of 25 January 2001 the French authorities maintained that the scheme of provisions forming the subject of the procedure did not appear to constitute State aid for the following reasons:
- (19) Finally, the French authorities informed the Commission that Articles 39gA and D of the CDI were not applied to any ECSC steel undertakings.

- (15) First, the provisioning system had not systematically given the firms concerned a financial advantage throughout the period concerned. According to the French authorities, unlike deferred taxation, the provision in the present case that was deducted when it was made allowed the firm to benefit from an advantage corresponding to the rate of corporation tax applicable in the year in question. When, however, the provision is reincorporated, tax must be paid corresponding to the rate applicable in the year of reintegration. The difference in the rates having reached more than eight points in the period 1993-1998, the firms concerned did not therefore benefit from any financial advantage in the period in question.
- (20) Under Article 4(c) of the ECSC Treaty, subsidies or aids granted by States are recognised as incompatible with the common market and must accordingly be abolished and prohibited. Decision No 2496/96/ECSC (the steel aid code) lists the only cases which may be exempted, under certain conditions, from this general prohibition.
- (21) In line with the caselaw of the Court of Justice of the European Communities (judgment of 23 February 1961 in Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority*)⁽⁵⁾ and the approach taken by the Commission (see point 10 of the Commission

5. ASSESSMENT OF THE AID

⁽⁵⁾ [1961] ECR 3.

notice on the application of the State aid rules to measures relating to direct business taxation ⁽⁶⁾, under Community law the concept of aid covers not only positive assistance from the State but also any measure that relieves an undertaking of a burden which it would otherwise have to bear, regardless of whether or not it is directly applied by the recipient companies. Accordingly, non-repayable grants, preferential loans from the State and credits against income or corporation tax are all measures which must be regarded as State aid.

— firms with establishments abroad whose main business is not marketing goods produced in France,

— firms producing in France and exporting but without any establishments abroad,

— firms engaged solely in trading.

(22) In the present case, the firms entitled to defer tax improve their cash flow as they are able for a certain time (up to 10 years) to benefit from funds free of charge which they would not have enjoyed had they had to pay the appropriate tax immediately. The fact that the tax rate in force when the provision is reincorporated may be higher than when the provision was constituted (see recital 15) does not cancel out the improvement in cash flow. Furthermore, when the provision was made, the recipient firms could not have been certain of the rate in force when the provision was reincorporated. Nevertheless, this element may constitute a factor in the calculation of the specific advantage enjoyed if the aid has to be recovered.

(25) In its comments on the initiation of the procedure (see recital 17), France did not dispute this finding and even confirmed it by acknowledging that, to qualify for the scheme, an establishment must have a direct effect on the volume of business of the parent company.

(23) As to the specificity of the measure, it is pointed out that according to both the Commission's approach (see points 13, 16 and 18 of the notice referred to above in recital 21 of this Decision) and the caselaw of the Court of Justice (see the Judgments of 10 December 1969 in Joined Cases 6 and 11/69 *Commission v France* ⁽⁷⁾ and of 7 June 1988 in Case 57/86 *Greece v Commission* ⁽⁸⁾), a measure is specific and therefore must be regarded as State aid instead of a general measure where, although *prima facie* it might be seen as general in form, in practice it supports a particular group of companies.

(26) Similarly, as regards industrial (or agricultural) investments or service establishments, the Commission had found when it initiated the procedure that only firms receiving the approval of the Ministry of Economic and Financial Affairs (which is given after obtaining the opinion of the Ministry of Industrial and Scientific Development in the case of industrial investments) may benefit under the measure. The Commission referred in this connection to its practice ⁽⁹⁾ and case law ⁽¹⁰⁾ according to which treating economic agents on a discretionary basis may mean that the individual application of a measure takes on the features of a selective measure.

(27) In the present case, the French authorities have not notified any provision, apart from the submission of administrative acts for a general review of legality by the courts, which might limit the discretionary power of the Minister for Economic and Financial Affairs. The Commission must therefore conclude that the administration has a margin of discretion.

(24) In the present case, the Commission had concluded when it initiated the procedure that, as regards the commercial establishments, only certain firms producing in France were eligible for the measure, which ruled out the following in particular:

(28) As regards the argument that the scheme is part of the system of territoriality of corporation tax (see recital 16), the Commission considers that the territoriality of French corporation tax does not justify the fact that some firms are automatically ineligible, in particular the commercial establishments of traders. The same applies

— firms producing in France but not exporting,

⁽⁶⁾ OJ C 384, 10.12.1998, p. 3.

⁽⁷⁾ [1969] ERC 523.

⁽⁸⁾ [1988] ERC 2855.

⁽⁹⁾ Points 21 and 22 of the abovementioned Commission notice (see footnote 6).

⁽¹⁰⁾ Case C-241/94 *France v Commission* [1996] ECR I-4551, points 23 and 24 and Case C-200/97 *Ecotrader v Altiforni e Ferriere di Serrola* [1998] ECR I-7907, point 40.

to the discretionary nature of the approval needed for industrial (or agricultural) investments and non-commercial services to be eligible.

- (29) As regards the procedural aspects, the Commission must point out that the ECSC Treaty, unlike the EC Treaty, makes no provision for the concept of existing aid. Article 4(c) of the ECSC Treaty provides that subsidies or aids granted by Member States are recognised as incompatible with the common market for coal and steel and will accordingly be abolished and prohibited within the Community. The Commission is of course aware that on two occasions, in 1973 and 1992, it concluded that the measures in question did not constitute aid under the EC Treaty.
- (30) Lastly, the fact that the French authorities state that no ECSC steel undertaking qualified for the scheme (see recital 19) in January 2001 does not rule out the possibility that ECSC undertakings or their subsidiaries benefited in the past or may benefit in the future.

6. CONCLUSION

- (31) The scheme in question is not generally applicable and can lead to State aid being granted to certain firms. It therefore constitutes State aid within the meaning of the Community rules and, to the extent that it benefits ECSC steel undertakings, it is contrary to Article 4(c) of the ECSC Treaty. Furthermore, none of the exceptions in the steel aid code are applicable in the case in point.
- (32) As to recovery of the aid, if the Commission finds that State aid which is incompatible with the common market has been granted, it generally requires the Member State to recover it. However, it will not require recovery of the aid if this is contrary to a general principle of Community law.
- (33) The Commission notes that on two occasions⁽¹¹⁾ it decided under the EC Treaty that the scheme did not constitute State aid. Under the circumstances, the Commission considers that even the most cautious and well informed steel firms could not have predicted that

the tax provisions under examination would be classified as State aid contrary to Article 4 of the ECSC Treaty and that they could rightly claim legitimate expectation. The Commission accordingly considers it appropriate not to order the recovery of the aid in question granted prior to the adoption of this Decision,

HAS ADOPTED THIS DECISION:

Article 1

All aid granted by France under Articles 39gA and D of the General Tax Code (CGI) to ECSC steel firms taxable in France is incompatible with the common market for coal and steel.

Article 2

France shall forthwith take the necessary steps to ensure that ECSC steel firms taxable in France are not eligible for the aid referred to in Article 1.

Article 3

France shall inform the Commission within two months of the date of notification of this Decision of the measures it has taken to comply herewith.

Article 4

This Decision is addressed to the French Republic.

Done at Brussels, 21 November 2001.

For the Commission

Mario MONTI

Member of the Commission

⁽¹¹⁾ Commission Decision 73/263/EEC of 25 July 1973 on the tax concessions granted, pursuant to Article 34 of French Law No 65-566 of 12 July 1965 and to the circular of 24 March 1967, to French undertakings setting up businesses abroad (OJ L 253, 10.9.1973) and Decision of 30 September 1992 (OJ C 3, 7.1.1993. See aid NN 96/92, p. 5).