

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 1 October 2003

on the State aid implemented by Germany for Jahnke Stahlbau GmbH, Halle

*(notified under document number C(2003) 3375)***(Only the German text is authentic)****(Text with EEA relevance)**

(2005/940/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Communities ⁽²⁾. The Commission called on interested parties to submit their comments.

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

(3) Pursuant to Article 10(3) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ⁽³⁾, the Commission ordered Germany to submit all the information necessary to enable it to verify whether a consolidation loan from the *Land* of Saxony-Anhalt had been granted in accordance with an approved aid scheme.

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

(4) The Commission received no comments from interested parties.

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

(5) On 17 May 2001, 22 November 2002 and 17 January 2003 Germany submitted its comments on the opening of the procedure.

Whereas:

I. PROCEDURE

(1) By letter dated 30 December 1999, Germany informed the Commission of various aid measures for Jahnke Stahlbau GmbH, Halle (hereinafter Jahnke). The case was registered under NN 9/2000.

(6) On 17 January 2003, Germany informed the Commission that Jahnke had applied for insolvency. On 31 July 2003, Germany informed the Commission that Jahnke's insolvency proceedings had been opened in February 2003.

II. DESCRIPTION

(2) By letter dated 2 March 2001, the Commission informed Germany that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid and the notified asset sale. The Commission's decision was published in the *Official Journal of the European*

(7) Jahnke is based in Halle, Saxony-Anhalt, Germany. Jahnke is a steel construction company. Saxony-Anhalt is an area eligible for regional aid pursuant to Article 87(3)(a) of the EC Treaty.

⁽¹⁾ OJ C 160, 2.6.2001, p. 2.

⁽²⁾ See footnote 1.

⁽³⁾ OJ L 83, 27.3.1999, p. 1.

1. Background

- (8) Jahnke was set up on 12 November 1999 by Mr Bernd Jahnke, managing director of the steel construction company Jahnke Stahlbau GmbH Lenzen (hereinafter Jahnke Lenzen). Its object was to take over the assets of HAMESTA Steel GmbH (hereinafter HAMESTA), a company which had filed for bankruptcy in May 1999. HAMESTA was the successor to Hallesche Metall- und Stahlbau GmbH i.Gv., in bankruptcy since 1998. Hallesche Metall- und Stahlbau GmbH was privatised in 1995 by the Treuhandanstalt by being sold to Thuringia AG. The privatisation involved lawful aid of some EUR 37 million.
- (9) In November 1999, HAMESTA's receiver informed Mr Jahnke that he could not sell HAMESTA's assets without the agreement of the meeting of creditors. With a view to a later sale, he envisaged that Jahnke might utilise the assets for a monthly fee of about EUR 13 000, payable after 1 January 2000.
- (10) On 3 February 2001, a draft takeover agreement was drawn up between HAMESTA's receiver and Mr Jahnke, under the terms of which assets were to be acquired by the investor for an envisaged purchase price of about EUR 2,5 million. However, in the meantime the creditors' meeting had decided not to proceed with the execution of the takeover agreement, but instead to sell the assets by public auction. The takeover agreement, therefore, was not certified and remains ineffective.
- (11) In May 2000 HAMESTA's receiver and Mr Jahnke signed a new rental agreement (monthly rent of about EUR 11 300; duration unlimited; six months' notice of termination at year's end).
- (12) In November 2002, Germany informed the Commission that, in order to obtain the assets, Jahnke now envisaged first taking over the liens held by two of HAMESTA's creditors in order to secure its position as buyer. To this end Jahnke concluded an agreement with the two creditors to take over their liens in return for EUR 1,54 million.
- (13) According to Germany, the public auction of HAMESTA's assets has not yet taken place. Jahnke is still the subject of insolvency proceedings. The public auction of HAMESTA's assets was originally scheduled for 2002 but will now take place at the end of 2003. The insolvency proceedings against Jahnke will not be concluded before mid-2004.
- (14) In March 2001, Jahnke had about 80 employees. It generated a turnover of about EUR 5 million (2000: about EUR 2 million) and an operating profit of about EUR 18 000 (2000: about EUR 100 000). Jahnke Lenzen generated in 2001 a turnover of about EUR 3,3 million (2000: about EUR 4,4 million) and an operating profit of about EUR 21 000 (2000: about EUR 71 000). Jahnke Lenzen employs about 40 people.

2. The aid measures

- (15) The proposed costs and funding of the restructuring have changed significantly compared with the information initially provided to the Commission in 1999 and 2000. By letter dated 4 September 2000, the following financing requirement was set out:

Financing requirement (EUR)	Origin of funds (EUR) (rounded figures)			
	Investor's own funds	Sparkasse Halle	Land of Saxony-Anhalt	Bundesanstalt für vereinigungsbedingte Sonderaufgaben (BvS)
Purchase price Up to 2,5 million		20 % of 2,5 million 500 000	Guarantee for 80 % of loan 2 million	
Assets/Current account 410 000	Share capital: 260 000			150 000
Financing of orders and start-up costs: 670 000			Consolidation loan 260 000	410 000
Total: 3,58 million	260 000	500 000	2,26 million	560 000

Purchase price of the assets of up to EUR 2,5 million

- (16) The purchase price for the assets was to be financed by a bank loan of EUR 2,5 million, 80 % of which was to be secured by a guarantee provided by the *Land* of Saxony-Anhalt. The remaining 20 % was to be secured by liens and property.
- (17) The guarantee of the *Land* of Saxony-Anhalt was to be provided under an approved guarantee scheme ⁽⁴⁾. One of the conditions of the scheme is that the criteria set out in the Community guidelines on State aid for rescuing and restructuring firms in difficulty (hereinafter the guidelines) have to be fulfilled ⁽⁵⁾.
- (18) According to Germany, neither the bank loan for the purchase of the assets nor the guarantee has been provided.

Financing of start-up measures

- (19) To cover its start-up costs Jahnke needed working capital totalling EUR 1,08 million mainly for order financing and for its current account facility. To this end the investor contributed EUR 260 000, the BvS two loans totalling EUR 560 000 and the *Land* of Saxony-Anhalt a loan of EUR 260 000 ⁽⁶⁾.
- (20) Subject to approval by the Commission, the loans from the BvS were to be converted into grants.
- (21) The working capital was needed for maintenance measures, interim financing of outstanding claims and order financing. According to the German authorities it is normal practice in the steel construction industry for about 10 % of the order value to be guaranteed by a bank at the outset. After the work has been completed and the product delivered, the customer has a guarantee claim of 5 % for two to five years.

3. The restructuring plan

- (22) According to Germany, central to the restructuring plan drawn up by the investor is the investor's acquired know-how; the introduction of effective control and tightening-up of management; the reduction of administrative expenditure; the restructuring of operational areas; and the increased use of the distribution network of Jahnke

⁽⁴⁾ Guarantee guidelines of the *Land* of Saxony-Anhalt, circular of 4 April 2000 (*Bürgschaftsrichtlinie des Landes Sachsen-Anhalt RdErl vom 4.4.2000*), N 413/91; E 5/94; E 8/01.

⁽⁵⁾ OJ C 288, 9.10.1999, p. 2.

⁽⁶⁾ Granted under the guidelines for granting consolidation loans to small and medium-sized businesses in the *Land* of Saxony-Anhalt (*Richtlinie über die Gewährung von Konsolidierungsdarlehen an mittelständische Unternehmen im Land Sachsen-Anhalt*), an aid scheme approved by the Commission under number N 452/97.

Lenzen. The restructuring period was given as 1 December 1999 to 30 November 2002.

- (23) The restructuring plan foresaw a turnover/annual result of about EUR 8 million/EUR 250 000 in 2000, EUR 9 million/EUR 600 000 in 2001 and EUR 10 million/EUR 600 000 in 2002. The actual turnover/annual result was EUR 2 million/EUR 100 000 in 2000 and EUR 5 million/EUR 15 000 in 2001.
- (24) The restructuring plan consisted, according to Germany, of the following measures.

Management and employees

- (25) According to Germany, one of the reasons that ultimately resulted in the insolvency of HAMESTA was inadequate management. HAMESTA was overstaffed in its operational and administrative departments, resulting in high costs and inefficient management.
- (26) The total staff was reduced to 80, of which 45 were production staff. Management staff levels were cut especially. In addition to the permanent staff, two external consultants, a lawyer and a business adviser were to take over some of the tasks previously performed in-house.

Control

- (27) According to Germany, in the past HAMESTA's management of orders was unbusinesslike. The management failed to keep track of any additional work done under contracts and consequently customers were not charged for it. This led in turn to contracts being wrongly costed.
- (28) As part of the restructuring of the enterprise, in December 1999 a start was made with the introduction of a comprehensive business-management plan incorporating the formulation of targets, target-based management and an indication of targets attained, involving the use of modern software for accounting and business planning. In this way, real-time costing became possible for contracts processed.

Production and more efficient manufacture

- (29) Existing warehouse stocks were to be properly listed and monitored using a warehouse management system. In order to reduce waste and offcuts, Jahnke was to obtain its steel requirements directly from the steelworks. The idea was that the steelworks would cut the raw materials to the required size for each contract and then deliver them to Jahnke by a private rail link.

A new focus for business areas

- (30) The range of customers was to be diversified by branching out into newer, more profitable activities. While HAMESTA's management aimed to process as much steel as possible in the shortest possible time, Jahnke's objective is to produce high-quality, sophisticated steel structures.
- (31) While HAMESTA did not specialise in any particular areas of steel structures manufacture, Jahnke Halle has developed a range of higher quality products. In cooperation with an architect, the enterprise's management has developed a wide range of hangars that incorporate glass and wood elements into the main steel structure. In order to facilitate the in-house production of turnkey hangars, Jahnke Bau GmbH was set up in conjunction with Jahnke Lenzen in 1998 with a view to carrying out work such as the production of concrete foundations for steel hangars.

Marketing and distribution

- (32) Jahnke was to be linked to the existing distribution network of Jahnke Lenzen and a systematic approach to marketing was to be adopted. According to Germany, Jahnke already has a well-established customer base, including well-known enterprises that rate it as a skilled and reliable supplier and are interested in placing further business with it.

4. Market analysis

- (33) Jahnke is active in the steel construction industry (Nace code 1 28.1).
- (34) Geographically the most important market for Jahnke is Germany where it has a market share of about 0,3 %. Its market share in Europe is less than 0,01 %. According to the German authorities, so far it has had only one supply contract for the European market, amounting to EUR 154 000.
- (35) According to information provided by Germany, there is no structural excess of production capacity either in the German market (about 80 % capacity utilisation in western Germany and about 90 % in eastern Germany) or in the EU market.
- (36) Starting in 1990 Jahnke has continuously reduced its capacity and discontinued a number of activities to improve cost structures. It has also reduced its staff from 650 in 1991 to 80 at present. The purpose of the aid is not to enable the recipient to expand production capacity but to finance mainly start-up costs.

5. Opening of the investigation procedure

- (37) By letter dated 28 February 2001, the Commission informed Germany that it had decided to open the procedure laid down in Article 88(2) of the EC Treaty in the absence of clarification of the following questions:
- (a) Is Jahnke, as a newly created firm, eligible for restructuring aid in accordance with the guidelines?
- (b) Does the restructuring plan, as presented, fulfil the viability criteria of the guidelines?
- (c) Is competition unduly distorted by the aid?
- (d) Would the guarantee of the *Land* of Saxony-Anhalt, as envisaged, be provided in accordance with the criteria laid down in the applicable aid scheme? The Commission accordingly considered the guarantee to be ad hoc aid.
- (38) The Commission also ordered Germany, pursuant to Article 10(3) of Regulation (EC) No 659/1999, to submit all the information necessary to enable it to verify whether the consolidation loan from the *Land* of Saxony-Anhalt had actually been granted in accordance with the criteria laid down in the applicable aid scheme.

III. COMMENTS FROM GERMANY

- (39) In its response to the opening of the investigation procedure, Germany took the view that a letter dated 30 November 1999 from HAMESTA's receiver to Mr Jahnke was to be regarded as a takeover agreement and that Jahnke therefore fell within the exception to the general prohibition on restructuring aid to a newly created firm, provided for in footnote 10 of the guidelines. The German authorities also pointed out that Jahnke had already taken over HAMESTA's stock and between 2000 and 2002 had invested some EUR 237 000 in repairs.
- (40) Germany maintained that the restructuring plan was suited to restoring Jahnke to long-term viability while avoiding undue distortions of competition.
- (41) The German authorities also submitted additional information on the application of the scheme under which the *Land* of Saxony-Anhalt had granted the consolidation loan. In their opinion, the loan had been granted in accordance with all the conditions of the scheme.

(42) Germany reminded the Commission that restructuring aid to newly created firms had been approved in the past and referred in particular to the Commission's decision of 2 August 2000 on aid to Homatec Industrietechnik GmbH (Homatec) and Ambau Stahl- und Anlagenbau GmbH (Ambau) (7).

(43) In January and July 2003 Germany informed the Commission that Jahnke had applied for insolvency and that the proceedings would last at least until mid-2004.

IV. ASSESSMENT OF THE AID

1. State aid within the meaning of Article 87(1) of the EC Treaty

(44) According to Article 87(1) of the EC Treaty, any aid granted by a Member State or through State resources, in any form whatsoever, which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market. Pursuant to the established case-law of the Courts of the European Communities, the criterion of trade being affected is met if the recipient firm carries out an economic activity involving trade between Member States.

(45) Jahnke has received from the BvS two loans totalling EUR 560 000 and from the *Land* of Saxony-Anhalt a consolidation loan amounting to EUR 260 000. The *Land* was prepared to provide an additional guarantee in order to secure a bank loan, which was to be granted in order to finance the sales price of the assets. These measures confer on Jahnke advantages that a company in such economic difficulties would not have obtained on the financial market.

(46) The *Land* of Saxony-Anhalt is part of the federal structure of Germany, and as a constituent State of the Federation shares in public authority. The BvS is likewise a public body. It finances its activities with public money, and acts as a public institution whose terms of reference require it to privatise the enterprises in its keeping on behalf of the authorities and in the public interest. For these reasons, the measures taken by it are also imputable to the State.

(47) The measures at issue are granted through State resources to an individual company favouring it by reducing the

costs it would normally have to bear if it wanted to carry out its restructuring project. Moreover, the recipient of the aid, Jahnke, is active in steel construction and manufactures products that are traded between Member States. As the aid threatens to distort competition, it falls within the scope of Article 87(1) of the EC Treaty.

(48) A derogation from the prohibition in Article 87(1) of the EC Treaty may be granted under either Article 87(2) or Article 87(3) of that Treaty.

(49) Germany has not claimed that the aid should be authorised under Article 87(2). Indeed, it is evident that this provision does not apply.

(50) This case falls under Article 87(3) of the EC Treaty, which gives the Commission discretion to permit State aid in certain specified circumstances. The derogations in Article 87(3)(b), (d) and (e) were not invoked in the present case and are indeed not relevant. Article 87(3)(a) of the EC Treaty empowers the Commission to approve State aid meant for the improvement and economic development of regions with especially low living standards or employment levels. The *Land* of Saxony-Anhalt is such a region. In this case, however, the main purpose of the aid is to promote the development of a certain economic sector rather than to promote the economic development of a region. Hence the aid for restructuring the company in accordance with the restructuring plan presented falls to be assessed under Article 87(3)(c) of the EC Treaty rather than under Article 87(3)(a).

(51) Jahnke is an SME within the meaning of Commission Recommendation 96/280/EC of 3 April 1996 concerning the definition of small and medium-sized enterprises (8).

2. Granting of aid under an approved scheme

(52) In its decision to open the investigation procedure the Commission noted that the *Land* of Saxony-Anhalt intended to provide a loan guarantee under the guarantee guidelines of the *Land* of Saxony-Anhalt (9), which is a scheme approved by the Commission (N 413/91) (hereinafter called the guarantee scheme). The guarantee of EUR 2 million was to be provided in order to secure 80 % of a loan totalling EUR 2,5 million.

(7) Homatec: decision of 12.7.2002 (OJ C 310, 13.12.2002, p. 22); Ambau: Commission Decision 2003/261/EC (OJ L 103, 24.4.2003, p. 51).

(8) OJ L 107, 30.4.1996, p. 4. See also Annex, Article 11 paragraphs 1 and 6.

(9) As adapted by circulars of the Ministry of Finance dated 4 April 2000 and 3 March 2001.

(53) The *Land* of Saxony-Anhalt also granted a consolidation loan amounting to EUR 260 000. According to Germany, the loan was granted in accordance with the guidelines for granting consolidation loans to small and medium-sized businesses in the *Land* of Saxony-Anhalt, which is also a scheme approved by the Commission (N 452/97) (hereinafter called the second scheme).

(54) In the case of both schemes, in order for aid to be granted, certain conditions must be met. In the case of a restructuring, the aid must be limited to restructuring plans that will restore the long-term viability of the recipient; in addition, it must be combined with a substantial contribution from the recipient; and lastly, it must be the minimum required to restore the recipient's competitiveness. Both schemes prohibit investment aid to newly created firms.

(55) As to the consolidation loan from the *Land* of Saxony-Anhalt, the Commission issued an information injunction pursuant to Article 10(3) of Regulation (EC) No 659/1999 to enable it to determine whether this measure fulfilled all the conditions of the second scheme.

(56) As to the envisaged guarantee, the Commission raised doubts whether it would fulfil all the conditions of the guarantee scheme (restoration of long-term viability; no aid for initial investment to a newly created firm). The Commission therefore considered the envisaged guarantee to be ad hoc aid.

(57) In its response to the information injunction and the decision to open the formal investigation procedure, Germany took the view that both measures were granted/would be granted in accordance with the conditions laid down in the respective scheme.

(58) As for the reasons given in point 3 below, the Commission considers that the restructuring plan presented does not fulfil the viability criterion of the guidelines. It also considers Jahnke to be ineligible for restructuring aid. It therefore considers that the loan and the guarantee from the *Land* of Saxony-Anhalt was not granted/would not be granted in accordance with all the conditions of the respective scheme.

(59) As both measures do not fulfil the conditions of the applicable aid scheme, they must be treated as ad hoc aid.

(60) Accordingly, the total amount of ad hoc State aid within the meaning of Article 87(1) of the EC Treaty to be assessed in the present Decision is EUR 2,82 million.

3. Restructuring aid to Jahnke

(61) In the Community guidelines on State aid for rescuing and restructuring firms in difficulty⁽¹⁰⁾, the Commission spelled out in detail the criteria for assessing aid for the purpose of restructuring a company.

Eligibility for restructuring aid

(62) According to point 3.2.2 of the guidelines, a newly created firm is not eligible for rescue or restructuring aid, even if its initial financial position is insecure. This is the case, for instance, where a new firm emerges from the liquidation of a previous firm or merely takes over such firm's assets. The only exceptions to this rule are cases dealt with by the BvS in the context of its privatisation remit and other similar cases in the new *Länder*, involving companies emerging from a liquidation or a takeover of assets occurring up to 31 December 1999.

(63) In its decision to open the formal investigation procedure the Commission noted that Jahnke, which was registered in November 1999, was a newly created firm. It raised doubts whether Jahnke fell within the exception to the general prohibition on restructuring aid to a newly created firm because there had been no liquidation of HAMESTA's assets, nor can Jahnke be considered to have taken over the assets since the creditors' meeting had decided not to proceed with the sale of the assets to Jahnke Halle but instead to dispose of them by public auction.

(64) In its comments Germany took the view that a letter dated 30 November 1999 from the receiver to Mr Jahnke was to be regarded as a takeover agreement. In this letter the receiver envisaged that Jahnke could utilise the assets until such time as a sale took place. The German authorities also pointed out that since December 1999 Jahnke had operated the business of HAMESTA and that both Mr Jahnke and his other company Jahnke Lenzen had made commitments.

(65) Germany also argued that the Commission had already approved aid to newly created firms in a number of instances. It referred in particular to the Homatec and Ambau cases.

(66) According to the German authorities, the takeover of HAMESTA's assets by Jahnke occurred in the following way:

⁽¹⁰⁾ OJ C 288, 9.10.1999, p. 2. These guidelines are applicable inasmuch as part of the aid was granted after they were published (see point 101 of the guidelines).

- (67) On 30 November 1999, the receiver informed Mr Jahnke that he envisaged selling the assets to Jahnke provided he secured the agreement of the creditors' meeting. In the meantime, and in agreement with another tenant of the assets, Mr Jahnke might utilise the assets for a price of about EUR 13 000, payable after 1 January 2000.
- (68) In February 2000 a draft sales contract was drawn up. After it appeared that HAMESTA's creditors' meeting would not agree to the sales contract but preferred to sell the assets by public auction, a new rental agreement for an unlimited duration was signed (in May 2000).
- (69) Germany first arranged for the auction to take place in 2002, then in 2003. In order to ensure that Jahnke might acquire the assets at this auction, it was first to acquire the liens from HAMESTA's creditors and then the assets.
- (70) Jahnke also took over HAMESTA's stock for a purchase price of EUR 76 694. Moreover, between 2000 and 2002 it invested some EUR 237 000 in repairs to the assets.
- (71) HAMESTA's receiver informed Mr Jahnke by letter dated 30 November 1999 of his intention to sell Jahnke HAMESTA's assets for a purchase price of EUR 2,5 million, provided he secured the agreement of the creditors' meeting. The assets were at that time rented out to someone else (until 31 March 2000 at the latest). The receiver also proposed to Mr Jahnke that he might, in agreement with the other tenant, utilise the assets for a fee of about EUR 13 000, payable after 1 January 2000.
- (72) The sales contract concluded between the receiver and Jahnke in February 2000 never became effective as HAMESTA's creditors' meeting preferred to sell the assets by public auction.
- (73) A new rental agreement between the receiver and Jahnke was concluded in May 2000. This agreement could be terminated at six months' notice at year's end. It would expire when HAMESTA came out of receivership.
- (74) The Commission considers that it does not follow clearly from the letter of 30 November 1999 that the receiver was committing himself to a final takeover of the assets by Jahnke. The receiver was merely proposing to Mr Jahnke that he might, in agreement with the other tenant, utilise the assets for an indeterminate duration. Mr Jahnke could utilise the assets until such time as the receiver terminated the agreement within the legal deadline.
- (75) The receiver was manifestly unable in November 1999 to enter into a long-term commitment for a takeover of the assets as he did not have the agreement of the creditors' meeting. As became clear in February 2000, the creditors' meeting was not in favour of a direct asset sale to Jahnke but preferred to sell the assets via a public auction.
- (76) The public auction of HAMESTA's assets has not yet taken place. According to the German authorities, the value of the assets has to be re-established before the auction can take place (now scheduled for the end of 2003). The Commission cannot therefore assume that Jahnke will be able to acquire the assets or operate them on a permanent basis.
- (77) The present case is different from the Homatec and Ambau cases, both of which fell under the 1994 guidelines on State aid for rescuing and restructuring firms in difficulty⁽¹¹⁾. Owing to the exceptional circumstances prevailing in the new *Länder*, the Commission authorised under the 1994 guidelines restructuring aid to firms newly created in the form of so-called '*Auffanglösungen*'⁽¹²⁾. As Homatec and Ambau were both *Auffanglösungen* and as all the relevant criteria of the 1994 guidelines were satisfied, the Commission was able to approve the restructuring aid for these two companies at that time.
- (78) The present case, however, concerns the application of the 1999 guidelines, under which the *Auffanglösung* concept was limited to cases dealt with before 31 December 1999. Moreover, the circumstances of the present case are factually different inasmuch as the economic operation of HAMESTA was not taken over by Jahnke on a long-term basis but only on the basis of an offer from the receiver to utilise the assets and only until such time as the receivership was closed. The present case is therefore different from the two aforementioned cases. As the case falls to be assessed under the new, stricter guidelines, the Commission must apply different criteria from those used in the Homatec and Ambau cases.
- (79) For the reasons set out above, the Commission cannot consider that Jahnke fulfils the criteria for exemption from the general prohibition on restructuring aid to a newly created firm.

⁽¹¹⁾ OJ C 386, 23.12.1994, p. 12.

⁽¹²⁾ New firms evolving out of the bankruptcy proceedings and taking over the economic operation of the bankrupt business.

(80) The Commission believes that its considerations about the non-eligibility for restructuring aid are reason enough to find that the aid does not meet the conditions for a favourable exercise of its discretion under Article 87(3)(c) of the EC Treaty. However, in order to assess whether the measures fulfil the other criteria of the approved aid schemes, the Commission has also examined the other relevant criteria of the guidelines.

Restoration of viability

(81) According to the guidelines, the restructuring plan must restore the long-term viability and health of the firm within a reasonable timescale and on the basis of realistic assumptions as to its future operating conditions. To fulfil the viability criterion, the restructuring plan must be considered capable of putting the firm into a position of covering all its costs including depreciation and financial charges and generating a minimum return on capital such that, after completing its restructuring, the firm will not require further injections of State aid and will be able to compete in the market place on its own merits.

(82) In its decision to open the formal investigation procedure the Commission noted that the cooperation with Jahnke Lenzen was a main element of the restructuring plan. The Commission pointed out in this connection that it could not endorse a restructuring plan under which the definitive beneficiary of the aid would not necessarily be in a position to carry out the restructuring measures. Furthermore, the Commission raised doubts whether the investor would have the necessary financial resources to acquire the assets. In the light of the fact that the restructuring period was to end in November 2002 but the public auction was only to take place between March and September 2002, the Commission also raised doubts whether the restructuring plan could restore the long-term viability of Jahnke in accordance with the guidelines.

(83) From the information set out above it appears that so far Jahnke has been unable to permanently acquire HAMESTA's assets, which in itself shows that the undertaking is not viable. For the following reasons it seems hardly possible that Jahnke will be able to acquire the assets in the near future:

- (a) the bank loan of EUR 2,5 million, necessary for financing the sales price of the assets, has not been granted;
- (b) the investor himself has only limited financial resources; and
- (c) Jahnke applied for insolvency in 2002.

(84) The weakness of the restructuring plan lies in the fact that at no time was the precondition for its implementation, i.e. the takeover of the assets, financially secured. The information submitted after the opening of the procedure does not allow the conclusion to be drawn that at any point has a clear commitment been given by the financing bank. Nor does this information show that the investor could have obtained the lacking financial support from out of his own resources, as they had already been allocated to financing the start-up measures, or from the planned profits of the business itself, as these would have been insufficient.

(85) The Commission's initial doubts have been confirmed by the fact that the actual performance of Jahnke has been below expectations. Whereas the restructuring plan foresaw an annual result of EUR 250 000 in 2000 and EUR 600 000 in 2001, the actual result has been about EUR 100 000 in 2000 and EUR 15 000 in 2001.

(86) The Commission cannot consider the restructuring plan as being based on realistic assumptions or that Jahnke will be restored to long-term viability within a reasonable timescale.

Distortion of competition

(87) The restructuring plan must contain measures to offset as far as possible adverse effects on competitors, otherwise the aid involved is contrary to the common interest and not eligible for exemption pursuant to Article 87(3)(c) of the EC Treaty.

(88) This implies that, if the undertaking concerned is active in a market in the EU where an objective assessment of supply and demand shows that there is a structural excess of production capacity, the restructuring plan must make a significant contribution, proportionate to the amount of aid received, to the restructuring of the industry serving the relevant market by irreversibly reducing or closing capacity. In cases where there is no structural excess of production capacity, the Commission will not normally require a reduction of capacity in return for the aid.

(89) Germany has provided the Commission with detailed information concerning the situation in the steel construction market. The Commission is satisfied that there is no structural excess of production capacity in the market in which Jahnke Halle is predominantly active, namely the German market, in which its market share is less than 1 %, and in the European market, where its market share is less than 0,001 %.

- (90) Since Jahnke is an SME and the restructuring plan does not provide for any increase in production capacity, the Commission considers the corresponding criterion of the guidelines to be fulfilled.

Proportionality to the restructuring costs and benefits

- (91) The amount and intensity of the aid must be limited to the strict minimum needed to enable the restructuring to be undertaken and in the Commission's opinion must be proportionate to the expected benefits. The investor must therefore make a significant contribution towards the restructuring costs from out of his own resources.
- (92) On the basis of the information provided by Germany, the proposed own contribution of the investor is about 21 % of the total costs. Because Jahnke is a firm in the small to medium-sized category, the Commission is justified in taking a less restrictive attitude towards the aid. It is, therefore, of the opinion that the investor contribution is reasonable.

V. CONCLUSION

- (93) In the light of the above considerations, the Commission finds that, even though its initial doubts concerning the undue distortion of competition and the proportionality of the aid have been allayed, neither the conditions set out in the guidelines concerning the eligibility of the company nor those concerning the viability of the restructuring plan have been met. Consequently, the aid has to be considered incompatible with the common market.
- (94) The Commission finds that the Federal Republic of Germany has unlawfully granted aid of about EUR 820 000 in breach of Article 88(3) of the EC Treaty.
- (95) The unlawfully granted aid, consisting of two loans from the BvS totalling EUR 560 000 and a loan from the *Land* of Saxony-Anhalt amounting to EUR 260 000, must, in so far as it has not been repaid, be recovered from the recipient,

HAS ADOPTED THIS DECISION:

Article 1

The aid which Germany has granted to Jahnke Stahlbau GmbH in the form of two loans from the BvS totalling EUR 560 000 and a loan from the *Land* of Saxony-Anhalt amounting to EUR 260 000 is incompatible with the common market.

Article 2

The aid which Germany has granted in the form of a EUR 2 000 000 guarantee from the *Land* of Saxony-Anhalt in favour of Jahnke Stahlbau GmbH is incompatible with the common market.

Article 3

1. Germany shall take all necessary measures to recover the aid referred to in Article 1 and unlawfully made available to the recipient.

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

Article 4

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

Article 5

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 1 October 2003.

For the Commission

Mario MONTI

Member of the Commission