Commission Decision of 20 July 2005 on a State aid implemented by Germany for a meat processing company, Greußener Salamifabrik GmbH (notified under document number C(2005) 2725) (Only the German text is authentic) (2005/920/EC)

COMMISSION DECISION

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(2005/920/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 called on interested parties to submit their comments pursuant to the provision cited above[1] and having regard to their comments,

Whereas:

I. PROCEDURE

(1) The measure was notified in accordance with Article 88(3) of the EC Treaty by letter of 6 November 1997. It appeared that the beneficiary had already received a related aid at an earlier stage. Therefore, the measure was registered as non-notified aid. By letters dated 4 February 1998, 10 June 1998 and 4 February 1999 Germany provided the Commission with further information.

(2) By letter dated 7 June 1999 the Commission informed Germany that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid.

(3) The Commission Decision to initiate the procedure was published in the *Official Journal of the European Communities*[2]. The Commission invited interested parties to submit their comments on the aid.

(4) 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 23 February 2000.

(5) By letter of 18 May 2005, registered as received on 23 May 2005, Germany asked the Commission to take a Decision on the basis of the information available to it, pursuant to Article 7(7) of Council Regulation (EC) No

659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty[3].

II. DESCRIPTION

(6) The benefiting company, Greußener Salamifabrik GmbH, was a meat-processing company producing and marketing several kinds of sausages and meat products. The beneficiary did not slaughter animals itself but processed meat. According to information provided by Germany, the insolvency procedure was initiated for Greußener Salamifabrik on 1 October 1999. The Commission was not informed about the outcome of the procedure. However, it would appear that at least the assets of the company are still operating under the name 'Greußener Salami- und Schinkenfabrik GmbH'. The remarks of the present Decision, however, refer to the pre-insolvency company Greußener Salamifabrik GmbH.

(7) A steady decrease in the turnover of Greußener Salamifabrik led to losses and to a negative operating cash flow from 1995 onwards. A document prepared by Dr. Zimmermann & Partner in September 1996 points to an extremely critical cash flow situation of the company. The fact that the company was in financial difficulty was stated in the Commission Decision initiating the procedure[4] and has not been contested in the course of the investigation procedure. A reorganisation of Greußener Salamifabrik was considered necessary. To finance this reorganisation, the company took out additional loans (a loan of DEM 375 000 at the Dresdner Bank AG and a loan of DEM 725 000 at the Sparkasse Erfurt) in the fourth quarter of 1996. For both these loans an 80 % State guarantee, thus covering the total amount of DEM 880 000, was granted via the Thüringer Aufbaubank. The guarantee was not notified to the Commission, contrary to the provisions of the Commission letter to Member States SG(89) D/4328 of 5 April 1989, hereinafter referred to as Aid 1.

(8) As of 8 January 1997 Ergewa GmbH took over 75 % of the shares of the beneficiary. The new owner wrote off DEM 1,2 million as bad debt related to exports to Russia and devaluation of stock. Combined with a further decrease in sales, this measures resulted in a deteriorated balance sheet making a second restructuring necessary.

(9) The German authorities made clear in their notification letter of 6 November 1997 that as Greußener Salamifabrik failed to reach its turnover and income targets for 1997, the company was permanently threatened by insolvency and was considered no longer to be able to meet its repayment obligation towards banks. Therefore, a new restructuring plan for Greußener Salamifabrik GmbH was elaborated by Schitag, Ernst & Young Deutsche Allgemeine Treuhand AG in August 1997. This new restructuring plan consisted of three parts:

(a) financial measures, such as:

— a partial debt relief by creditors,

— a refinancing of existing debts,

— a capital contribution from shareholders;

(b) a new marketing strategy;

(c) cost-saving measures.

1. Financial measures

(10) As part of the restructuring, Sparkasse Erfurt renounced an outstanding debt amounting to DEM 1 700 000. In compensation, the guarantee previously given by Thüringer Aufbaubank (a State bank) for a loan of DEM 725 000 (cf. recital 7) was partly liquidated and DEM 370 000 (64 % of the guaranteed amount) were paid to Sparkasse Erfurt in the context of this restructuring. Additionally, another guarantee given in 1993 by a private bank, Bürgschaftsbank Thüringen GmbH for a loan amounting to DEM 1 000 000 was partly liquidated which resulted in a payment of DEM 590 000 (74 % of the guaranteed amount) to Sparkasse Erfurt.

(11) Furthermore, Dresdner Bank Erfurt refinanced a DEM 2 500 000 loan, formerly granted by Sparkasse Erfurt. Dresdner Bank was only prepared to give this loan under an 80 % guarantee to be granted by Thüringer Aufbaubank.

(12) This new guarantee, covering an amount of DEM 2 000 000, as well as the partial mobilisation of the DEM 370 000 under the old guarantee were notified to the Commission by letter of 6 November 1997 pursuant to Article 88(3) of the EC Treaty as well as to the Commission letter to Member States SG(89) D/4328 of 5 April 1989. These two measures are hereinafter referred to as Aid 2. The German authorities stated in their letter of 4 February 1999, and reiterated in their letter of 18 May 2005, that the guarantee by Thüringer Aufbaubank covering DEM 2 000 000 was given subject to the Commission authorisation.

(13) The loan of DEM 2 500 000 by Dresdner Bank Erfurt was paid out to Greußener Salamifabrik.

(14) Finally, Ergewa GmbH, the 75 % shareholder of the company, injected DEM 1 500 000 in the form of a subordinated loan to Greußener Salamifabrik.

2. Marketing strategy

(15) In the field of marketing, the restructuring plan described three areas for improvement: product development, product policy and sales promotion. In general, Greußener Salamifabrik GmbH would become more market oriented.

3. Cost-saving measures

(16) In an earlier reorganisation the easiest cost-cutting measures had been taken already. However, the reorganisation plan mentioned further cost saving measures to reduce electricity consumption and transport costs.

(17) According to information provided to the Commission services, these measures combined would have led to a return of viability of the company and to a return of profitability. However, to regain profitability the turnover would have had to increase from DEM 6 845 000 in 1996 to DEM 7 million in 1998 and to DEM 8 million in 1999.

(18) The Commission initiated the procedure provided for under Article 88(2) of the EC Treaty in respect of the abovementioned measures in favour of Greußener Salamifabrik GmbH, which can be summed up as follows:

— the 80 % guarantee given by Thüringer Aufbaubank for two bank loans totalling DEM 1,1 million in December 1996 (with the guarantee amount being DEM 880 000),

— the partial mobilisation of one of the guarantees amounting to DEM 370 000 in the course of the restructuring/debt rescheduling in 1997,

— the second 80 % guarantee by Thüringer Aufbaubank for a bank loan amounting to DEM 2,5 million (with the guarantee amount being DEM 2 million) in 1997.

(19) As the guarantees were given to a company that was in financial difficulties, the Commission considered the aid element of these guarantees to be at the time of their granting equal to 100 % of the guaranteed amount, namely DEM 880 000 in 1996 and DEM 2 000 000 in 1997, in total DEM 2,88 million.

(20) The Commission initiated the procedure provided for under Article 88(2) of the EC Treaty in respect of the above measures because it had doubts on the following points: compliance with the Commission letter SG(89) D/4328 of 5 April 1989 concerning State guarantees and compliance with the Community guidelines of 1994 and 1997 on State aid for rescuing and restructuring firms in difficulty[(5)]. In the latter case specific doubts were raised concerning the effect of the restructuring which should be a return to viability of the company, compliance with the one time — last time principle, and compliance with the condition to fully implement the restructuring plan.

(21) Aid 1 was given in the form of State guarantees which means that the aid had to comply with the letter to the Member States SG(89) D/4328 of 5 April 1989. In this letter the Commission stated it would accept guarantees only if their mobilisation would be contractually linked to specific conditions which might go as far as the compulsory declaration of bankruptcy of the benefiting company. It seemed no such conditions were attached to the guarantees granted under the measure.

(22) The aids were granted because the company was in financial difficulty and needed restructuring. This means the aid had to be considered in the light of

the Community guidelines on State aid for rescuing and restructuring firms in difficulty applicable at the time when the guarantee was granted. As far as Aid 1 is concerned, the Commission had no information to evaluate the compatibility of the aid with the abovementioned guidelines. As for Aid 2, it seemed that three of the conditions of the restructuring guidelines were not met. It seemed as if the aid would not lead to a return of viability of the benefiting company. Moreover, it seemed the company tried to regain its viability by outgrowing its problems. This expansion would seem to unduly distort competition. Finally, it was not clear whether the restructuring plan was adhered to.

III. COMMENTS FROM INTERESTED PARTIES

(23) The Commission received comments from Kemper Fleischwarenfabrik (Nortrup), from the Bundesverband der Deutschen Fleischwarenindustrie e.V. (Bonn) and from an interested party that prefers to remain anonymous. All three parties argued that an increased turnover could only be realised by lowering prices which would be detrimental to the sector. The Bundesverband der Deutschen Fleischwarenindustrie e.V. pointed out that every year 1 % of the meat-processing companies in Germany are forced to halt their activities. In this highly competitive market only the best undertakings can survive. By artificially keeping a company afloat, the interests of the sector are harmed. Moreover, the proposed new marketing strategy was the common strategy followed by almost all companies. According to the Bundesverband, such a strategy would not be successful without a large marketing budget, which was not available.

IV. COMMENTS FROM GERMANY

(24) Apart from requests to prolong the period in which Germany could react, Germany gave its comments by letters of 22 July 1999, 28 July 1999, 6 August 1999 and 23 February 2000.

(25) In the first letter Germany stated that the ownership of the company had partly changed hands.

(26) In the second letter Germany mentioned that the guarantee contract showing the conditions under which the guarantee could be mobilised would be sent. A restructuring plan of the first restructuring was presented and the planned results following the second restructuring would be sent as well. Furthermore, Germany stated more information would follow which would explain why the targeted turnover was not reached after the second restructuring.

(27) In the same letter of 28 July 1999 Germany stressed that the company would not increase its capacity, it would only produce the same amounts of products as in the past (years 1994/1995). The problems of the company were due to external factors such as swine fever, the implosion of the Russian market and the advent of BSE. Finally, Germany argued it was unlikely that the aid would

distort competition as the beneficiary was an SME which was only active in Thüringen.

(28) In the third letter of 6 August 1999 Germany presented the guarantee contract and the restructuring plan of the first restructuring.

(29) In its letter of 23 February 2000 Germany stated that the insolvency procedure had been initiated for Greußener Salamifabrik GmbH. Germany mentioned that the banks had withdrawn their credit. Furthermore, a letter of Greußener's main bank, Dresdner Bank, was handed over. In this letter the bank stated it was obvious that competitors would be against the aid.

V. ASSESSMENT OF THE AID

Market organisations

(30) The measure grants aid to an undertaking that is active in meat processing. Article 40 of Council Regulation (EC) No 1254/1999 of 17 May 1999 on the common organisation of the market in beef and veal[(6)] and Article 21 of Council Regulation (EEC) No 2759/75 of 29 October 1975 on the common organisation of the market in pigmeat[(7)] lay down that Articles 87, 88 and 89 of the EC Treaty apply to products covered by these Regulations. The sectors concerned by the aid scheme in question are therefore subject to the Community rules on granting State aids.

Prohibition of State aids under Article 87(1) of the EC Treaty

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

(32) The aid was granted in the form of State guarantees. The guarantees enabled the beneficiary undertaking to raise money in order to remain active instead of being eliminated or restructured.

(33) Aid 1 was granted in 1996. Non-notified State aid has to be assessed on the basis of the legislation in force at the time of its granting. The legal basis applicable for State guarantees in 1996 was the Commission letter to the Member States SG(89) D/4328 of 5 April 1989. According to this letter the Commission regards all guarantees given by a State as falling within the scope of Article 87(1) of the EC Treaty. Moreover, pursuant to point 2.3 of the Community guidelines on State aid for rescuing and restructuring firms in difficulty (1994 guidelines), funding guaranteed by the State to an enterprise that is in financial difficulties is presumed to involve State aid. As described in point 7, the beneficiary was a firm in financial difficulties at the time of granting of Aid 1. According to point 2.1 of the 1994 guidelines, deteriorating profitability, diminishing turnover and declining cash flow are typical symptoms for firms in difficulties.

(34) Aid 2 was notified in 1997. Notified aid has to be assessed on the basis of the legal framework applicable at the time of its assessment. Point 4 of the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees[(8)] sets out the four conditions that have to be met for an individual State guarantee not to constitute State aid under Article 87(1) of the EC Treaty. As the German authorities made clear that the borrower Greußener Salamifabrik GmbH had to be classified as a firm in difficulties at the time of the granting of the second guarantee (cf. recital 9), already the first condition is not met.

(35) Therefore, the measure is considered to grant an aid through State resources (via the Thüringer Aufbaubank).

(36) As the guarantees were given to a company that was in financial difficulties, the Commission considers the aid element to be equal to 100 % of the guaranteed amount, namely DEM 880 000 for the first and DEM 2 000 000 for the second guarantee, in total DEM 2,88 million.

(37) The aid is selective in that it favours a single company, Greußener Salamifabrik GmbH.

(38) According to the case law of the Court of Justice, improvement in the competitive position of a company resulting from a State aid generally points to a distortion of competition compared with other competing companies not receiving such assistance[(9)]. Neither the relatively low level of aid nor the relatively modest size of the beneficiary company rules out the possibility of trade between Member States being distorted[(10)].

(39) A measure affects trade between Member States if it hampers imports from other Member States or facilitates exports to other Member States; the deciding factor is whether there is a risk that intra-Community trade will develop differently or is liable to develop differently as a result of the measure in question.

(40) The products to which the aid in question relates are involved in trade between Member States[(11)] and are thus exposed to competition. Therefore, there is a risk that intra-Community trade has developed differently as a result of the measure.

(41) The measure in question thus constitutes aid within the meaning of Article 87(1) of the EC Treaty.

Article 87(2) of the EC Treaty: exceptions

(42) Exceptions to the prohibition laid down in Article 87(1) of the EC Treaty are set out in paragraphs 2 and 3 of that Article.

(43) The exceptions listed in Article 87(2) are not applicable, given the nature of the aid measure and its objectives. Nor has Germany claimed that Article 87(2) is applicable.

Article 87(3) of the EC Treaty: exceptions at the Commission's discretion

(44) Article 87(3) of the EC Treaty lists aids which may be considered to be compatible with the common market. Their compatibility with the Treaty has to be studied from the point of view of the Community, not solely that of a given Member State. To ensure the proper operation of the common market, the exceptions provided for in Article 87(3) must be interpreted in a strict manner.

(45) As regards Article 87(3)(a) of the EC Treaty, it is pointed out that the beneficiary of the aid is located in a region where the economic situation can be described as extremely unfavourable in relation to the Community as a whole according to the Guidelines on national regional aid[(12)] (having a per capita gross domestic product, measured in purchasing power standards, of less than 75 % of the Community average). However, the abovementioned regional aid guidelines (and a previous version of these guidelines[(13)]) state that the specific provisions concerning the granting of State aid in Article 87(3)(a) regions are not applicable in the agriculture sector. Therefore, Article 87(3)(a) of the EC Treaty cannot justify an aid for the production, processing or marketing of Annex I products.

(46) As regards Article 87(3)(b) of the EC Treaty, it is noted that the measure concerned is not intended to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy in Germany.

(47) Nor is the aid designed or intended or appropriate to the objectives referred to in Article 87(3)(d) of the EC Treaty.

Article 87(3)(c)of the EC Treaty

(48) Aid to facilitate the development of certain economic activities or of certain economic areas may be deemed by the Commission to be compatible with the common market under Article 87(3)(c) of the EC Treaty if the aid does not adversely affect trading conditions to an extent contrary to the common interest.

(49) Normally, the Commission would assess compatibility with Article 87(3)(c) of the EC Treaty of aid granted to companies in financial difficulty on the basis of the 2004 Community guidelines on State aid for rescuing and restructuring firms in difficulty[(14)] (2004 guidelines). However, in accordance with points 103 and 104 of these guidelines, the Commission assesses aid notified prior to 10 October 2004 as well as non-notified rescue and restructuring aid granted in full before the publication of the 2004 guidelines on the basis of the guidelines in force at the time of notification or at the time the aid was granted, as the

case may be. Aid 1 was granted in 1996 and Aid 2 was notified in November 1997. At the time, the 1994 Community guidelines on State aid were in force. According to point 2.2 of the 1994 guidelines, special rules for rescue and restructuring aid could be applied to individual beneficiaries in the agriculture sector at the discretion of the Member State concerned. Germany has not asked for the application of special rules. Therefore, the measure is assessed under the conditions and provisions of the 1994 guidelines.

Aid 1

(50) Aid 1 concerns an 80 % State guarantee on loans worth DEM 1,1 million. The Commission initiated the procedure provided for under Article 88(2) of the EC Treaty on the following grounds:

— it was not certain whether the guarantee complied with the specific conditions required for a State guarantee,

— there was no restructuring plan which would show the aid was compatible with the rescue and restructuring guidelines.

(51) Germany has sent a copy of the guarantee contract. This copy shows that the guarantee can only be invoked when the benefiting company is in financial difficulties (bankruptcy- or a similar procedure) and when the sale of other assets owned by the company cannot lead to redemption of the guaranteed loan. Therefore, the specific condition mentioned in the Commission letter to Member States SG(89) D/4328 of 5 April 1989[15] has been met and the guarantee thus complied with the specific conditions required for a State guarantee.

(52) However, as the beneficiary of the guarantee, Greußener Salamifabrik GmbH, had to be regarded as a firm in difficulty at the time of the granting of the guarantee, the aid has to be assessed under the rules for rescuing and restructuring firms in difficulties applicable at that time (cf. recital 49). The guarantee was granted in the context of a restructuring of the beneficiary company.

(53) Germany has sent a copy of a report drafted by Dr. Zimmermann & Partner dated 9 September 1996. According to Germany, this report was the restructuring plan that was adopted at the time of the first State aid. The report has two major shortcomings as a restructuring plan: the status of the report is not clear and the report does not seem to concern any restructuring.

(54) The report seems to be a description of the company, dated 9 September 1996. According to the report, difficulties are caused by the BSE-crisis and by the loss of export markets in Eastern Europe. However, figures have been changed by hand, presumably at a later date. The status of those amendments is not clear. Furthermore, it is not clear whether the plan was adopted by the owners of the company.

(55) The report depicts the cost structure and the need for capital in September 1996. Apart from a description of a reinforcement of the existing management it is not clear how the company is to be restructured. If the report was meant as a restructuring plan at the time, which is not clear, it seemed to suggest that the company could outgrow its difficulties without any restructuring.

(56) To be compatible with the 1994 guidelines, the following conditions would have to be met:

(a) the aid would lead to a restoration of viability;

(b) the aid would avoid undue distortion of competition;

(c) the aid amount would be in proportion to the restructuring costs and benefits;

(d) the restructuring would be monitored and would be reported on.

(57) The report drafted by Dr. Zimmermann & Partner showed a yearly decrease in turnover from 1994 onward. Still, according to the report, turnover would increase again in the following year. The report did not give an explanation of this expected development. However, the return to viability depended on this change of trend. According to point 3.2.2(i) of the 1994 guidelines 'the improvement in viability must mainly result from internal measures contained in the restructuring plan and may only be based on external factors such as … price and demand increases …, if the market assumptions made are generally acknowledged'. As this condition is not met, the Commission does not consider the aid in form of a guarantee to lead to a restoration of viability.

(58) The restoration of viability would have been the result of an increase of turnover. Although, this increased turnover apparently could be realised with the existing capacity, the restoration would depend on the loss of market share of competitors (if the market would be stable, however, according to the 'restructuring' report, the demand was decreasing). Therefore, the Commission also concludes that the aid does not avoid an undue distortion of competition since a return to viability would have led to a disadvantage of competitors.

(59) The condition concerning the balance between costs and benefits of the restructuring plan is difficult to assess. Normally, beneficiaries are expected to make a significant contribution from their own resources or from external commercial financing. According to the report drafted by Dr. Zimmermann & Partners the owner of the benefiting company would inject new capital but it was unclear whether this was done. Therefore, the Commission cannot conclude that the aid complies with the 1994 guidelines on this point.

(60) Finally, it is unclear how the 'restructuring' would be monitored or reported on. Consequently, this condition of the guidelines is not met either.

(61) Greußener Salamifabrik GmbH met the criteria to fall under the definition of small and medium-sized enterprises (SMEs). Point 3.2.4 of the 1994 guidelines provides that the Commission is justified in taking a less restrictive attitude towards restructuring aids granted to SMEs as those tend to affect trading conditions less than that to large firms. However, this more lenient approach towards SMEs in assessing restructuring aid particularly concerns the obligation of capacity reduction in markets of structural overcapacity and the reporting obligation. In spite of the more lenient approach applicable to SMEs, the aid was already found not to lead to a restoration of viability (cf. recital 57) and to distort competition unduly.

(62) For the abovementioned reasons, the Commission considers Aid 1, granted in the form of State guarantees to Greußener Salamifabrik GmbH for an amount of maximally DEM 880 000, to be incompatible with Articles 87 and 88 of the EC Treaty. Since the aid has been granted illegally and is incompatible, it has to be recovered.

Aid 2

(63) The second aid concerns the partial mobilisation and payment of DEM 370 000 to Sparkasse Erfurt under the first guarantee in the context of the debt rescheduling/restructuring undergone in 1997 as well as an 80 % State guarantee on a DEM 2,5 million loan taken out in 1997 at Dresdner Bank.

(64) As it is stated in point 62 that the first State guarantee was found to be illegal and incompatible aid to Greußener Salamifabrik GmbH under Articles 87 and 88 of the EC Treaty, the part-mobilisation of the first guarantee under the second restructuring plan is covered by these findings.

(65) The 80 % State guarantee on a DEM 2,5 million loan has to be assessed under the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (cf. recital 34). The general conditions for guarantees applied by Thüringer Aufbaubank, provided to the Commission, show that guarantees can only be invoked when the benefiting company is in financial difficulties (bankruptcy- or a similar procedure) and when the sale of other assets owned by the company cannot lead to redemption of the guaranteed loan (cf. also recital 51). Therefore, the specific conditions for guarantees under point 5.3 of the abovementioned Commission Notice are met.

(66) Pursuant to point 2.1 of the 1994 guidelines, typical symptoms for a firm in difficulties are deteriorating profitability, increasing size of losses, diminishing turnover, growing inventories, excess capacity, declining cash flow, increasing debt, rising interest charges and low net asset value.

(67) As the German authorities communicated that the company was permanently threatened by insolvency, Greußener Salamifabrik GmbH was found to be a firm in difficulty at the time of the granting of the guarantee (cf. recitals 9

and 34). Therefore the aid has to be assessed under the applicable rules for rescuing and restructuring firms in difficulties. As set out in recital 49, these are the 1994 guidelines. The Commission initiated the procedure provided for under Article 88(2) of the EC Treaty against this aid because it was doubted whether the following conditions from the 1994 guidelines were met:

(a) restructuring aid should be granted once only;

(b) the aid should lead to a restoration of viability;

(c) the aid should not unduly distort competition;

(d) the implementation of the restructuring plan should be monitored and reported on.

(68) According to point 3.2.2(i) of the 1994 guidelines, aid for restructuring shall basically only be granted once. Germany has not commented upon this point.

(69) The fact that another guarantee was granted in the course of a second restructuring violates the basic principle of the one-off character of restructuring aid.

(70) The Commission doubted whether the restructuring plan, presented to justify the second restructuring aid (i.e. the second guarantee), would lead to a restoration of viability. The restoration of viability seemed to be based on a higher turnover. This increased turnover seemed unlikely, especially since the first projected turnover figures were already proven to be too optimistic at the time of the initiation of the procedure. Germany has not provided any justification or explanation for the projected increases in turnover. Therefore, the Commission maintains its doubts on the fulfilment of the condition that the restructuring plan should lead to restoration of viability.

(71) As far as the condition on the avoidance of an undue distortion of competition is concerned, Germany presented two arguments. First of all, Germany stated that the company concerned was too small to distort competition or influence Community trade. Secondly, Germany stated that the company would not expand its capacity but would make better use of existing capacity.

(72) The first argument is rebutted by the jurisprudence of the Court of Justice (cf. recital 38). As to the second argument, according to point 3.2.2(ii) of the 1994 guidelines, the Commission only asks for a reduction of capacity if there is a structural excess of production capacity in the European Community. At the initiation of the procedure the Commission found that there was no overcapacity in the sector concerned. However, the Commission wondered how the measure could be considered in the common interest if it was based on increased production. Increased production would automatically lead to a decrease in market share for competitors.

(73) Germany has in no way explained how the increased production could be absorbed by the market without negative consequences for competitors. Moreover, Germany has not given any data on the balance between the benefit for the company concerned and the costs for the sector as a whole. Therefore, the Commission cannot assess whether the measure avoids an undue distortion of competition.

(74) Germany did not provide any information on the monitoring of the restructuring plan.

(75) As of 8 January 1997 Ergewa GmbH took over 75 % of the shares of the beneficiary. It is not clear whether Ergewa falls under the SME definition under the 1994 guidelines and thus changes the status of Greußener Salamifabrik GmbH, being a more than 25 % shareholder. However, even taking into account the more lenient approach for SMEs provided for in point 3.2.4 of the 1994 guidelines, it was made clear in recital 72 that no overcapacity existed in the sector concerned and furthermore no assessment could be made on the monitoring requirement due to a lack of information. Therefore, the fact that the beneficiary company could probably still fall under the SME definition in 1997, does not change the evaluation of the present aid.

(76) For the abovementioned reasons, the Commission considers Aid 2, granted in the form of a State guarantee for an amount of up to DEM 2 million to Greußener Salamifabrik GmbH to be incompatible with Articles 87 and 88 of the EC Treaty. The German authorities stated in their letter of 4 February 1999, and reiterated in their letter of 18 May 2005, that the guarantee had been given subject to the Commission authorisation. Therefore, as no payments have been made under the guarantee, the incompatible aid does not have to be recovered.

VI. CONCLUSION

(77) The Commission finds that the State aid measures in the form of State guarantees worth DEM 880 000 (Aid 1) and DEM 2 000 000 (Aid 2), totalling DEM 2,88 million on loans worth DEM 1 100 000 and DEM 2 500 000 respectively, totalling DEM 3,6 million are incompatible with the common market.

(78) Incompatible aid granted illegally has to be recovered. The Commission notes that the insolvency procedure was initiated for Greußener Salamifabrik on 1 October 1999. As it is not known to the Commission whether the company has ceased its existence as a result of the insolvency proceedings, the recovery may still have to take place.

(79) The Commission draws the attention of the German authorities to the fact that according to point 6.4 and 6.5 of the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees the question whether the illegality of the aid affects the legal relationship

between the State and third parties is a matter which has to be examined under national law. National courts may have to examine whether national law prevents the guarantee contracts from being honoured and in that assessment the Commission considers that they should take account of the breach of Community law,

HAS ADOPTED THIS DECISION:

Article 1

The State aid which Germany has granted in the form of a guarantee in 1996 to Greußener Salamifabrik GmbH amounting to DEM 880 000 is incompatible with the common market.

Article 2

1 Germany shall take all appropriate measures to recover from the recipient the payments made under the guarantee referred to in Article 1.

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

Article 3

The State aid which Germany planned to grant to the Greußener Salamifabrik GmbH in the form of a guarantee amounting to DEM 2 million is incompatible with the common market.

This aid may not therefore be granted.

Article 4

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

Article 5

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 20 July 2005.

For the Commission

Mariann FISCHER BOEL

Member of the Commission

(1) OJ C 238, 21.8.1999, p. 15.

(2) See footnote 1.

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

(4) See footnote 1.

(5) OJ C 368, 23.12.1994, p. 12 and OJ C 283, 19.9.1997, p. 2.

(6) OJ L 160, 26.6.1999, p. 21. Regulation as last amended by Commission Regulation (EC) No 1899/2004 (OJ L 328, 30.10.2004, p. 67).

(7) OJ L 282, 1.11.1975, p. 1. Regulation as last amended by the 2003 Act of Accession.

(8) OJ C 71, 11.3.2000, p. 14.

(9) Judgment of the Court of 17 September 1980 Case 730/79 *Philip Morris Holland BV v Commission of the European Communities* [1980] ECR 2671, paragraphs 11 and 12.

(10) Judgment of the Court of 21 March 1990 Case C-142/87 *Kingdom of Belgium v Commission of the European Communities* [1990] ECR I-959, paragraph 43, and Judgment of the Court of 14 September 1994 Joined Cases C-278/92, C-279/92 and C-280/92 *Kingdom of Spain v Commission of the European Communities* [1994] ECR I-4103, paragraphs 40 to 42.

(11) The meat sector in general is subject to significant intra-EU trade. In 1996, some 8 million tonnes of meat (carcass weight) were traded within the EU. This represented some 23 % of total 1996 meat production. (*Source*: Eurostat).

(12) OJ C 74, 10.3.1998, p. 9.

(13) OJ C 31, 3.2.1979, p. 9.

(14) OJ C 244, 1.10.2004, p. 2.

(15) This letter has been superseded by the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (OJ C 71, 11.3.2000, p. 14).