II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 20 January 1999

on the acquisition of land under the German Indemnification and Compensation Act

(notified under document number C(1999) 42)

(Only the German text is authentic)

(1999/268/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 93(2) thereof,

Having given interested parties a time limit within which to submit their comments pursuant to the above Article and having taken account of those comments,

Whereas:

I

The Commission, by decision of 18 March 1998, initiated the procedure provided for in Article 93(2) of the EC Treaty against the acquisition of land under the Indemnification and Compensation Act (*Ausgleichsleistungsgesetz*) (EALG) (by letter SG(98) D/2532 of 30 March 1998).

In that letter the Commission asked Germany to submit its comments within one month of its receipt. In accordance with Article 93(2) the other Member States and interested parties were given due notice by means of publication of the letter in the *Official Journal of the European Communities* [1] and were requested to submit their comments.

The Commission initiated the procedure because it was unable to ascertain whether the EALG, which had entered into force in 1994, permitted measures which could be deemed incompatible with the common market.

The Commission was unsure whether the measures in question could be defined as State aid within the meaning of Article 92(1) of the Treaty or as other measures not covered by aid legislation in compensation for the expropriation of property. Although the Commission acknowledged the possibility of compensation for resettled farmers (*Wiedereinrichter*), it expressed doubts as to whether that possibility applied to newly settled farmers (*Neueinrichter*) and certain legal entities.

In respect of those measures defined as aid, the Commission doubted whether the maximum aid intensities for the acquisition of agricultural land (pursuant to Article 92(3)(c) of the EC Treaty, 35 % for agricultural land in areas which are not less-favoured) had been complied with.

The further purpose of the procedure was to clarify whether, and if so to what extent, the measures constitute discrimination against west German citizens and other citizens of the Community which is incompatible with Articles 6 and 52 and following of the EC Treaty.

Germany submitted its comments to the Commission by letter dated 29 May 1998 (Section II). No other Member State submitted comments but hundreds of interested parties did (Section III). Germany submitted further information to the Commission by letters of 22 October and 16 December 1998 and in a meeting held on 18 December 1998.

[1] OJ C 215, 10.7.1998, p. 7.

II

Germany submitted the following position with regard to the Commission letter of 30 March 1998 initiating the procedure:

1. **Applicability of Articles 92, 93 and 94 of the EC Treaty**

Germany felt that the acquisition of land should be exempt from the aid controls under Articles 92, 93 and 94 of the EC Treaty firstly, because in temporal terms the measure was a scheme which should really have been adopted by the German Democratic Republic and secondly, because its contents constituted a scheme for the settlement of open property issues which did not fall within the scope of the EC Treaty's aid provisions. It gave the following detailed position.

Land acquisition schemes under the EALG formed part of the reform of east German agricultural and forestry property ownership rules introduced by the GDR to comply with west German rules and therefore constituted a general measure deriving from special historical circumstances. Their legal mission and purpose were set out in the GDR's first State Treaty and in the Unification Treaty.

1.1. *State Treaty of 18 May 1990*

A fundamental principle of the State Treaty between the Federal Republic of Germany and the German Democratic Republic establishing a monetary, economic and social union of 18 May 1990 (the State Treaty) was the creation of private ownership. In the Treaty the two parties committed themselves to a free, democratic, federal and social basic order governed by the rule of law (first sentence of Article 2(1)) and private ownership (Article 1(3)). The GDR expressly undertook to model the law of the GDR on such a rule of law (Protocol on guidelines, A.I.1). In other words, through the State Treaty the GDR had already committed itself to creating private ownership governed by the rule of law to replace State ownership.

1.2. *Joint Declaration of 15 June 1990*

However, the open property issues created particular problems. For that reason on 15 June 1990, the contracting parties to the State Treaty agreed on a Joint Declaration on the settlement of open property Issues before ratifying the Treaty. The settlement, as defined by its purpose, was, of course, restricted to the territory of the GDR which, since it at no time formed part of the common market, could not be made subject to the provisions of the EC Treaty, even for the settlement of open property issues. Nor was the purpose to help enterprises to adapt to the changing competitive situation, but to provide the necessary measures to remodel ownership conditions against the background of decades of deprivation suffered by those concerned. The purpose of the settlement therefore lacked any relationship to the mission of the Community under the EC Treaty. The purpose of the planned settlement, thus restricted to the settlement of open property issues, was specified in the preamble to the Joint Declaration.

'The division of Germany, the resultant migration of the population from east to west and the different rules of law in the two German States created numerous property law problems affecting many citizens of the German Democratic Republic and the Federal Republic of Germany. The two governments base their attempts to solve the property issues on the creation of a balance between different interests based on a reconciliation of interests within society. Legal certainty and unambiguity and the right to own property are the principles by which the Governments of the German Democratic Republic and the Federal Republic of Germany will be guided in settling the open property issues. This is the only way to create lasting legal concord in a future Germany'.

In commerce and industry the GDR itself created the legal basis for the reintroduction of private ownership: the Privatisation and Reorganisation of Publicly Owned Assets Act, otherwise known as the Trusteeship Act (*Treuhandgesetz*), of 17 June 1990, provided the basis for the business sector to privatise. However, that was the only sector in which the basis for restructuring property was created. The conversion of State-owned businesses into private companies belonging to the Trust Agency (*Treuhandanstalt*) allowed the Agency to sell to anyone under market-economy principles. Directly after, while the GDR was still a separate State, the privatisation of industrial and other commercial businesses began. The GDR was faced with particular problems in the restructuring of State-owned agricultural and forestry property. Although in principle the Trusteeship Act

prescribed privatisation in this sector too, it attached restrictive conditions: it stipulated that the special economic, environmental, structural and property-law features of the sector had to be taken into account in the process of privatisation and reorganisation (Article 1(1), first sentence, and (6) of the Act).

In view of the special nature of land reform, the two governments agreed when negotiating the Joint Declaration that lasting legal concord could only be secured if the extreme conflicts of interest between the current exploiters and the previous owners could be satisfactorily reconciled. The preamble to the Declaration therefore stated that a settlement acceptable to all parties had to be created. In the agricultural sector, this settlement was based on the exclusion of restitution to former owners and on preventing the agricultural production cooperatives from exercising a unilateral ownership option. The settlement would therefore clarify who could become owner of the former State-owned land and under what conditions. The GDR had a strong interest in such a declaration since it had seen no possibility of reviewing the expropriations which took place between 1945 and 1949 (point 1 of the Joint Declaration) and therefore wished to safeguard the interests of east German citizens with regard to the use of the land. Moreover, the GDR was also obliged to solve those ownership problems because of the creation of a private ownership system (point 13 of the Joint Declaration). As a result of the progress of the unification process, the GDR ran out of time before the ownership problems could be solved.

1.3. *The Unification Treaty of 31 August 1990*

The Unification Treaty, too, came into being when the GDR was still a separate State and was therefore outside the scope of the EC Treaty. In its negotiation of the Treaty the GDR stuck rigidly to its position as expressed in the Joint Declaration.

Because the property ownership problems had yet to be solved, the Joint Declaration was made an integral part of the Unification Treaty (Article 41). It was not until legislators in a unified Germany adopted the land acquisition scheme in the Indemnification and Compensation Act that the settlement acceptable to all parties was achieved. Those legislators had to create a scheme that had eluded the GDR. The legal positions applying to the acceding territory as established in the Joint Declaration and confirmed in the Unification Treaty with the sovereign GDR continued in force under the scheme. The land acquisition programme transposed, all at the insistence of the new *Länder*, provisions from the Unification Treaty in favour of the interests of east German citizens which were protected by its guarantee (Article 44). In a resolution of 19 December 1996 the Bundesrat confirmed, with regard to the settlement of the open property issues, that the Joint Declaration was an integral part of the Unification Treaty, compliance with which by the new *Länder* could be enforced by the Federal Constitutional Court (BR-Drs. 871/96).

After further background details Germany stated that a parliamentary majority in support of an amended legal scheme which did not include the newly settled farmers and legal entities resident on 3 October 1990 in the land acquisition programme would not be achievable. It went on to conclude that this would leave the land reform ownership issues unsolved indefinitely since the entire process of forming a political consensus would have to begin *ab initio*. This would create further deep political rifts in Germany.

2. **Compensation for prejudice suffered**

The Federal Government adhered to the broadly-defined concept of prejudice. It explained that what was at stake was the restoration of a basis for economic activity under individual responsibility. The greatest possible degree of restoration of private and balanced ownership structures, vital for reasons of domestic growth and not least for political stability in a country, had to be understood in the broad sense as the elimination of a prejudice.

The government stated that the Commission's comments on compensation for a disadvantage were too narrow and did not take account of the special nature of the transformation and integration of part of a country structured as a State-controlled economy into a market economy.

Moreover, an approach aimed at individual cases would not be practicable and could jeopardise legal security in the new *Länder*. The requirement of individual evidence of prejudice would also result in an immense number of individual cases being notified.

3. **Right of acquisition by newly settled farmers who were not old enough to be gainfully active on the reference date**

Germany submitted the following position on this category of newly settled farmers.

Such cases were only conceivable under special circumstances and were for practical purposes insignificant. Alongside the requirement of residence on 3 October 1990, the legislator had added the further requirement that eligible parties must, as at 1 October 1996, have established a new farm (concept of newly settled farmer) and must have leased trust land for a long period. The requirement of a long-term lease agreement was also linked to the condition that the party involved had to manage the farm and possess the appropriate vocational qualification for managing an agricultural holding.

Thus, in the case hypothesised by the Commission, the newly settled farmer must, in 1990, have been too young to be gainfully active, must have acquired his vocational qualification between 1990 and 1996 and must immediately afterwards have been awarded a long-term lease agreement as at 1 October 1996. But in the vast majority of cases the newly settled farmers acquired their vocational qualification in GDR times before 1990 and were employed as salaried or waged workers in an agricultural production cooperative or on a people's estate. However, no statistics existed on this matter.

4. **Legal entities without resettled farmers as partners**

The possibility of this category acquiring land was also at this point without practical significance. Firstly, it was difficult to imagine a legal successor to an agricultural production cooperative which did not include a partner who could qualify as a resettled farmer. Although it might have been the (exceptional) case in the past, the effect of the hitherto published details of the Commission communication and certainly its imminent publication in the *Official Journal of the European Communities* would have been to encourage such legal entities to adjust their group of partners accordingly.

5. **Loss of potential income**

Germany had originally assumed a sum of DEM 3 billion for loss of potential income. However, it expected that 'decreasing market values would place that sum in context'. No further explanation was given.

6. **Distortion of competition and prejudice to the common market**

The following comments were made.

The fact of subsidised acquisition did not affect the market or competitive position of the holding in question *vis-à-vis* competing holdings, since the holding could only acquire leased land on which it was already producing. Assuming acquisition using borrowed capital, a comparison of the expenditure on interest with the price of leasing the and at the time produced the result that the acquisition had a more or less neutral effect on profit, with the result that neither the production structure nor the cost structure of the holding changed. The acquisition of the land therefore had no impact on the supply behaviour of the holdings. Price levels and market margin remained the same.

Since the land acquisition programme therefore caused no distortion of competition, it could not prejudice the common market either.

On the other hand, the long-term stability of the holdings was improved since once the land was acquired there was no uncertainty arising from the need to renew leases. But this did not improve the competitive position of the holding *vis-à-vis* its competitors. What it did was to increase the percentage of farmed land under ownership. In the pre-unification *Länder* that percentage had been 51,8 % whereas the corresponding figure in the new *Länder* was a mere 8,9 %. The land acquisition programme was intended to help achieve a ratio between leased and owned land comparable to the structures in the pre-unification *Länder*. A further point to note was that because of restrictions on disposal (re-conveyance notice in the Land Register in favour of the *Bodenverwertungs- und verwaltungs* GmbH (BWG), 20-year ban on resale of the land) the land only had limited value as collateral and could really only be used to guarantee the purchase price. However, the improved asset structure compared to that of a business farming solely leased land could facilitate access to more borrowed capital in the form of a personal loan.

7. **With regard to the exemption in Article 92(2)(c) of the EC Treaty**

Germany argued:

It was true that the phrase 'to compensate for the economic disadvantages caused by (that) division' was linked to the division of the country. However, that was not the result of natural events hindering or preventing links between the eastern and western parts of the country but of 'contemporary political circumstances' (ECR[1960] 343 and following (415), regarding Article 92(2)(c)). In view of the actual situation at the time of formulating the division clause, the term

'division' had to be understood not simply as the physical erection of the border installations, as the artificially created barrier, but rather as an expression of the overall political context consisting of the border and the introduction of a State-controlled economic system. The isolation of the former GDR and the creation of a centrally-controlled economy were indissolubly linked and had to be regarded as a uniform process. It was therefore not possible to attribute the cause of the economic deficits which had arisen in the new *Länder* on the one hand to the physical blockade and on the other to the State-controlled economic system.

The argument put forward by the Commission, that the current economic problems being experienced in the new *Länder* were not caused by the division, but by its removal, could only be valid if the reasons for the economic misery in the eastern *Länder* disappeared forever when the division disappeared and the current difficulties could be attributed to new circumstances not resulting from the former isolation of, and State-controlled economy in, the GDR. That the inadequacies of the state-controlled economic system continued to exist after the demise of the GDR was indisputable. The establishment of German unity and the concomitant introduction of the market economy in eastern Germany were not an event that broke the causal chain; the event merely made the economic disadvantages more obvious. They were nevertheless caused by the division of Germany.

There were disadvantages in all the cases covered by the land acquisition programme and these have been defined in detail above. All the disadvantages were direct consequences of the division of Germany and thus caused by this 'aberration'. The legislator drafting the EALG was therefore justified in eliminating those consequences so as to raise standards to a level comparable to the West.

8. **With regard to the exemption in Article 92(3)(a) of the EC Treaty**

Germany did not base its argument on Article 92(2)(a) of the EC Treaty. The elimination of a one-off prejudicial circumstance could not be regarded as normal regional economic aid, but it could be regarded as a sectoral aid to be examined under Article 92(3)(c) of the EC Treaty.

9. **With regard to the exemption in Article 92(3)(c) of the EC Treaty**

The Federal Government notified the Commission of the following with regard to Article 92(3)(c).

The limits drawn by the German legislator (maximum 50 % ownership, maximum 600 000 or 800 000 yield index units) were intended to ensure that the subsidised acquisition resulted in a balanced ratio between leased and owned land. In that way land acquisition as an entitlement to the leasers of land was a suitable means of eliminating structural disequilibria in the agricultural holdings in the new *Länder*.

When the object of the sale was being examined what had to be taken into account from the State-aid law point of view was that the land sold on beneficial terms was subject to extensive disposal restrictions, such as a 20-year ban on resale and an undertaking by the purchaser to manage the land himself for the same period of time. In addition, the BVVG had the right of cession if the land was used for building purposes and therefore increased in value during the 20-year resale ban.

Therefore, if land was purchased by someone who had already leased it for a long period nothing would change in respect of:

— the structure, scope and intensity of production,

— liquidity and profitability (at an interest rate of 7 % the amount of borrowed capital needed was roughly equivalent to a lease of DEM 5 per soil point).

The benefit to the farmer merely consisted in the possession after 20 years of agricultural land free of disposal restrictions with an appropriate commercial value, the land not being fully acceptable as collateral until that time. Benefiting purchasers could not realise the normal market price for such land.

The benefit should therefore be calculated as follows.

The commercial value, relative to 4 300 yield index units, was DEM 6 298/ha in 1996. The difference in value compared to the price under the EALG (DEM 3 010/ha) was DEM 3 288/ha. However, the purchaser could only realise that 'added value' after 20 years. Assuming that the purchase value did not change in the next 20 years the difference in value subject to interest from the date of purchase (i = 5 %) was DEM 1 240/ha. That figure was the benefit at the time of purchase. Accordingly the aid intensity at the time of purchase was 29,2 %.

A similar result is arrived at if the question is posed under what market conditions could the beneficiary today achieve the 'beneficial effect', i.e. increasing the percentage ownership of land. The land was still subject to a 20-year ban on resale, so the benefit linked to the aid could only be realised after 20 years and the purchaser could not therefore make a speculative profit. In comparison with the commercial value of land, free of disposal restrictions, the value of such land, had to be discounted. Since there was no market for such land a theoretical commercial value had to be determined and compared with the subsidised price.

Under those conditions an active farmer would only be prepared to pay a purchase price corresponding to the productive value of the land since he could only acquire it for farming purposes (in fact, he was bound by a farming plan that was to be drawn up and lodged with the privatising agency).

The farmer would therefore set the purchase price he was prepared to pay at the cash value of the long-term supportable lease capitalised over 20 years since the cash value of the lease was equivalent to the productive value under the farm's production conditions. At lease interest of DEM 5/soil point, the cash value of the lease was DEM 2 804/ha (i = 5 %). Since the disposal restrictions lapsed after 20 years the farmer would be willing to give that benefit an additional value. That benefit, subject to interest from the time of purchase, had therefore to be added to the cash value of the lease (see above). That resulted in a theoretical market price of DEM 4 044/ha which a farmer would be prepared to pay under market conditions for land subject to a resale ban. Compared to the subsidised price of DEM 3 010/ha, the result was an aid intensity of 25,6 %.

In addition, it had to be borne in mind that the extent of the benefit arising from the privatisation of State-owned land could not be established merely by comparing it with market prices arising under quite different conditions.

10. **With regard to restricting the acquisition opportunity to those resident on 3 October 1990**

Germany argued:

— Restriction of the reorganisation of property and social structures under the EALG to the region of the acceding territory resulted in a direct link both to the former GDR inhabitants with ties to the region and to the former owners. By setting a reference date of 3 October 1990 the legislator wished to ensure that those interested in acquisition who, or whose families had lived and worked for decades in the GDR could participate in the settlement which had to be created between them and the former owners. The legislator adopting the EALG had to link the modelling of the settlement and the establishment of the conditions for acquisition connected to it to the circumstances prevailing in the acceding territory on 3 October 1990.

— For compelling reasons of broad social continuity, too, the evolution of agriculture and forestry intended via the land acquisition scheme ought, in the event that there were no former owners to consider, to have taken special account of purchasers who had already been resident in the region for a long period. When restructuring the agricultural economy of the GDR, whose dominant feature was the agricultural production cooperatives, the social impact of such an action could not be ignored. The abrupt demise of the GDR system threatened the collapse of existing social structures. Only the gradual adaptation of those structures to the new conditions would permit a successful conversion process. In the legislator's view, that also applied to the question

of who should participate in the restructuring of the land. Therefore, an acquisition opportunity needed to be created which would enable former GDR citizens to take their place in new social structures as part of their special link with the region. For such reasons too the legislator was justified in ensuring that newly settled farmers also took part in the restructuring process, in respect of the land which had found its way into GDR State ownership.

— Germany also explained that were it not for the reference date there would, in view of the price differential both within and beyond Germany (particularly for forest land), very likely have been a rapid and uncoordinated sale of east German woodland, probably without access for the east Germans themselves.

III

Following publication of the communication about opening the procedure [1], the Commission received observations and comments from some hundreds of associations, businesses and individuals affected. Some of them were based in Member States (including France, the United Kingdom, Germany and Belgium), others in countries outside the Community (including the United States, Canada, Argentina and Brasil).

Except for Germany's observations (set out under Section II), no further comments were received from Governments of other Member States.

The comments and observations were forwarded to Germany on expiry of the period stipulated when opening the procedure [2].

They can essentially be summarised as follows.

Two distinct tendencies emerged from the observations dealing directly with issues raised by the procedure.

Some parties [3] took the view, that in so far as the competition rules applied, the measures under examination were to be regarded as compatible with the common market. The other tendency (the remaining parties) concurred with the doubts raised by the Commission, reinforcing them or commenting that the Commission had not gone far enough. To the extent that elements of aid were involved, they regarded them as incompatible with the common market.

1. **Applicability of Articles 92, 93 and 94 of the EC Treaty**

Some parties to the procedure began by pointing out that, in its letter of 25 January 1995 and its subsequent comments on the entitlement to compensation for the legal successors of agricultural production cooperatives and for newly settled farmers, Germany had itself expressed the view that the EALG was a case in which aid should be monitored under Articles 92, 93 and 94. According to their comments, there could be no doubt as to the applicability of these provisions.

Conversely, one party argued that land purchase was not subject to aid scrutiny under the EC Treaty because of the historically unique integration process.

None of the other parties questioned (and they hence implicitly affirmed) the applicability of the relevant Treaty provisions.

Several parties from both tendencies stated that the land purchase scheme had not been incorporated into the EALG until a later stage, contrary to the legislator's original intention. As could be seen from the way in which the Act had come into being, the aim had been to encourage widespread acquisition of property by private individuals. In particular, it was stated that the German Government could not argue that 'in the historically unique situation of German unification, the measure was a general one designed to create a system of property ownership appropriate to the Federal Republic's legal system'. It was alleged that the purpose of this phrase was once again to conceal the presence of State aid as defined in Article 92(1) of the EC Treaty, since the German Government had made no provision whatsoever for a land purchase scheme in its draft EALG of 31 March 1993 *(Bundesratsdrucksache* 244/1993 of 16 April 1993). In their view, there had been no 'mandate to the German legislator from the Unification Treaty' to achieve a social reconciliation of different interests in agriculture and forestry with the aid of a land purchase scheme. In fact, they stated, the land purchase scheme had been incorporated into the draft not at the Federal Government's instigation, but by the parliamentary parties of the CDU/CSU and

[1] OJ C 215, 10.7.1998, p. 7.
[2] Letter No VI/32143, 19.8.1998.
[3] Roughly 1 % of all the letters received.

FDP coalition only after the first reading of the Act on 13 May 1993 *(Bundestagsdrucksache* 12/4887; stenographic report of the 158th sitting of the 12th parliament on 13 May 1993). However, this had not been done in order to 'achieve a social reconciliation of different interests in agriculture and forestry'. Rather, this parliamentary initiative had at first provided solely for a 'land purchase scheme' to compensate victims of expropriation/those entitled to indemnification.

Not until the Bundesrat had twice rejected the draft and it had twice been discussed by the mediation committee had the land purchase scheme, originally envisaged as compensation for victims of expropriation, been recast as primarily a settlement scheme for persons not entitled to compensation (newly settled farmers and successors to agricultural production cooperatives).

None of the legislative texts drafted between 1991 and 1994 had contained anywhere the grounds now advanced by Germany for the land purchase scheme.

2. **Compensation for prejudice suffered**

2.1. *Resettled farmers without entitlement to restitution*

None of the parties to the procedure gave good grounds for calling into question the need and eligibility, under German law, of resettled farmers without entitlement to restitution [1] to be compensated. Some of them further emphasised the compensatory nature of the EALG with regard to this group of recipients. This also applied to a significant proportion of the parties which supported Germany's arguments. They admitted that 'the EALG accords only inadequate indemnification or compensation to the expropriated'.

2.2. *Resettled farmers with entitlement to restitution*

The Commission's attention was drawn to the fact that, under German law, 'mere wastage of assets' is not regarded as a prejudice which entitled those affected to preferential purchase of agricultural or forestry land under Article 3 of the EALG, since resettled farmers with entitlement to restitution [2] had got back their former property. They were thus excluded from the outset under law from preferential purchase of agricultural or forestry land, with only one exception: under the first half of the third sentence of Article 3(2) of the EALG, resettled farmers with entitlement to restitution were allowed to purchase agricultural or forestry land on preferential terms only if they had been unable to enforce their claim for the return of their property under the Property Act *(Vermögensgesetz)* owing to exclusion under Articles 4 and 5 of the Property Act. If that was the case, however, then no property whatsoever had been returned. The resettled farmers with entitlement to restitution would then exceptionally be in the same position as resettled farmers without entitlement to restitution who had not had any property returned to them. In those cases, there could not have been notional asset wastage of property which had not been returned at all.

However, if a resettled farmer with entitlement to restitution had got back his former property, then supposition of a (residual) asset loss (owing to wastage) was excluded under German law. That was why resettled farmers with entitlement to restitution were, on principle, not legally accorded preferential treatment under the disputed arrangements contained in Article 3 of the EALG.

This followed not only from the first half of the third sentence of Article 3(2) of the EALG, but also from Article 349(3) of the Equalisation of Burdens Act *(Lastenausgleichsgesetz* — LAG). Under the latter, the legal supposition was that the loss incurred was compensated in full when an expropriated economic asset was returned, even if 'the substance of the returned property ... had deteriorated considerably'. Consequently, under German law there was in that case no longer any form of 'residual loss' deserving compensation. Accordingly, this category of persons was excluded from preferential purchase of agricultural or forestry land under Article 3 of the EALG. Furthermore, the very nature of the matter was such that the loss of agricultural inventory could not lawfully be compensated through preferential land purchase. It was also argued that asset loss in the case of resettled farmers with entitlement to restitution had already been compensated several times over, because since 1990 they had received large amounts of annual adjustment aid. However this assertion was not further substantiated.

Certain resettled farmers (land-reform settlers) did not qualify for inclusion among those entitled to compensation, since they had never been

[1] As defined in OJ C 215, 10.7.1998, p. 9. Resettled farmers without entitlement to restitution are former owners of farms expropriated between 1945 and 1949.

[2] As defined in OJ C 215, 10.7.1998, p. 9. Resettled farmers with entitlement to restitution were expropriated after 1949 and are entitled to have their farm returned under the Property Act.

outright owners (their land had been barred from being sold, bequeathed or encumbered). That was why the courts had rejected claims for restitution.

2.3. *Local resettled farmers*

Some parties to the procedure regarded Germany's assertion that local resettled farmers ([1]) needed to be compensated for inventory losses as inadmissible, since in their case it was out of the question that 'inventory contributed to an agricultural production cooperative had often not been replaced in full'. In this respect, the legal position deriving from Article 44 point 1 of the Agriculture Restructuring Act (*Landwirtschaftsanpassungsgesetz*) was significant for assessing the aid elements contained in the EALG. According to Article 44, local resettled farmers would have been legally entitled to full replacement of the value of inventory contributions. A report in the *Frankfurter Allgemeine Zeitung* of 6 May 1998, page 19, states that the Federal Constitutional Court had decided to that effect only recently, namely in its ruling of 22 April 1998 — 1 BvR 2146/94 and 2189/94.

However, if local resettled farmers were legally entitled to full replacement of the value of inventory contributions, the legal supposition would have to be that full replacement of the inventory contributed to the agricultural cooperative had taken place or would have taken place. Such claims could also be enforced in practice, since the successors to cooperatives, not least because of considerable subsidy income from Community funds since 1990, on the whole, possessed sufficient assets to meet local resettled farmers claims in respect of compensation for inventory contributed. Under German law, the Commission could not therefore assume that 'inventory contributed to the cooperative had often not been replaced in full' and could not deny that the preferential treatment of local resettled farmers involved elements of aid.

On the contrary, local resettled farmers were covered by the Commission's absolutely correct reference, in the decision to open the procedure ([2]), to the Federal Constitutional Court's ruling of 21 May 1996 in EuGRZ 1996, 332, et seq., according to which the Federal Government had itself pleaded before the Federal Constitutional Court that Article 3 of the EALG constituted in that respect 'an independent support scheme for building up agriculture and forestry in the new *Länder*' and not an indemnification scheme.

One party to the procedure countered this with the argument that the property ownership of former individual farmers in the GDR had been reduced to an empty shell by the cooperatives' legally unrestricted right of use. Restrictions of this kind, under which all GDR citizens had suffered, should be compensated, at least in part, by preferential land purchase for a category of persons who had worked in agriculture.

2.4. *Newly settled farmers*

One party argued that it was grossly unfair to accord less favourable treatment, under the EALG, to the approximately 800 to 1 000 newly settled farmers ([3]), to whom about one tenth of the land to be privatised was allotted and who had, in the same way as the other persons entitled to purchase, been prevented by the economic and social structure of the communist system from acquiring property and working independently, than the other persons entitled to purchase under the EALG. These newly settled farmers experienced disproportionately greater difficulties in building up new farms compared with all other groups, because (unlike other Community citizens) they had not had the opportunity to accumulate capital over the past 40 years and (unlike the other persons entitled to purchase) they did not have at their disposal, as venture capital, parts of former property which had been returned to them. Nor had they received, from the cooperatives' use of their property following the redistribution of assets under the Agriculture Restructuring Act, any start-up capital comparable with that of resettled farmers. It was not acceptable to treat newly settled farmers differently from the other persons entitled to purchase.

By contrast, other parties took the view that there was no reason to treat newly settled farmers any better than other persons in the new *Länder* who had set up a business since unification.

2.5. *Legal entities*

The general argument put forward was that, unlike most citizens of the former GDR, legal entities had not individually suffered any prejudice and could at best be classified as 'least affected'.

([1]) As defined in OJ C 215, 10.7.1998, p. 9.
([2]) OJ C 215, 10.7.1998, p. 14.
([3]) As defined in OJ C 215, 10.7.1998, p. 10.

The Commission's attention was specifically drawn to the fact that, in particular, the comments made regarding resettled farmers with entitlement to restitution and regarding local resettled farmers were to be taken into account, *mutatis mutandis,* as regards the question of delimiting compensation/aid in the case of legal entities whose partners included a resettled farmer with entitlement to restitution or a local resettled farmer.

Many parties criticised the Commission's assertion (in the decision on opening the procedure [1]) that elements of aid under Article 92(1) of the EC Treaty might possibly be denied in the case of legal entities including resettled farmers. Such an arrangement was open to abuse, since there was a risk that the aid rules would be circumvented by legal entities deciding later to include resettled farmers among their partners and thus obtain preferential treatment not owing to them because they were not entitled to compensation. It was therefore suggested that a reference date should be fixed on which the legal entity's membership (and hence its inclusion of a resettled farmer) had to be in place. An alternative proposal was to set a minimum share that must be held by resettled farmers, since the proportionality principle would be breached if an entire legal entity of which only a completely insignificant share was owned by a resettled farmer were regarded as having incurred a loss and hence accorded preferential treatment.

Yet others insisted that only the resettled farmer in question (and not the legal entity as a whole) should be entitled to purchase land and be entered in the land register. That would prevent the partnership from receiving aid, even indirectly.

3. **Purchase entitlement of newly settled farmers who were not yet of working age on the reference date**

One party argued to the effect that virtually all those entitled to purchase had been of age in 1990 and were sufficiently experienced to run farms, since preferential land purchase was conditional on the purchaser, provided that he had not been expropriated under Soviet occupation (a pre-GDR owner), having taken out a long-term lease on farmland from the BVVG (Land Utilisation and Management Company) as at 1 October 1996. Under the leasing guidelines which the Treuhandanstalt had issued following consultation with the relevant federal departments, farmland could be leased only by persons who submitted a viable agricultural business plan.

Since the tenant farmers had to run the farm themselves, only persons with sufficient farming experience and business knowledge could lease land and hence ultimately purchase it under the EALG. It could not be ruled out that very few persons (an estimated 10 to 15 in all five new *Länder*) satisfied the requirement to have been resident in the GDR on 3 October 1990 without belonging to the target groups of former owners or of persons who had worked as farmers under GDR conditions.

The number of persons who were already permanently resident on 3 October 1990 but were not GDR citizens could be ignored for the purposes of the main scrutiny procedure.

4. **Distortion of competition and impairment of Community trade**

Only one party to the procedure criticised the Commission's comments on these issues. The party in question argued that the preferential sale of land did not enhance the competitive position of those entitled to purchase it. Cheaper purchase of agricultural and forestry land did not enable farms to build up reserve capital on more favourable terms than their competitors, since their reserve capital was not increased if they had own capital which they transferred into land assets. However, since low profitability in agriculture meant that most farms had to take out loans in order to purchase land, the need to service capital reduced the farms' already limited liquidity even further and weakened the competitive position of recipients working in agriculture.

Also the banks hesitated to issue loans against the land purchased, since a 20-year embargo on its sale was entered in the land register. The land purchased thus offered no additional collateral in obtaining capital.

The 'Bohl Paper' (adopted on 16 November 1992 under the aegis of the Federal Chancellery) had given the land yield value as a basis for the preferential purchase price. For reasons of simplification, the basis taken in the EALG had been three times the standard value — itself originally based (in 1935) on the yield value.

[1] OJ C 215, 10.7.1998, p. 12.

It was inferred that preferential land purchase could therefore not possibly reduce the cost of production inputs or enable those entitled to purchase it to market agricultural products at cheaper prices.

The agricultural land market was, in any case, not determined by yield potential. Land prices in Germany and in almost all Member States bore no relation to yield potential. Land purchase in agriculture led, in almost all regions of the Community, to an increase in production costs which was harmful to competitiveness.

Agricultural production costs were determined by land rental prices and not by land purchase prices. It could not be denied that farms which, over decades and often centuries, had been able, through the thrift of those running them, to purchase land enjoyed greater stability and security.

But this argument did not apply to farms being built up in the new *Länder*, which were in any case burdened with high loan costs, and particularly did not apply as regards preferential land purchase.

Furthermore, land prices in the Community varied markedly between different Member States and regions and bore no relation to income potential.

Three times the standard value, at which those entitled to purchase under the EALG could buy, was higher than the average market value of land in France, Spain, Wales and Scotland. Complaints from landowner associations in their Member States were thus to be refuted by the fact that land could be bought more cheaply there. Moreover, rental prices, which were determinant for agricultural competition, in all Member States other than western Germany were roughly similar to those in the new *Länder*.

Against this, another party argued that preferential land purchases enhanced the competitive position of those entitled to purchase. Land which could be purchased preferentially was also available as reserve capital, because in most cases the reconveyance entry for the BVVG expired. Nor was there anything to prevent secondary encumbrances.

5. **Exemption under Article 92(2)(c) of the EC Treaty**

Not a single party challenged the Commission's view that the exemption under Article 92(2)(c) of the EC Treaty would not apply to the land purchase scheme. One party took the position that Germany had not been able to put forward convincing counter-arguments, particularly in response to the Commission's assertion that the disputed arrangements had been caused not by the division of Germany, but by its termination. Nor could Germany refute this argument by saying that 'the shortcomings of the State-controlled economic system continued to have an effect after the GDR ceased to exist', or even by claiming that 'the introduction of the market economy in eastern Germany' was a result of the division of the country which justified the disputed preferential treatment.

The 'aberration' caused by the division of Germany had been remedied since 1990. The argument was therefore correct that the removal of the division was the reason for according tenant farmers preferential treatment so that from now on they could farm huge areas of agricultural land on a private-enterprise basis in order to build up their own assets. There was no apparent reason, not even one based on the division of Germany, for additionally transferring property to them on preferential terms.

6. **Exemption under Article 92(3)(a) of the EC Treaty**

It is worth noting that not a single comment was made to the effect that the measure in question could be regarded, within the meaning of Article 92(3)(a), as aid to promote the economic development of an area where the standard of living is abnormally low or where there is serious underemployment.

7. **Exemption under Article 92(3)(c) of the EC Treaty**

7.1. *Development of specific economic sectors or economic areas/common interest*

The point was made that Germany could not argue that, 'farms in the new *Länder* showed a structural imbalance with regard to land ownership, as the vast majority of them (91,1 %) operated on leased land',

since this situation had come about because those farms, unlike other applicants, and particularly the complainants, had received excessively large areas of land under lease. Moreover, even long-term leases for large areas of agricultural land could serve as a sufficient safeguard for investment and jobs. The preferential purchase scheme might lead to 'a balance between leased and owned land' if successors to former cooperatives were viewed in isolation. But if the structure of agriculture in the new *Länder* were taken as a whole, there was no way that ownership of agricultural and forestry land could be regarded as evenly distributed among the groups in question.

7.2. *Aid intensity in the case of agricultural land not in less favoured areas*

One party pointed out that agricultural land purchased on preferential terms was encumbered with legal restrictions which had a significant negative influence on its market value compared with agricultural land purchased on the free market.

For example, sales contracts under the Land Purchase Order regularly contained provisions prohibiting transfer or disposal, clauses governing the transfer of excess proceeds, and cancellation rights for as much as 20 years after conclusion of the contract.

It was generally acknowledged by agricultural land valuation experts that, as legal attributes, these serious disposal restraints and encumbrances had a lasting effect on the estimated land price. It was therefore inadmissible to compare the purchase price at three times the standard value in the case of preferential purchase under the land purchase scheme with purchase transactions in respect of unencumbered agricultural land on the open market.

If the actual market value of this agricultural land was determined taking into account the disposal restraints, the aid intensity was often likely to be below 35 % — even in the case of a preferential purchase price of three times the standard value.

The party in question did, however, subsequently concede that in some cases an intensity above 35 % could be expected.

Other parties accused Germany of calculating the aid intensities incorrectly. They refuted the attempt to play down the preferential treatment so as to arrive at an alleged aid intensity of just 29,2 % at the time of purchase, bearing in mind that the Commission had found an aid intensity of 35 % outside less favoured areas to be justified. Long-term tenants who wished to purchase property, particularly in order to secure loans, would not be deterred by the temporary ban on transfer, since they did not in any case intend or need to sell. Some parties produced documentary evidence of aid intensities as high as 70 % and more.

7.3. *Reference date of 3 October 1990 — Discrimination*

One party to the procedure argued that it was apparent, from the manner in which the Act had come into being and from the prior discussions led by the Federal Chancellery, that the Federal Government, supported by the parliament, had attempted to confine preferential land purchase to persons resident in the GDR. Former citizens of the Federal Republic of Germany who had not been expropriated under Soviet occupation or by the GDR or had not owned land in the GDR would thus likewise be excluded. They would be treated in the same way as other Community citizens.

Newly settled farmers should not be 'victimised' by the Commission. Unlike other Community citizens, over the past 40 years they had not had the opportunity to accumulate capital.

The other parties took a different view, however. A lack of proportionality between the measure and the prejudice suffered was often criticised and felt to be discriminatory: losses had been suffered by pre-GDR owners with or without entitlement to restitution (as newly settled farmers or persons not themselves engaged in farming) and by local resettled farmers. It was, admittedly, difficult to put an exact figure on the prejudice suffered by each group — particularly in the case of resettled farmers with entitlement to restitution and local resettled farmers, whose asset wastage or lack of development opportunities were regarded as losses. However, if one wished to compare the losses and establish a ranking order, there should be no question that the greatest losses in relative terms had been suffered by expropriated persons without entitlement to restitution, while the smallest losses in relative terms had been suffered by local resettled farmers who had never been expropriated.

Assuming this point to be beyond doubt, it seemed questionable in terms of State-aid law that the ranking order had been reversed in the case of those receiving compensation. Under the EALG, local resettled farmers, i.e. persons who had never been expropriated and whose loss comprised only a lack of development opportunities were granted right of first refusal and the right to purchase 600 000 yield units. By contrast, non-farming pre-GRD owners, some of whom had not been able to take over the running of their farms again because the locals 'had got in first', were granted only 'right of last refusal' to purchase 300 000 yield units. Those who had suffered the greatest loss and were therefore entitled to the most compensation were, at least if they were simultaneously tenants, granted least compensation in relative terms, while those who had suffered the smallest loss in relative terms were granted most compensation.

It was incongruous for those with relatively minor losses to receive more compensation than those who had incurred greater losses.

Some parties accused the legislator of arbitrary government in the case of the land-purchase scheme, since it did not accord entitlement to preferential purchase to former GDR citizens who had fled because of the repression and confusion in 1989 and had not returned to their home region until after 3 October 1990, although they may have previously had to spend the whole of their lives in the GDR. Entitlement was granted, however, to persons from the territory of the old Federal Republic who had moved to the territory of the former GDR 'virtually just in time' before 3 October 1990. In one case, this meant that the complainant could not expand his existing farm in a commercially viable manner, not even at market value, because the neighbouring land was all being sold at preferential prices under the EALG.

The other parties described the measure in question as discriminatory and asserted that it infringed Articles 52, 6 and 40(3) of the EC Treaty. They expressly concurred with the doubts the Commission had voiced when opening the procedure. Some went on to argue that Germany was vainly attempting to objectively justify the undeniable unequal treatment of other west Germans and Community citizens 'by the circumstances arising in the GDR'. In this context, too, the fact was being overlooked that the EALG had not entered into force until five years after German unification, when there were neither legal nor factual reasons for discriminating against other west Germans and Community citizens compared with successors to the cooperatives and newly settled farmers.

Here, again, Germany was arguing, but without any foundation, by mere reference to 'achieving a reconciliation of interests in society' and to allegedly 'compelling reasons for more extensive social continuity' in agriculture and forestry. These parties countered with the view that the preferential treatment of the successors to cooperatives was arbitrary, socially unbalanced and profoundly unjust, such that Germany's reference to a supposed reconciliation of interests within society must not be confused with the likelihood that the preferential purchase scheme had actually led to such a result.

That was evidenced by Germany's reference to the fact that, in reforming the GDR's agricultural structure (which had been shaped by the agricultural cooperatives), 'the social consequences should not have been overlooked'. What was described, in this context, as 'uncoordinated destruction of existing social structures' was, in truth, the actual loss of several hundred thousand rural jobs which could not have been avoided in any case. In particular, this had not been avoided by preferential treatment shown to cooperative successors and newly settled farmers by granting leases and enabling them to purchase property.

The preferential treatment objected to was thus in no way connected with Germany's claimed preservation of 'existing social structures'. On the contrary, the massive departure of agricultural labour from the cooperatives had exposed this reference as a mere pretext. These parties in the new *Länder*, who still lived there today but who had not received comparable preferential treatment, must surely regard the Federal Government's following argument as downright hypocrisy: the government had sought to create purchase opportunities 'which enabled former GDR citizens to integrate into new social structures within the framework of their special ties with the region'. Here, again, the Federal Government had not thought of 'the people' in the new *Länder,* and hence also of these parties, but only of the approximately 3 000 successors to cooperatives. In reality, the legislator had 'for these reasons' not achieved a reconciliation of society's interests.

The Commission's attention was also expressly drawn to the fact that the vast majority of long-term leases had in any case been concluded in 1996 with east Germans. Because most west Germans and other Community citizens consequently did not meet that requirement, they would have been unable to take part in the land purchase scheme even if the reference date of 3 October 1990 had not been set. The reference date of 3 October 1990 thus proved to be unnecessary.

IV

By letter of 22 October 1998 Germany responded to the parties' above comments as follows.

1. **Resettled farmers with entitlement to restitution**

Contrary to the complainants' written pleadings and other parties' observations, resettled farmers with entitlement to restitution and local resettled farmers who once again have unrestricted use of the land which they contributed to former cooperatives were entitled to purchase land under the first sentence of Article 3(2) of the EALG.

Germany did not accept the argument that the first half of the third sentence of Article 3(2) of the EALG meant that resettled farmers with entitlement to restitution could purchase agricultural or forestry land on preferential terms only if they had been unable to enforce their existing claim for return under the Property Act because they had been excluded from doing so under Articles 4 and 5 of the Property Act. The phrase 'resettled farmers within the meaning of the first sentence are also...' in the third sentence of Article 3(2) of the EALG already proved that this rule did not conclusively define the group of resettled farmers. It merely made clear that the categories of persons specified there, in whose case restitution of expropriated assets had not been possible for various reasons, were still among the resettled farmers with entitlement.

The legislator had intended resettled farmers within the meaning of the first sentence of Article 3(2) of the EALG specifically to include persons who had received back their former property by means of restitution and former members of cooperatives who were farming on their own account again. Otherwise, a large number of local resettled farmers who had leased a substantial proportion of the BVVG's land would be excluded from purchasing land under the scheme.

In order to be entitled to purchase as a resettled farmer within the meaning of Article 3(2) read in conjunction with Article 3(1) of the EALG, it was sufficient if a farmer had resumed operations and, in the course of that reestablishment, farming had been extended to the land specified in Article 3(1) of the EALG.

Nor was entitlement to purchase land under Article 3 of the EALG excluded, as had been alleged, by other German laws (the Equalisation of Burdens Act and the Agriculture Restructuring Act).

Only in terms of claiming back/settling burden compensation did Article 349(3) of the Equalisation of Burdens Act appear to provide full loss compensation to entitled persons, but they did not actually get back viable farms. This fiction was significant only in legal terms as a basis for entitlement to claim back. Claiming back burden compensation was always restricted to the actual value of the restitution property.

The equalisation of burdens measure had been a means of settling hardship cases and, no more than the settlement of unresolved asset questions in the Unification Treaty, in no way represented full compensation for the losses incurred — within the meaning, for example, of civil law or expropriation compensation under Article 14(3) of the Basic Law.

The equalisation of burdens mechanism thus in no way excluded settlements on other legal bases, in this case settlement of property questions.

From the fact that former members of cooperatives were legally entitled, under Article 44(1) of the Agriculture Restructuring Law, to full replacement of the value of their inventory contributions, the complainants also inferred that it must be assumed 'on legal grounds' that full replacement of inventory contributed to cooperatives had indeed taken place. In so doing, however, they were equating entitlement to compensation with receiving it. It was generally known, however, that in many cases inventory contributed to cooperatives had not been fully replaced.

2. **Compensation of asset losses**

In the observations the view had repeatedly been expressed that, since 1990, farms in the new *Länder* had '[received] such substantial amounts of annual

restructuring aid that their asset losses had already been compensated several times over'.

This supposition was based on false premises. While it was correct that substantial funds had been made available to farms in the new *Länder* since 1990, those funds had not served to compensate asset losses suffered by the holdings or their proprietors before German unification. Rather, the introduction of economic, currency and social union, adoption of the Community market organisations and adjustment to the level of agricultural prices in the territory of the former Federal Republic had resulted in producer prices for agriculture in the new *Länder* (which in the GDR era had been fixed by the State) falling sharply. Although prices for farm inputs had also fallen at the same time, this had come nowhere near offsetting earnings losses and most farms had not been in a position to discharge their payment obligations. Restructuring aid had therefore been paid in order to compensate for these disadvantages. The Commission had received notification of these restructuring aid schemes and had approved them each time.

3. **Discrimination**

As to whether there had been substantial discrimination under Community law, Germany argued that even if a former owner in a, hypothetical, isolated case were to have actually been discriminated against in the leasing and subsequent purchase of agricultural land or in the sale of woodland compared with another applicant entitled to purchase land, nationality would have played no part in the matter. Such competition took place only among former GDR citizens. The reference-date rule (3 October 1990) applying to land purchases was objectively justified. Compared to GDR citizens, west German citizens had enjoyed excellent opportunities for vocational development in accordance with their individual wishes and talents; hence they had also enjoyed the opportunity to acquire assets. If west Germans (or citizens of other Member States) who had not personally been affected by the division of Germany were now allowed to take part in the purchase of land, they would have the opportunity to invest the assets acquired in the west in the new *Läínder* on preferential terms (e.g. in forestry as a subsidiary source of income). This would also deprive GDR citizens, who had not enjoyed anything like the same opportunity to acquire personal assets, of the chance to build up new business (rather than private) assets. The exclusion of capital-investment schemes had been a guiding policy principle in devising the proper reconciliation of interests within society.

The fact that only persons directly affected by the division of Germany were entitled to purchase land also showed that there was no contradiction between the objective of creating new ownership structures (thereby releasing economic and social potential) and the idea of compensation for the disadvantages suffered in the GDR.

The land purchase scheme did not involve any arbitrary unequal treatment of west Germans and Community citizens. In adopting the EALG, the legislator had been obliged to devise a reconciliation of social interests and to stipulate the relevant purchase eligibility requirements on the basis of conditions prevailing in the acceding territory on 3 October 1990. In order to establish inner unity and secure legal concord, it had been necessary to extend the entitlement to preferential land purchases to farmers resident on that date. This also ensured that participation in land purchases was open only to persons who had been personally and directly affected by the division of Germany.

V

In its decision opening the procedure the Commission noted that the land-purchase scheme had not been notified as an aid under Article 93(3) of the EC Treaty, which stipulated that aid had to be notified to the Commission at the draft stage. Since Article 93(3) had been breached, if the scheme was State aid it was also unlawful.

Germany however maintained that Article 93(3) and the other Treaty provisions on State aid did not apply in this case. The Commission pointed out that, when the GDR acceded to the Federal Republic of Germany on 3 October 1990, the EC Treaty had also entered into force in the territory of the former GDR. From that point onwards EC competition rules applied equally to both western and eastern Germany.

The section of the EALG containing the land-purchase scheme had entered into force on 1 December 1994 [1], i.e. after 3 October 1990 and at a time when the EC Treaty already applied to the united Germany. Article 93(3) and the Community's other State-aid provisions consequently applied to the EALG.

The Commission also notes in passing that Germany had declared itself, even before 3 October 1990, to be not just politically but legally bound to adopt the measure in

[1] BGBl. I, p. 2624.

question. A number of parties to the procedure disputed this, pointing out that the land-purchase scheme had not originally formed part of the EALG bill and that the legislative texts relating to the bill had not mentioned any such legal obligation.

This point may be left open, as it is not crucial to the issue at hand: even if at a given time prior to 3 October 1990 the Federal Government had indeed already committed itself legally and not just politically to adopting specific aid measures in the territory of the new *Länder* at a later point in time (i.e. after the entry into force of the EC Treaty in those new *Länder*), under Article 93(3) it would have been obliged to notify the Commission of its plans before making such an undertaking because Germany had been bound by the Treaty since 1958. However, it is not in dispute that such a notification never took place.

To the extent that it contains elements of State aid, the land-purchase scheme is therefore unlawful.

VI

The unlawful character of a State aid does not prejudge the issue of its compatibility with the common market in accordance with Article 92 of the EC Treaty, which, like Articles 93 and 94, applies to agriculture on the basis of Article 42 of the Treaty. This aspect will be looked at more closely later. First the Commission needs to look at to what extent the land purchase scheme contains measures that do not meet the conditions laid down in Article 92(1) of the EC Treaty and where no decision must therefore be taken on whether or not they are compatible with the common market.

This may be the case for instance if the State simply returned to an economic operator something that it had previously expropriated (illegally). This may typically be compensation for losses suffered by the operator as a result of expropriation or similar action (compensation in kind or monetary compensation). In opening the procedure, the Commission made it quite clear that, provided that the advantage accorded did not exceed the losses suffered by the operator as a result of such action, no preferential treatment within the meaning of Article 92(1) of the EC Treaty was present. Thus no State aid would be involved in this case. The Commission also notes that neither Germany nor any of the other parties to the procedure have disputed this principle.

However, the Commission also specifically noted when opening the procedure that State aid might be present because of the way the preferential land purchase was structured.

The Commission notes that none of the parties, i.e. Germany or the other parties to the procedure, had reacted to this possibility.

The Commission does not therefore see any reason to alter its position on this aspect and continues to assume that preferential treatment is involved, unless the measure can be proven to compensate simply for prejudice suffered as a result of expropriation or similar action.

The Commission uses national, in this case German, law as a yardstick. The Commission must be satisfied beyond all doubt that national law other than the EALG recognises that the individual groups covered by the land-purchase scheme are entitled to compensation and can actually be compensated. There are basically five such groups in all.

1. **Resettled farmers without entitlement to restitution**

Resettled farmers without entitlement to restitution are former owners of farms who were expropriated between 1945 and 1949 [1]. The farms were generally at least 100 ha.

This group had not yet had their farms returned. Their financial loss is at least equal to the value of the assets of the expropriated farms.

In opening the procedure, the Commission noted that the financial advantage involved was that such farmers were 'merely entitled... to buy back part of their land at a favourable price'.

None of the parties, not Germany nor other interested parties, disputed this or contested the conclusion that 'the financial advantage is thus less than the value of the expropriated property' [2].

In the absence of any comments to the contrary or other evidence, the Commission has no reason to alter its earlier opinion. It had made clear that this compensation merely reflected the legal principles common to all Member States regarding the protection of property rights.

[1] Including 'former' owners.
[2] OJ C 215, 10.7.1998, p. 12, Section III.1.

For the above reasons the Commission finds that the land-purchase scheme did not contain elements of State aid within the meaning of Article 92(1) of the EC Treaty in the case of resettled farmers without entitlement to restitution.

2. **Resettled farmers with entitlement to restitution**

Resettled farmers with entitlement to restitution are persons whose farm was expropriated after 1949 and who are thus entitled to have their farm returned under the Property Act.

In this category the Act distinguishes between resettled farmers with entitlement to restitution who are able to enforce their claim and those who are unable to enforce their claim for the return of their property.

Resettled farmers with entitlement to restitution but unable to enforce their claim are to all intents and purposes in the same position as expropriated farmers without entitlement to restitution. For the purposes of this examination, therefore, resettled farmers who have been unable to enforce their entitlement to restitution are regarded as equivalent to resettled farmers without entitlement to restitution.

Hence the conclusions drawn under point 1 also apply to this specific subgroup of resettled farmers with entitlement to restitution.

On the question of whether or not the other resettled farmers with entitlement to restitution, i.e. those able to enforce their claim, were entitled to purchase land, the opinion of the German authorities differed from that of most other parties to the procedure. Some claimed that such farmers were indeed entitled to purchase the land, while others contested that entitlement. This disagreement centres on the interpretation of national law, but neither side has pointed to a court judgment in support of their argument. It is not the Commission's place to decide how national law should be interpreted in this matter.

However, since Germany assumes that these farmers are entitled to purchase land under the scheme, it cannot be ruled out that this group of people could actually benefit from preferential land purchases in practice.

Preferential treatment within the meaning of Article 92(1) cannot by any means be ruled out in this case. For this specific sub-group of resettled farmers with entitlement to restitution each individual case must be examined on its own merits, as the Commission does not have any grounds to conclude with certainty that in each case the value of the advantage accorded by the purchase of land at preferential rates subsequent to (enforced) entitlement to restitution is (always) arithmetically equal to or less than asset losses as a result of expropriation (or inventory losses).

This conclusion is not altered by the adjustment aid which some parties to the procedure maintain has been granted 'extensively' to agricultural holdings in the new *Länder* since 1990. That aid is not intended to compensate for asset losses suffered by the beneficiaries prior to unification and is not therefore to be taken into account in this examination. Where elements of aid within the meaning of Article 92(1) of the EC Treaty are subsequently found to exist, this does not prejudge the issue of compatibility with the common market. This question will be examined in the following sections.

3. **Newly settled farmers**

Local newly settled farmers are persons who, prior to unification, worked in agricultural production cooperatives (LPG) or people's estates (VEG), did not formerly own a farm, but have now set up a new farm.

Newly settled farmers were never expropriated. In the GDR they were merely prevented from acquiring agricultural and forestry property: in this context, the German authorities have referred to 'denied opportunities' ([1]).

Under German law these persons are not therefore entitled to financial compensation ([2]).

This finding has not been contested.

When it opened the procedure the Commission noted that:

'In this connection, the Commission first notes that probably almost all GDR citizens, quite irrespective of the sector in which they worked, may have been denied opportunities for as long as the GDR applied a communist planned-economy system.

[. . .]

That being so, taking into account the concept of damage as defined in the Court of Justice's above-mentioned case-law, the Commission certainly cannot rule out the existence of State aid within the meaning of Article 92(1) of the EC Treaty'.

Having examined the remarks and comments made by all the parties, the Commission has found no reason to change its earlier position. None of the parties were able to prove any legal obligation under German law to pay compensation for such 'losses'. The restoration of private ownership and balanced property structures might be viewed in a broad sense

([1]) OJ C 215, 10.7.1998, p. 13, Section III. 5.
([2]) OJ C 215, 10.7.1998, p. 10, Section II. 2.

as an action to remedy losses. But German law does not necessarily require public funds for this purpose. This would also appear to be impossible in practical terms. Otherwise all economic operators, including in other sectors of the economy, would have to be 'compensated' for the loss of opportunity to pursue free economic activity over 40 years.

For these reasons the Commission cannot uphold the view that its remarks on compensating for economic loss were too limited or did not do sufficient justice to the special requirements of transforming and integrating part of a country with a planned-economy structure into a market economy framework.

The Commission therefore maintains its view that the preferential sale of agricultural or forestry land to newly settled farmers, which involves a particular sector of the economy, represents a specific measure involving preferential treatment within the meaning of Article 92(1) of the EC Treaty. The compatibility of this measure with the common market will be examined in subsequent sections.

The above considerations apply all the more to the two distinct subcategories of newly settled farmers, namely new farmers who moved from the western part of Germany to the GDR shortly before 3 October 1990 (and who had never been prevented from acquiring agricultural and forestry property) and those who, on the reference date, were not yet old enough to be gainfully active (e.g. school-age children).

4. **Local resettled farmers**

Local resettled farmers are owners of farmland who have claimed back their land from an agricultural production cooperative (LPG) and have re-established their farm. Germany argues that the prejudice suffered by these persons again comprised the returned property's, in most cases considerable, loss of intrinsic value, for which no financial compensation was paid. In addition, the inventory originally contributed to the agricultural cooperative had often not been replaced to its full value.

Some of the parties to the procedure challenged this: referring to German constitutional case-law, they argued that German law already provided an entitlement to compensation for inventory loss. Germany did not deny this, but said that an entitlement to a claim could not be equated with its actual fulfilment. The Commission shares its opinion.

Germany did not however submit any facts indicating that such claims were not normally met. In a State based on the rule of law, such as Germany, the Commission feels it can in fact be assumed that the authorities strictly uphold the law.

In the absence of grounds to the contrary, the Commission therefore has to assume that parties are normally compensated for inventory loss. It admits however that circumstances might differ from case to case, in that insufficient compensation might have been provided, or none at all. The Commission therefore assumes that, in normal cases involving inventory loss, parties have been compensated under the Agricultural Adjustment Act and that the amount in question was not below the damage suffered through loss or destruction of the inventory, but exceeded the loss threshold. Assuming this to be the case, as always based on the normal case, it would have to assume the existence of preferential treatment in accordance with Article 92(1) of the EC Treaty. However, each individual case has to be taken into account, particularly since there may have been some loss of intrinsic value. Precise calculations therefore have to be carried out on a case-by-case basis. Since losses (inventory damage/loss of intrinsic value) might be cumulative or mutually exclusive and the compensation (under the Agricultural Adjustment Act or EALG) might conceivably be cumulated, case-by-case calculations will show whether or not the overall advantage accorded is below the total amount of losses. Depending on the result, compensation or preferential treatment might be found to exist within the meaning of Article 92(1) of the EC Treaty. The question of compatibility of any such preferential treatment with the common market is to be examined separately.

5. **Legal entities**

Legal entitles are also eligible to acquire land on preferential terms. However, this has been made conditional on certain requirements: 75 % of the capital must be in the hands of persons who were already resident on 3 October 1990.

Some of the parties to the procedure have argued that, in contrast to most citizens in the former GDR, legal entities had not incurred losses on a personal basis. Germany has not denied this.

Where the legal entities in question have not been victims of expropriation or similar action, in accordance with the above hypothesis elements of aid within the meaning of Article 92(1) of the EC Treaty cannot be ruled out. The Commission made this clear for this category of beneficiary in its decision opening the procedure ([1]).

Nevertheless, despite concerns about possible abuse, the Commission is of the opinion that, under certain clearly defined conditions, the scheme does not contain possible elements of State aid in this case even though legal entities who had not suffered losses acquired the land on preferential terms. This might for instance be the case where a resettled farmer without entitlement to restitution or an equivalent local resettled farmer (i.e. a resettled farmer with entitlement to restitution but unable to enforce that claim) decides that the legal entity in which he holds shares should purchase on his behalf and at preferential rates the land to which he is entitled.

In Community law it can make no difference whether a resettled farmer without entitlement to restitution or an equivalent local resident in his place enters the legal entity in the land register (proxy purchase).

The Commission has carefully considered the argument by various parties that such a rule might invite abuse or circumvention of State-aid rules. It must however reiterate that at this point it is concerned only with the definition of compensation/preferential treatment within the meaning of Article 92(1) and not with a finding of compatibility with the common market.

In response to concerns that such a rule might be open to abuse, the Commission notes that preferential treatment did not exist only where there was no risk of duplicate purchase by a member of the legal entity. Duplicate purchase in this sense means that land could be purchased by both the member of a legal entity and the legal entity. If this were the case, the Commission would not at all be able to rule out the existence of preferential treatment in the case of legal entities. Where the risk of duplicate purchase could be ruled out, however, the legal entity would not be entitled to purchase a larger maximum area (average of 140 ha maximum) than its member (if he had been able to purchase the land).

Subject to those conditions being met, the Commission feels that the establishment of a qualifying date by which the company must have been formed or the resident farmer must have become a member of the legal entity, as called for by the parties to the procedure, is not imperative. It will however have to obtain a yearly report from Germany on compliance with the above conditions.

Subject to the aforesaid conditions being met, the Commission does not consider that there are any grounds for the objections by some parties that, because persons not meeting the normal prejudice criteria might hold a very small share in a legal entity, the principle of proportionality had been breached as the legal entity as a whole had been viewed as an injured party and therefore given preferential treatment.

As already set out above, the Commission does not automatically assume that a legal entity has suffered loss (such as expropriation or similar action). Nor can a legal entity purchase more land than the resettled farmers without entitlement to restitution (or their equivalent) who hold shares in that legal entity. The Commission also notes the 75 % rule laid down by law.

Finally, it should be noted that under the above model the existence of preferential treatment for legal entities within the meaning of Article 92(1) of the EC Treaty can only be ruled out with sufficient certainty where the requisite number of shares are held by at least one resettled farmer without restitution (or a resettled farmer with entitlement to restitution but unable to enforce that claim).

With respect to the other categories of partner described under points 2, 3 and 4, for the reasons given therein the Commission cannot rule out the existence of preferential treatment enjoyed by the legal entity, or rather must presume that elements of State aid are involved. In all these cases the question whether the measure is compatible with the common market is a separate issue.

In conclusion on the aspects addressed in this section, the Commission can rule out the existence of any preferential treatment within the meaning of Article 92(1) of the EC Treaty only in the case of resettled farmers without entitlement to restitution, equivalent resettled farmers with entitlement to restitution but unable to enforce their claim, and legal entities with at least one of the above as a member. It cannot do that in the case of any of the other beneficiaries.

([1]) OJ C 215, 10.7.1998, p. 12.

Where preferential treatment cannot be ruled out, the competition rules (Articles 92, 93 and 94) apply.

Under Article 92(1) of the EC Treaty any aid granted by a Member State or from State resources in any form whatsoever, which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, is prohibited in so far as it affects trade between Member States.

The existence of an aid scheme is defined, as noted in the decision to open the procedure ([1]), in terms of its preferential treatment of the recipient and not in terms of Member States' objectives and economic policy considerations. Germany denies that any preferential treatment is contained in the land purchase scheme.

In accordance with its Communication on State aid in sales of land and buildings by public authorities ([2]), the Commission assumes that elements of State aid are contained in sales of land where they:

(a) do not follow an open and unconditional bidding procedure accepting the best or only bid,

or

(b) are effected without an unconditional bidding procedure and without attaining the minimum market value established by an independent expert.

In this particular case the Commission assumes that the land purchase scheme does indeed contain elements of State aid.

Although, as a tenant, the beneficiary is already in occupation of the land in question, he is subsequently also given ownership of the property. The right of tenure is to be set against the dominant right of ownership acquired by the tenant.

An owner not only has more rights than an occupier, but is also better off financially. If no preferential treatment had been connected with the land purchase scheme, it would not have attracted any interested parties or buyers — but the scheme did in fact arouse a great deal of interest.

The Federal Government admits that the purchased land might be used as collateral. It might also facilitate access to more outside capital.

This confirms the Commission's view, expressed in the decision to open the procedure ([3]), that the opportunity to purchase agricultural and forestry land at a reduced price enables beneficiaries to build up business assets and hence also a reserve of capital. The Commission maintains this opinion.

Even the reference to the encumbrances on the land purchased (specifically the 20-year restraint on sale) cannot alter the conclusion that preferential treatment exists in principle.

Such clauses are not unknown to the Commission in the case of investment subsidies or preferential land purchases in other contexts.

The purpose of this type of anti-speculation clause is to prevent purchasers from cashing in the advantage acquired straight away. The farmer or forester is supposed to work the land purchased at preferential rates and earn a livelihood by that means rather than make a profit as a result of speculation. The existence of an anti-speculation clause would therefore seem to suggest precisely that the land purchase scheme involves commercial advantage. The extent (intensity) of this advantage will be discussed later.

One party has maintained that the additional land purchased does not provide any extra security in terms of capital procurement as banks are 'hesitant' to award loans against the land purchased.

The Commission cannot uphold this argument, either. The registered restraint on sale is undoubtedly an encumbrance, but is limited in duration. Moreover, unencumbered property may subsequently be encumbered, just like any other property. Furthermore, another party to the procedure quite rightly notes that even during the 20-year restraint on sale (and despite the notice of reconveyance to the BVVG, which is generally without force or set to lapse) there is nothing to prevent subsequent encumbrances. Germany has not denied this either.

([1]) OJ C 215, 10.7.1998, p. 17.
([2]) OJ C 209, 10.7.1997, p. 3.
([3]) OJ C 215, 10.7.1998, p. 13.

Where aid is found to exist on the analysis thus far, it distorts or threatens to distort competition by favouring certain undertakings. Under Article 92(1) of the EC Treaty even the potential to distort competition is sufficient.

The distortion of competition or the potential to do so arises from the fact that the parties purchasing land at preferential rates are placed in a better financial position than their competitors who have not received any such support.

On this point, Germany objects that in the hypothetical case of purchase with borrowed capital, a comparison of the interest charges with current rent levels would show that the land purchase would be 'roughly neutral in terms of profit margin' and thus neither the cost nor the production structure would change.

This argument is unconvincing as it covers only one of several purchase hypotheses. A number of parties pointed out that the beneficiaries (in particular the successors to former agricultural production cooperatives) might quite possibly be in a position to pay the purchase price out of their own financial resources and so it was not always essential to borrow the money.

It must also be pointed out the claim of being 'profit-neutral' has not been made, or indeed substantiated, in each individual case. An influence on the farm's cost structure cannot by any means be ruled out therefore.

In the absence of further explanations, the Commission cannot accept the claim that the price level and margin will remain unchanged. The same applies to the assertion that preferential land purchases would facilitate lower expenditure on production inputs and thus enable produce to be marketed at a more attractive price.

One party claimed, without backing up this statement, that in almost all regions of the Community, the purchase of agricultural land pushes up production costs and thus impairs competitiveness. If that party is seriously claiming that the preferential land purchase scheme in eastern Germany, which is the only point under consideration here, weakened the competitive position of the holdings concerned one can only wonder why the holdings in question actually participated in the land purchase scheme at all.

Another argument, that the notional value based on three times the standard value in 1935 at which EALG beneficiaries were entitled to purchase land was much higher than the average market value of land paid in France, Spain, Wales and Scotland, is not relevant.

The aid monitoring aid rules must be based on the real economic situation in the individual Member States and regions in the Community. The purpose of competition law cannot be to level out the objective differences in conditions of competition [1] and to aim to generate absolute equality.

In its decision to open the procedure the Commission put forward the view that distortion of the common market was to be suspected where the recipient of the aid was in competition with undertakings in other Member States. The statutorily accorded preferential purchase of land particularly affected other Member States on account of the large surface area held by the agricultural cooperatives' successors. Foreign undertakings did not receive comparable favourable treatment and were thus placed at a disadvantage.

It must be emphasised that a relatively low rate of aid does not necessarily rule out distortion of trade between the Member States.

The observations submitted to date do not give the Commission any reason to alter its position.

Accordingly, the land purchase scheme meets the criteria under Article 92(l) of the EC Treaty, with the exception of the measures in favour of resettled farmers without entitlement to restitution, equivalent resettled farmers with entitlement to restitution but unable to enforce their claim, and legal entities in which such persons are members.

VII

However, certain exceptions to or exemptions from the principle of incompatibility with the common market as contained in Article 92(1) of the EC Treaty are possible.

1. **Exemption under Article 92(2)(c) of the EC Treaty**

Under Article 92(2)(c) of the EC Treaty, aid granted to businesses in certain areas of the Federal Republic of Germany affected by the division of Germany is compatible with the common market in so far as such aid is required in order to compensate for the economic disadvantages caused by that division.

[1] Joined cases 6 and 11/69 Commission v. France (Bangue de France) [1969] ECR 523 et seq.

In this connection, in its communication opening the procedure, the Commission argued that the wording and intention of Article 92(2)(c) of the EC Treaty would appear to refer only to the direct consequences of the geographical division of Germany, and not to compensation for the poor economic situation in the new *Länder*. Moreover, the requisite causal link between the geographical division and the economic disadvantages was lacking, since undertakings in the former GDR had not been affected by the division of Germany but by the ending of that division. The communist planned economy of the former GDR had caused economic deficits, not the division of Germany itself.

The lack of assets and capital mass was ultimately a result of the socialist ownership structure in the GDR and not the division of Germany.

Germany takes the view that the isolation of the former GDR and the creation of a centralised State economy were inextricably interlinked and must be seen as one and the same process. There could however be no dispute about the fact that the inadequacies of the State-controlled economic system continued to prevail after the GDR had ceased to exist. The economic disadvantages continued to be a result of the division of Germany, and these were inherent in all the disadvantages covered by the land-purchase scheme.

In the first place, this is contradicted by the argument that the relevant provision must be interpreted narrowly. It contains merely an exception to the general principle of the ban on aid laid down in Article 92(1).

Prior to the unification of Germany, the scope of this provision was restricted to the parts of the former Federal Republic placed at a disadvantage by the division of Germany near the border between east and west Germany (areas bordering the east zone plus west Berlin). If at all, after the unification of Germany, the continuation of this provision would justify the inclusion of only those areas of the former GDR close to this border.

There would be no justification for extending this provision to all the territory of the former GDR. However, the very purpose of the land purchase scheme was precisely the State-subsidised sale of land on the entire territory of the former GDR.

The Commission would also point out that there is no evidence of a causal link between the division of Germany and the disadvantages on all the territory of the former GDR. Without doubt the division led to problems, in particular in terms of infrastructure (interruption) and markets (isolation). These can now be considered to have been overcome. The economic problems still in existence in the former GDR are the direct consequences of the former political and economic regime (and not of the division of Germany) or, at the most, consequences of the ending of that division, because in reality those economic problems are due to other causes which occurred subsequently.

For these reasons the Commission holds by its standard practice, according to which Article 92(2)(c) cannot apply to the entire former GDR ([1]).

2. **Exemption under Article 92(3)(a) of the EC Treaty**

Under Article 92(3)(a) of the EC Treaty, aid may be approved to promote the economic development of areas where the standard of living is abnormally low compared with the Community as a whole. As already explained in the notice opening the procedure ([2]), that provision only regulates regional aid in favour of particularly less-favoured areas of the Community. Aid measures must be applied as part of comprehensive, targeted regional policy programmes and normally aim to promote cross-sector job creation and encourage new investment.

In this respect, the Commission holds to its view that there is no evidence of such a regional assistance element. At present, the land-purchase scheme only governs the future ownership of land formerly 'State-owned' (volkseigen) by the former GDR. There is no evidence of any effects on the economic development of certain regions.

There is still no link between the land-purchase scheme and the above economic framework for eligible undertakings.

The question as to what extent the sale of land at low prices to newly settled farmers and the successors to former agricultural production cooperatives can

([1]) SG(94) D/5981, p. 2 (transport TettauBavaria); decision of 14 April 1992 (Potsdamer Platz) (OJ L 263, 9.9.1992, p. 15); Opel-Eisenach (OJ C 43, 16.2.1993, p. 14); Carl-Zeiss-Jena (OJ C 97, 6.4.1993, p. 7); Rhone-Poulenc Rhotex (OJ C 210, 4.8.1993, p. 11); SST-GarnG (OJ L 114, 5.5.1994, p. 21); Volkswagen I (OJ L 385, 31.12.1995, p. 1) and Deggendorf (OJ L 386, 31.12.1994, p. 13).

([2]) OJ C 215, 10.7.1998, .

contribute to improving the standard of living or the labour-market situation in the new *Länder* remains unanswered. Such a contribution is, however, a required justification to qualify under Article 92(3)(a) of the EC Treaty.

The derogation in question does not apply for these reasons. Neither the German authorities nor the other parties involved in the case refer to this derogation in justification.

3. **Exemption under Article 92(3)(c) of the EC Treaty**

Under Article 92(3)(c) of the EC Treaty, State aid may be approved to facilitate the development of certain economic activities or of certain economic areas where such aid does not adversely affect trading conditions to an extent contrary to the common interest.

Article 92(3)(c) therefore applies in particular when the aid in question can help combat structural weaknesses in specific industries or areas.

As the law stood when the EALG entered into force, under Articles 35(1) and 12(5) ([1]) of Council Regulation (EEC) No 2328/91 of 15 July 1991 on improving the efficiency of agricultural structures ([2]), it was in principle possible for the Commission to view aid for agricultural land purchase in the form of investment aid ([3]) as compatible with the common market and approve such aid if the rate did not exceed 35 % (or 75 % in less-favoured areas ([4])).

Regarding forestry measures in general, under Article 8(2) of Council Regulation (EEC) No 2080/92 of 30 June 1992 instituting a Community aid scheme for forestry measures in agriculture, Member States may grant aid for which the conditions of award differ from those laid down therein or the amount of which exceed the limits stipulated therein, provided that the said measures comply with Articles 92, 93 and 94 of the EC Treaty. It is the Commission's standard practice not to raise objections in certain cases to investment aid representing up to 100 % of the eligible costs of measures ([5]) in this sector. However, the Commission also wishes to warn that this policy may be changed in the near future.

In the case in point the sale of forest land at a reduced rate must be viewed as a 'condition of granting aid differing from those laid down in this Regulation'.

However, State aid, no matter what kind, is not covered by an exemption under Article 92(3) of the EC Treaty, where and in so far as it is discriminatory and contravenes the Treaty.

Therefore, ahead of the question as to whether the abovementioned specific Commission rules on aid for the purchase of agricultural and forest land at low prices have been met, the Commission must examine the priority issue of whether it is discriminatory within the meaning of the relevant provisions of the EC Treaty.

3.1. *Discrimination*

When it opened the procedure, the Commission expressed doubts as to whether the requirement that newly settled farmers should already have been resident on 3 October 1990 or 75 % of the shares should be held by persons who were already resident on 3 October 1990 was compatible with certain Articles of the EC Treaty (*inter alia,* Articles 52 and 6). It pointed out that Articles 52 to 58 provided for the abolition of restrictions on freedom of establishment, whether setting up or establishing undertakings, principal places of business or secondary establishments or branches. In accordance with the case-law of the Court of Justice of the European Communities ([6]), the concept of freedom of establishment may also include the purchase of property for an economic purpose ([7]). By prohibiting 'restrictions on freedom of establishment by nationals of Member States in another Member State', this provision makes a clear link with the concept of nationality ([8]) and prohibits any discrimination on these grounds. The ban on discrimination does not only imply overt discrimination by reason of nationality, but also all covert forms of discrimination. Covert discrimination by reason of nationality exists if 'the application of

([1]) Now Article 12(2)(a) of Regulation (EC) No 950/97.
([2]) See State aid schemes N 682/97, N 156/97, N 797/96 and N 940/96.
([3]) See criteria in Commission communication of 1979, point 18(i) of the Annex (OJ C 31, 3.2.1979).
([4]) In the new *Lander* only around half of all areas are classified as less-favoured; see Articles 2 and 3 of Directive 75/268/EEC (now Subtitle III in Regulation (EC) No 950/97).
([5]) State aid schemes N 567/97, N 752/96, N 750/96, N 646/96 and N 153/96.
([6]) Case 305/87 Commission v. Greece [1989] ECR 1461.
([7]) See 1962 General Programme for the abolition of restrictions on freedom of establishment (OJ 2, 15.1.1962, p. 36/62).
([8]) In the case of legal persons, under Article 58 of the EC Treaty, the nationality of a company or firm formed in accordance with the law of a Member State is to be determined having regard to its registered office, central administration or principal place of business.

other distinguishing criteria leads to the same result as discrimination by reason of nationality' ([1]), i.e. discrimination is carried out not directly as a result of the nationality but based on criteria that only nationals or foreigners may typically meet (e.g. requirements relating to place of origin or of residence).

Article 54(3)(h) of the EC Treaty further lays down that the Commission is to satisfy itself that the conditions of establishment are not distorted by aid granted by Member States. Under this provision and through its 1962 General Programme for the abolition of restrictions on freedom of establishment ([2]), the Council laid down that the provisions and practices which, in respect of foreign nationals only, exclude, limit or impose conditions on the power to exercise rights normally attaching to an activity as a self-employed person are to be eliminated. These provisions and practices include direct or indirect State aid, such as subsidising the purchase of land.

By prohibiting restrictions on freedom of establishment, Articles 52 to 58 aim among other things to ensure that the undertakings concerned are treated in the same way as undertakings with their registered offices in the host country. Under this provision, however, only those resident under Article 3(2) of the EALG may benefit from the measure. In order to qualify under that provision, undertakings that do not have their registered office in the new *Länder* would have had to relocate, or natural persons would have had to move their principal place of residence, to the regions in question. However, as a result of the political and economic circumstances, on the qualifying date of 3 October 1990 this was practically impossible to do from other Member States. Thus this law gives natural and legal persons in the new *Länder* an advantage over persons without a registered office or residence in Germany and is therefore liable to contravene the ban on discrimination under Articles 52 to 58 of the EC Treaty ([3]), as the Court of Justice held in its judgment in Case C-107/94 (Asscher).

Community citizens may perhaps have been able, *de jure,* to meet the requirement that they provide evidence of a (principal) place of residence in the acceding territory on the qualifying date of 3 October 1990. However, *de facto* it was almost exclusively German nationals that met this condition — particularly those previously resident in the new *Länder*.

This condition therefore had the effect of excluding those persons not meeting the criterion that their (principal) place of residence be in the acceding territory.

Nevertheless, with reference to the relevant case-law of the Court of Justice ([4]), the Commission has admitted that the effect in practice of distinguishing criteria such as place of residence does not, however, represent inadmissible indirect discrimination by reason of nationality if the distinguishing criteria (and therefore difference in treatment) are objectively justified.

The distinguishing criterion 'residence on 3 October 1990' can only be justified where it is both necessary and appropriate to serve the purpose pursued by the legislator. Such a measure is not necessary where the objective pursued by the legislator can also be achieved by a milder, i.e. less stringent, measure which is as appropriate.

According to the Federal Government, 'by stipulating the qualifying date of 3 October 1990, it was the legislator's intention to ensure that potential purchasers who or whose families had lived in the GDR for several decades could benefit from the reconciliation of social interests to be established between them and the previous owners'.

The purpose was therefore to include potential purchasers who or whose families had lived and worked in the GDR for several decades.

Germany justified this inclusion for 'compelling reasons ensuring broad social continuity'. It claimed that a 'reconciliation of interests within society' had to be found and that special account had to be taken of 'purchasers who had already been settled in the region for a long time'. The legislator was 'justified in ensuring that newly settled farmers were also involved in the restructuring of land which had become State property of the GDR'.

([1]) Case C-419/92 Scholz v. Opera Universitaria [1994] ECR-I 505, point 7; Case C-237/94 O'Flynn [1996] ECR-I 2617, point 17.
([2]) OJ 2, 15.1.1962, p. 36/62.
([3]) Case C-107/94 Asscher [1996] ECR-I 3089, points 36, et seq.
([4]) Case C-237/94 O'Flynn [1996] ECR-I 2617, points 20, 21; Case C-278/94 Commission v. Belgium [1996] ECR-I 4307, point 20.

The Commission fully supports the objectives of these measures. The adjustment of east German ownership structures to the new economic system is a totally legitimate objective of the German legislator. In fact most Member States have carried out land reforms enabling farmers to purchase the land they farm. Acknowledging such ties with the land in this way has the Commission's approval.

However, to achieve this objective, there was no need at all for a qualifying date for residence on 3 October 1990 since, in accordance with Article 3(1) of the EALG, these newly settled farmers or legal entities were allowed to participate in the land purchase scheme if on 1 October 1996 they had held a long-term lease on previously State-owned land to be privatised by the *Treuhandanstalt* [1].

In the course of its main examination, the Commission was expressly informed by parties to the procedure that by far the majority of long-term lease agreements had been concluded with east Germans. Germany gave a detailed and robust response to all questions raised regarding discrimination but it did not challenge these claims, let alone provide substantiated evidence to refute them.

Thus it is clear that, although the legitimacy of the objective pursued by the legislator (i.e. participation of east Germans in the land-purchase scheme) is recognised, the object would not, in practical terms, have been defeated if there had been no qualifying date of 3 October 1990.

Thus in so far as the purchase of agricultural and forest land is tied to the qualifying date of 3 October 1990, in the Commission's view this provision is not necessary and therefore not justified.

[1] Except for the purchase of forest land by newly settled farmers under Article 3(8)(b) of the EALG.

In so far as the residence rule is not linked to a requirement of a long-term lease [2], the following applies.

The Court of Justice has consistently held that discrimination prohibited under the Treaty exists where similar things are treated differently or different things are treated in the same way [3].

The same or different treatment must be justified by compelling objective reasons pertinent to the particular case.

The Commission has already pointed out that in its opinion the adaptation of ownership structures to the new economic system is a totally legitimate goal.

The adaptation of ownership structures by granting those persons already farming the land to be privatised a preferential purchase option could, essentially, be justifiable as a result of the close material link (tenant-future owner).

However, the date of 3 October 1990 is not tied to a (long-term) tenancy.

In the light of these considerations, the exclusion, *de facto* and *a priori,* of other Community citizens cannot be justified.

It is clear from the comments on newly settled farmers [4] that there is just as little justification for different treatment on the basis of loss: as rightly argued by other parties to the procedure, the newly settled farmers have never been expropriated, just like their competitors in the other Member States. The Commission already pointed this out when it opened the procedure [5].

For these reasons, the Commission cannot follow the reasoning behind the claim made by one party to the procedure that the Commission's aim was to 'exclude' the newly settled farmers. In line with its remit, the Commission is only attempting to ensure that the EC Treaty is applied. Thus the Commission takes the view that as a result of the unjustified different treatment of what are, in principle, identical categories of interested parties in allowing access to land to be purchased at a low price (potential purchasers from (east) Germany/the other Member States), there has been discrimination in breach of Articles 52 to 58 of the EC Treaty.

[2] Article 3(8)(b) of the EALG.

[3] For example, for the first category: Cases 8/55 and 9/55 Federation Charbonniere de la Belgique v. Haute Autorite *de jure* [1955/56] ECR 297 and 331; Case 14/59 Société des Fonderies de Pont à Mousson [1958/59] ECR 465; Case 79/77 Kühlhaus-Zentrum [1978] ECR 611; and for the second category: Case 13/63 Italy Commission [1963] ECR 357; Case 8/78 Milac [1978] ECR 1721; Case 230/78 Eridania [1979] ECR 2749; Case 8/82 Wagner [1983] ECR 371.

[4] See Section VI; legal entities may not purchase under Article 3(8)(b)) of the EALG.
OJ C 215, 10.7.1998, p. 18. See section iV(5) (penultimate paragraph).

[5] OJ C 215, 10.7.1998, p. 17 *passim.*

As set out in detail in the decision opening the procedure, this indirect discrimination is also in breach of Article 6 of the EC Treaty [1].

In that decision, the Commission did not rule out in principle the possibility of there being a breach of Article 40(3) of the EC Treaty[17].

Germany properly countered that although the provisions were also directed at the Member States, this was only in so far as they took action under a common market organisation.

It is indeed correct that the land-purchase scheme is a national measure. It is not a measure implementing a common market organisation [2]. For that reason the scheme does not fall within the scope of Article 40(3) of the EC Treaty. No further substantiated comments on this issue have been made.

For those reasons it is not necessary to go any further into the large number of comments by parties to the procedure claiming that the beneficiaries of the land-purchase scheme were primarily the successors to the agricultural production cooperatives, which they see as an 'arbitrary, socially one-sided and wholly unjust' result. The Commission therefore also refrains from commenting on the complaint that treatment among those eligible for the scheme was totally disproportionate, because those who were relatively least disadvantaged were said to have obtained greater compensation under the land-purchase scheme than those who suffered a greater loss as a result of expropriation. For the abovementioned reasons, the Commission will not go into the criticisms made of the Federal Government, which the latter has not not contested, according to which the disputed rules are not appropriate for preserving 'existing social structures' and it did not consider 'the people' in the new *Länder* at all but only the approximately 3 000 successors to the agricultural production co-operatives.

In conclusion, the Commission takes the view that the parts of the aid tied to residence on 3 October 1990 (newly settled farmers and legal entities) breach Articles 6 and 52 to 58 of the EC Treaty and are thus incompatible with the common market within the meaning of Articles 92, 93 and 94.

Finally, as regards the qualifying date of 1 October 1996, the Commission notes that the German authorities have not commented since it was not the subject of complaints by parties involved in the procedure.

3.2. *Rate of aid (intensity)*

First of all, the Commission has not been able to establish with sufficient certainty whether the aid scheme complies in every case with the rates of aid the Commission has laid down.

The calculation method which Germany itself has put forward (Section II.9) yields an aid rate of 29,2 % for east Germany. Nevertheless, even if the Commission fully accepts this method of calculation, these are only average figures.

However, the Federal Statistics Office data forwarded to the Commission by Germany in its letter dated 25 July 1997 clearly show that these figures vary depending on the *Land* both upwards (on average +8,7 % for the *Land* Brandenburg) and downwards (-7,8 % for the *Land* Mecklenburg-Western Pomerania). With such a range of average figures for the individual *Länder*, even using the calculation method later submitted by Germany, it is to be feared that in some *Länder* there could have been an overrun of the 35 % ceiling for areas other than less-favoured areas. Since these figures as well are only average figures, i.e. for individual *Länder*, and even if the most recent method of calculation submitted later on is used, there could in some cases still be a considerable overrun of the 35 % limit.

In addition, there are considerable doubts as to whether the calculation methods submitted late by Germany are correct. The Commission fully recognises that the encumbrances on this farmland (ban on re-sale for 20 years and right of withdrawal in the event of conversion to building land) are liable to bring down the market value of this land to some extent. However, the drawback of the calculation

[1] OJ C 215, 10.7.1998, p. 17.
[2] Case C-351/92 Graff [1994] ECR-I 3361, 3379; Cases 201/85 and 202/85 Klensch and Others v. Luxemburg [1986] ECR 3477.

methods later submitted by Germany is that they assume that the purchase of the land at a low price will not have any 'added value' for the farmer during the 20-year ban on re-sale. As has been rightly pointed out however by parties to the procedure, as a rule long-term tenants will not be 'troubled' by the ban on sale for the specified period, since, because of the long-term tenancy, they will not usually want or need to sell during that period in any case.

Therefore, in the Commission's opinion it would be more correct to take the subsidy equivalent of an average of 55,5 % specified by Germany in the abovementioned letter, possibly reduced by applying an average sales or withdrawal coefficient. Germany has not forwarded any sales or withdrawal coefficient (i.e. the average number of sales of farmland over 20 years or conversions to building land).

The Commission thus has no basis on which to judge whether the subsidy equivalents for the individual *Länder* (Brandenburg 64,2 %; Saxony 61,9 %; Saxony-Anhalt 61,3 %, Thuringia 59,4 % and Mecklenburg-Western Pomerania 47,7 %) specified by Germany comply with the Commission's 35 % limit. This is a further reason why in this respect the land-purchase scheme [1] cannot be considered compatible with the Commission's policy on the maximum intensity rate as described above.

For these reasons the Commission cannot grant an exemption under Article 92(3)(c) of the EC Treaty.

Since the aid scheme in question does not pursue any of the other objectives referred to in Article 92(2) [2] and (3) of the EC Treaty either, the Commission must conclude that this measure cannot be considered compatible with the common market.

VIII

In conclusion, the Commission takes the view that Germany has implemented the aid scheme in breach of Article 93(3) of the EC Treaty.

All aid granted unlawfully must be reclaimed from the recipients in order to reinstate the economic situation that would have obtained if the aid had not been granted. Repayment must be made in accordance with the provisions and procedures of German law, together with interest from the date on which the aid was granted at the reference interest rate used in evaluating regional aid schemes.

Consequently, Germany must recover aid granted under the land-purchase scheme which was tied to the requirement of residence on 3 October 1990 or which exceeds the maximum rate of 35 % for farmland in areas other than less-favoured areas as defined in Regulation (EC) No 950/97. Germany must inform the Commission, within two months of the date of notification of this Decision, of the measures it has taken to comply therewith,

HAS ADOPTED THIS DECISION:

Article 1

The land-purchase scheme provided for in Article 3 of the German Indemnification and Compensation Act (EALG) does not constitute aid in so far as the measures represent only compensation for expropriation or intervention of equivalent effect by the State authorities, and the benefits awarded are equal to, or less than the financial loss caused by such State intervention.

Article 2

The aid given is compatible with the common market where it is not tied to residence on 3 October 1990 and where it complies with the maximum intensity rate of 35 % for agricultural land in areas other than less-favoured areas in accordance with Regulation (EC) No 950/97.

Aid tied to residence on 3 October 1990 and aid exceeding the maximum rate of 35 % for agricultural land in areas other than less-favoured areas in accordance with Regulation (EC) No 950/97 is not compatible with the common market.

Germany must cancel the aid referred to in the second paragraph and may no longer grant such aid.

Article 3

Germany shall within two months recover all aid granted as referred to in the second paragraph of Article 2. Repayment shall be made in accordance with the procedures and provisions of German law, together with interest from the date on which the aid was granted using the reference interest rate applied when evaluating regional aid schemes.

Article 4

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

[1] The maximum rates for less-favoured areas (75 %) and for aid for the purchase of forest land (100 %) have clearly been met.

[2] Including the exemption provided for in point (b) for other exceptional occurrences.

Article 5

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 20 January 1999.

For the Commission
Franz FISCHLER
Member of the Commission