II

(Non-legislative acts)

DECISIONS

COMMISSION DECISION

of 29 June 2011

on State aid SA.14554 (C 7/04) implemented by Germany for the Gesellschaft für Weinabsatz (Wine Marketing Company)

(notified under document C(2011) 4426)

(Only the German text is authentic)

(2012/268/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) [1] thereof,

Having called on interested parties to submit their comments pursuant to the provision cited above [2],

Whereas:

I. PROCEDURE

(1) Following a complaint received on 10 May 2001 the Commission sent a written inquiry to the Federal Republic of Germany on 9 November 2001. The measure was notified by letter of 5 March 2002, received on 8 March 2002, in response to this inquiry of the Commission. Since the measure had at that time already been implemented, it was listed among aid schemes not notified (aid NN 159/02).

(2) Germany sent additional information by letter dated 20 November 2002, received on 25 November 2002, by letter dated 28 April 2003, received on 2 May 2003, by letter dated 27 May 2003, received on 28 May 2003, and by fax dated 2 October 2003.

(3) By letter dated 19 February 2004, SG-Greffe (2004) D/200645, the Commission informed Germany that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union in respect of the aid.

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

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

(6) Germany submitted comments to the Commission by letter of 18 March 2004, registered as received on 23 March 2004. Further comments were submitted by letter of 10 January 2006, registered on 10 January 2006, and by letter of 13 July 2007, registered on 16 July 2007.

(7) By letter dated 21 October 2008, SG-Greffe (2008) D/206430, the Commission informed Germany that it had decided to extend the procedure which had been initiated under Article 108(2) of the TFEU in respect of the aid.

(8) The Commission decision to extend the procedure was published in the *Official Journal of the European Union* [5]. The Commission called on interested parties to submit their comments on the aid.

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

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

[2] OJ C 69, 19.3.2004, p. 11 and OJ C 329, 24.12.2008, p. 18.

[3] OJ C 69, 19.3.2004, p. 11.

[4] The complainant sent reminding letters to the Commission, but did not submit additional formal comments.

[5] OJ C 329, 24.12.2008, p. 18.

(10) Germany submitted (after a request for delay extension of 17 November 2008, accepted by the Commission on 21 November 2008) comments to the Commission by letter of 23 December 2008, registered on 5 January 2009.

II. DETAILED DESCRIPTION OF THE AID

II.1. Title of the measure

(11) *Kredit an die Gesellschaft für Weinabsatz mit nachfolgendem Forderungsverzicht* [loan to the *Gesellschaft für Weinabsatz* (wine marketing company) and subsequent waiver of claims]

II.2. Legal basis

(12) The measure was implemented on the basis of a contractual agreement between the *Wiederaufbaukasse der rheinland-pfälzischen Weinbaugebiete* (reconstruction fund for the Rhineland-Palatinate winegrowing areas, WAK) and the *Gesellschaft für Weinabsatz Pfalz GmbH* (Palatinate wine marketing company, GfW).

II.3. Objective

(13) The objective was to grant a loan to GfW to purchase must from winegrowing enterprises and merchants. Secured assets were agreed as collateral. These assets were also subject to varying degrees of retention of title (*Eigentumsvorbehalt*) by the winegrowing enterprises and merchants (*Weinbaugetriebe und Kommissionäre*) in the form of simple, extended or prolonged retention of title. The waiver of claims took place when GfW got into financial difficulty due to a slump in market prices.

II.4. Public body

(14) WAK is a public-law corporation of the federal state of Rhineland-Palatinate registered in Mainz. It operates in the winegrowing sector in a similar manner as a bank. WAK's customary trade is the granting of loans for land reparcelling (*Flurbereinigung*). WAK is financed from contributions, fees, loans and grants (Article 8(1) of the *Weinbergsaufbaugesetz* [winegrowing enterprise development act]).

II.5. Beneficiaries

(15) Beneficiary of the measure was GfW, which was granted a loan by WAK on terms which were not in conformity with market conditions.

(16) GfW was a wholly-owned subsidiary of the *Bauern- und Winzerverband Rheinland-Pfalz Süd* (southern Rhineland-Palatinate farmers' and winegrowing enterprises' association). It was founded in 1984 for the purpose of marketing wine and its trade was the production and marketing of sparkling wine, grape juice, grape jelly, grape spirit and brandy. GfW also provided services for winegrowing enterprises in connection with distillation measures (*Destillationsmaßnahmen*). These distillation measures involved the measures covered by the common market organisation ([6]) and state-funded distillation normally carried out on the basis of Council decisions ([7]). In connection to this GfW advised small wine producers and organised the transport of wine to the distilleries.

(17) Other possible beneficiaries are the winegrowing enterprises and merchants from whom, as a result of the loan, GfW was placed in a position to buy must and who did not waive any of their claims on GfW when WAK decided to do so at the time GfW got into financial difficulty.

II.6. Background of the aid

(18) In 1999, using a loan of EUR 15 302 696,25 from WAK and its own resources, GfW purchased 44 million litres of must. 60 % of this must had a minimum of 60 degree Oechsle and an average of 81 degree Oechsle. 40 % of the must was ordinary table wine must with a minimum of 44 degree Oechsle which was bought to take advantage of the beneficial conditions of preventive distillation. An average price of EUR 0,38 per litre was paid for all the must purchased. No finished wine was purchased. The purchase was carried out on the basis of simple, extended or prolonged retention of title (*einfache, erweiterte, verlängerte Eigentumsvorbehalte*) by the winegrowing enterprises and merchants. At the same time these secured assets were agreed as collateral for WAK.

(19) According to the information submitted by Germany, GfW's business plan was to take advantage of the distillation opportunities in accordance with Regulation (EEC) No 822/87 for 40 % of the must and process 60 % of the must into raw wine for the production of sparkling wine and to sell it to sparkling wine producers. In addition, GfW were planning to stock 20 % of the raw wine for nine months to one year in order to take advantage of EU subsidies for stocking of wine in accordance with Regulation (EEC) No 822/87, before it would be sold on the market for raw wine for the production of sparkling wine.

(20) On 11 November 1999 the winegrowing enterprises and merchants received a down payment of 80 % of the purchase price. A down payment of EUR 0,31 per litre was paid on average.

([6]) Council Regulation (EEC) No 822/87 of 16 March 1987 on the common organization of the market in wine (OJ L 84, 27.3.1987, p. 1), as of 1 August 2000 Council Regulation (EC) No 1493/1999 of 17 May 1999 on the common organisation of the market in wine (OJ L 179, 14.7.1999, p. 1).

([7]) See, for example, Council Decision 2000/808/EC of 19 December 2000 on the granting of exceptional national aid by the authorities of the Federal Republic of Germany for the distillation of certain wine sector products (OJ L 328, 23.12.2000, p. 49).

(21) In 1999, GfW sent 40 % of its stocks to preventive distillation. In view of the fall in prices on the market for raw wine at the end of 1999 GfW decided not to sell any of the raw wine that year but to wait for the market to recover in 2000.

(22) In 2000, due to the comparatively large harvests and falling sales of sparkling wine the market in white wine slumped even further (average prices falling in some instances by as much as EUR 0,20). Much of the cask wine still in storage had to be sent for another round of distillation.

(23) As a result of an amendment of the common organisation of the market in wine adopted in 1999 and entered into force on 1 August 2000, preventive distillation in accordance with Regulation (EEC) No 822/87 was replaced by distillation to supply the potable alcohol market in accordance with Regulation (EC) No 1493/1999. The terms were considerably poorer, and only around half the previous price of EUR 0,50-0,55 per litre for preventive distillation could be achieved.

(24) Following on the slump in prices in 2000 it proved impossible for GfW to achieve the expected profits neither on the wine market nor in distillation to supply the potable alcohol market. As a result, the book value of GfW's stocks had to be reduced significantly and as a result, GfW's liabilities exceeded its assets.

(25) In view of the commercial problems described above, an interim statement of account was drawn up for the year until 31 October 2000 and examined by an auditor. On 31 October 2000 GfW's liabilities (EUR 15 670 155) exceeded its current assets (EUR 9 886 856) with EUR 5 783 299 and GfW had the liabilities as expressed in the table below. According to a report prepared by Wirtschaftsprüfungsgesellschaft Falk & Co. GmbH, GfW would very soon be facing insolvency proceedings due to its liabilities exceeding its assets (*Überschuldung*) if nothing was done to avoid this.

(26) *Table 1*

(EUR)

Liabilities to	Amount
WAK	10 150 959
Financial institutions	726 892
Suppliers	218 460
Winegrowing enterprises and merchants	4 355 581
Other	218 263
Total	*15 670 155*

(27) According to §19 of the German insolvency law (*Insolvenzordnung*) liabilities exceeding the assets of a company is cause for opening the insolvency proceedings. Because of this, the Executive board of GfW was under the obligation in accordance with § 64 GmbHG a.F. i. V. m. § 19 InsO, to within three weeks of entering into the state of its liabilities exceeding its assets (*Überschuldung*) to apply for the opening of the insolvency proceedings.

(28) As a result of the impending insolvency, GfW asked some creditors (WAK, the winegrowing enterprises and around 130 merchants involved in the purchase described in recital 18) to waive part of their outstanding claims to enable the company to continue trading. In the case of the winegrowing enterprises and merchants, the waiver was to cover 90 % of their outstanding claims, meaning they would only receive an additional 2 % of the agreed purchase price. The remaining deficit was to be eliminated by the necessary subordination of claims and waiver of claims by WAK.

(29) As principle creditor (see table 1) with a weaker security position, WAK had a considerable interest in avoiding the impending insolvency. It therefore tried to convince the winegrowing enterprises and merchants to agree to waive a part of their claims. WAK also signed a written agreement with GfW, dated 4 December 2000, where it agrees to subordinate a part of its outstanding claims — corresponding to GfW's deficit — in favour of the other creditors. The final amount of the subordination of claims was only to be specified once the waiver of claims declarations of the winegrowing enterprises and merchants had been received, so as to minimise the amount subordinated. It was also agreed that WAK would, if it would prove necessary at a later stage to avoid insolvency proceedings, waive the same amount of claims as it had subordinated.

(30) 1 700 out of the 2 700 winegrowing enterprises and merchants declared their willingness to waive 90 % of their remaining claims, corresponding to around 60 % of the outstanding claims of the group as a whole. However, the remaining winegrowing enterprises and merchants either specifically refused the offer or did not answer the request. It was clear that some of them decided not to waive their claims because of their stronger security position — some had prolonged retention of title and had already received down payment of 80 % of the agreed price. This meant that their returns in case of insolvency proceedings would be higher than the 2 % of the agreed purchase price which was on offer.

(31) In addition, a number of the winegrowing enterprises and merchants had handed in complaints against GfW and these complaints had been treated by the court who proposed settlements agreements. According to the settlement agreements GfW should pay 70 % of the remaining claims and 30 % should be waived. The

court also decided that GfW would have to carry 80 % of the court fees. Similar settlement agreements were proposed by other courts and, with this in mind, it was no longer possible for GfW to expect that the other winegrowing enterprises and merchants would agree to waiving 90 % of their remaining claims. In addition, several winegrowing enterprises and merchants now declared that they would demand 100 % repayment of the remaining 20 %.

(32) § 305a of the German insolvency law states that an out of court settlement (*außergerichtliche Einigung*) to avoid settlement of debts fails when one single creditor decides to proceed to enforcement after the out of court settlement negotiations have started.

(33) Therefore, contrary to its original intention, GfW could no longer ask the winegrowing enterprises and merchants to waive any of their claims. Instead, GfW signed an agreement with WAK dated 21 February 2001 stating that WAK agrees to fully cover GfW's deficit of year 2000 by waiving EUR 5 005 441,60 of its claims. On the remaining debt for the time period of 1 January 2001 to 31 December 2001, no interest would be charged. The agreement also stated that the winegrowing enterprises and merchants remaining claims would be settled in full. This way, the security of WAK's non-subordinated claims was guaranteed, the deficit situation was remedied, insolvency proceedings were avoided for the time being and GfW could continue trading.

(34) During the period of 1 November 2000 to 31 December 2000 GfW made repayments to WAK on the loan at a value of EUR 1 440 446,92. During the period of 2001-2005 GfW continued trading and made regular repayments on its loan to WAK, totalling EUR 3 728 969,40. In addition, during 2001, GfW made interest payments totalling EUR 149 757,16 to WAK.

(35) Due to a decline in turnover in GfW's regular fields of business as well as insufficient capitalisation, GfW had by 31 December 2004 decided to cease all activity and to liquidate GfW. All remaining stock of the remaining business areas was sold. All the proceeds were used to repay WAK. It was agreed with the buyer (a private person) that the value of all the stock remaining according to the inventory list on 31 December 2004 would be transferred to WAK at the end of 2005. The value would be the original purchase value of EUR 79 579,79.

(36) GfW was eventually dissolved as of 1 June 2005 and deleted from the trade registry during the course of 2006. There is neither a legal successor nor any legal entity from which the aid could be recovered.

(37) By 31 December 2005 EUR 9 897 154,65 of the loan had been repaid and EUR 793 994,99 in interest payments had been made. After winding-up GfW's remaining assets (EUR 87 079,79), WAK's remaining outstanding claims of around EUR 313 000 were declared irrecoverable and were written off. The part of the loan that was never repaid therefore totalled EUR 5 318 441,60 (the original waiver of claims of EUR 5 005 441,60 plus the outstanding claims after liquidation of EUR 313 000).

II.7. **Nature and intensity of the aid**

(38) WAK's EUR 15 302 696,25 loan to GfW was granted in several instalments in 1999 for a term of 12 to 18 months:

(EUR)

11.11.1999	5 936 061,62
25.11.1999	6 868 777,04
1.12.1999	585 429,72
13.12.1999	112 110,66
17.12.1999	1 800 317,21
Total	*15 302 696,25*

(39) The interest rates charged was as follows:

4th quarter 1999	3,28 %
1st quarter 2000	3,51 %
2nd quarter 2000	4,15 %
3rd quarter 2000	4,80 %
4th quarter 2000	5,15 %
2001	4,55 %-5,25 %

(40) On 11 November 1999 the suppliers received a down payment of 80 % of the agreed price. In addition, as a result of the prolonged retention of title awarded some of the suppliers, which would not come to an end on processing, blending or mixing, part of the stock was used to secure these suppliers' remaining claim of 20 %. The stocks were also agreed as collateral for WAK. However, due to the retention of title WAK had only a secondary claim on part of the stock as long as the claims with prolonged retention of title were not settled. The larger share of the risk of fluctuations in prices consequently lay with GfW and its creditors of which WAK was the main one.

(41) On the loan granted by WAK to GfW only limited interest was paid: from 11 November 1999 to 31 December 1999 (at a rate of 3,28 %), from 1 January 2000 to 31 December 2000 (3,51-5,15 %) and from 1 January 2001 to 31 December 2001 (4,55-5,25 %). No further interest was claimed after 31 December 2001.

(42) Considering the risk that WAK took when lending the money to GfW, a substantial risk premium should have been charged on top of the regular interest rate. As there was no such risk premium added to the interest rate an aid element was present at the time of granting of the loan. This aid element can be calculated as the difference between the interest rate charged and the market interest rate plus the risk premium which should have been charged.

(43) According to the Commission notice on the method for setting the reference and discount rates [8] as amended by Commission notice on technical adaptation to the method for setting the reference and discount rates [9], applicable for the period in question, the base reference rate for Germany lay between 5,23 % and 6,33 %. According to the notice, the reference rate determined is a floor rate which may be increased in situations involving particular risk (for example, an undertaking in difficulty, or where the security normally required by banks is not provided). In such cases, the premium may amount to 400 basis points or more if no private bank would have agreed to grant the relevant loan.

(44) According to Germany, interest rates charged by German banks during the same period for similar credits lay between 5,25 % and 6,50 % (VR-Bank Südliche Winstrasse e.G.) and 5,40 % and 6 % (Die Kreissparkasse Bad Dürkheim).

II.8. **Duration of measure**

(45) One-off measure.

II.9. **Reasons for initiating the formal investigation procedure**

(46) The Commission initiated the formal investigation procedure provided for under Article 108(2) of the TFEU because it suspected that the subordination and waiver of claims could constitute State aid in the meaning of Article 107 of the TFEU.

(47) In particular, the Commission had, based on the information available at the time of the initial opening of the formal investigation procedure, examined whether the subordination and waiver of claims were carried out pursuant to the private creditor test.

(48) The private creditor test assesses whether, under the same market conditions, a private creditor would have acted or has acted in the same way as the public creditor. As regards the case at hand, private creditors had claims on GfW totalling EUR 5,5 million on 31 October 2000, but none of them waived their claims. The report by an independent auditor did appear to show that it made economic sense for WAK to subordinate and waive a share of their claims, but did not explain why none of the other creditors were prepared to waive their own claims.

(49) In the opening of the formal investigation procedure the Commission concluded that at the time of the opening of procedure, it could not be excluded that WAK's subordination and waiver of claims (the loan to GfW and future interest payments on this loan) were not in accordance with the private creditor test as they seemed to be higher than absolutely necessary and excessively favoured not only GfW but also the other creditors (primarily the winegrowing enterprises and merchants) who had their claims refunded in full.

(50) The opening of the formal investigation procedure was then extended to include the granting of the loan. Specifically, doubt was expressed concerning whether the granting of the loan was done on market terms (no risk premium was charged) and with sufficient securities.

(51) In the extension of the formal investigation procedure, doubt regarding possible aid to the winegrowing enterprises and merchants was again raised. The information available at the time seemed to indicate that the price paid for the must was above the relevant market price, that the aim of the transaction was not to maximise profits but to support the wine and must market, and that the security position awarded the winegrowing enterprises and merchants under the sales contract were more advantageous than under normal circumstances.

(52) The doubt regarding the price was emphasised by documents provided by Germany after the first opening of procedure, which showed a fluctuation in the price per litre of table wine (not including VAT) in 1999 in the Pfalz-Rheinhessen region from a minimum EUR 0,26 (October/November) to EUR 0,30 (June to September), EUR 0,35 (April), and a maximum EUR 1,10 (February, June, November/December). The minimum market price that could be achieved for table wine at the time of granting the loan was therefore EUR 0,26 per litre.

(53) The average purchase price of EUR 0,38 per litre therefore seemed to be above the lowest market price of around EUR 0,26 per litre.

[8] OJ C 273, 9.9.1997, p. 3.
[9] OJ C 241, 26.8.1999, p. 9.

III. COMPLAINTS AND INFORMATION FROM THIRD PARTIES

(54) The Commission received information indicating that the above waiver of claims was financed through WAK funds. As the public authority funding WAK, the federal state of Rhineland-Palatinate was said to have examined a possible capital injection due to WAK's reduced capital base, but ultimately decided against it.

(55) The Commission received a complaint concerning the alleged State aid involved in the waiver of claims by WAK. The complainant stated that GfW was competing in selling wine distillates and, as a result of the waiver in favour of this company, competitors would have considerable problems selling their own products. The complainant submitted several news paper articles with information concerning the waiver of claim by WAK to the benefit of GfW.

(56) The same complainant also forwarded a letter he had received from the public prosecutor's office in Kaiserslautern (central economic crime office) as a response to a letter he had sent there. The letter from the public prosecutor's office in Kaiserslautern summarises the information received from the complainant in the form of news paper articles and statements and in the letter informs the complainant that, based on this information they had received, there are no grounds for opening criminal investigation proceedings (*strafrechtliches Ermittlungsverfahren einzuleiten*).

IV. COMMENTS FROM INTERESTED PARTIES

(57) The Commission did not receive any comments as part of the formal investigation procedures.

(58) The repeated letters from the complainant after the initial opening of procedure did not add any new facts or arguments.

V. COMMENTS FROM GERMANY

V.1. Aid element at time of granting of the loan

(59) Germany has provided comprehensive information on the conditions of the loan granted by WAK to GfW which has been included in the description of the measure in section II.

(60) In its comments, Germany agrees that the interest charged by WAK for the loan to GfW was lower than the market rate. Germany recognises that the difference between the market rate and the interest rate charged constitutes aid to GfW in the meaning of Article 107(1) of the TFEU.

(61) Germany also supplies proof of that GfW was liquidated and dissolved as of 1 June 2005. All remaining stock of the remaining business areas was sold. All the proceeds were used to repay WAK. It was agreed with the buyer (a private person) that the value of all the stock remaining according to the inventory list on 31 December 2004 would be transferred to WAK at the end of 2005. The value would be the original purchase value of EUR 79 579,79. GfW was deleted from the trade registry during the course of 2006 and there is neither a legal successor nor any legal entity from which the aid could be recovered. In accordance with settled case-law [10] recovery is according to Germany therefore not possible.

(62) Germany gives their assurances that GfW's granting of simple, extended or prolonged retention of title to the winegrowing enterprises and merchants in connection with the sale of must, was in accordance with common business practise. Germany also assures that to accept the secured assets as collateral despite the retention of title as WAK did for the loan to GfW is also according to common business practice.

(63) Further, Germany states that the purchase of must in autumn 1999 by GfW was carried out at the market price because 60 % of the must bought was quality must (minimum 60 degree Oechsle) and not ordinary table wine must as assumed in the opening of procedure. According to Germany the quality requirements for the production of sparkling wine are higher than the requirements for table wine (minimum 60 and 44 degree Oechsle respectively). The remaining 40 % of the must was ordinary table wine must and was bought to take advantage of the beneficial conditions of preventive distillation.

(64) In its comments, Germany emphasises that the marketing concept of GfW for 60 % of the stock involved the purchase of high quality must in large quantities and the subsequent processing into homogenous batches of raw wine for sparkling wine (Sektgrundwein), in compliance with the homogeneity and quality requirements of wineries. Raw wine for the production of sparkling wine requires a low level of SO2 and high levels of fruit acids. This could only be achieved if the must was purchased during the autumn sales period and through GfW's own preparation of the must into raw wine.

(65) Pursuant to the information provided by Germany, on the market for raw wine for sparkling wine, the basic price paid for one litre of must of 60 degrees Oechsle was EUR 0,312 per litre. For each additional degree Oechsle (up to a maximum of 80 degrees Oechsle) EUR 0,005 per litre was paid. The winegrowing enterprises and merchants were paid for their high quality must, 60 % of the must purchased, in accordance with this principle.

[10] ECJ, 21.3.1990, *Belgium* v *Commission (Tubemeuse)*, C-142/87, ECR I-959.

(66) In this context Germany points to the relevant market. In its opinion the market price for ordinary table wine cannot be taken as a benchmark for this 60 % of the stock because the relevant market for GfW is not the ordinary table wine market but the market for higher quality raw wine to be used in the production of sparkling wine. Germany also makes reference to the theory of demand substitution which points out that two products are not traded on the same market if one cannot be replaced by the other even if the price of one changes. In the case at hand, the specific requirements for must and raw wine for the production of sparkling wine makes it impossible to replace it with ordinary table wine must or table wine even if the price for table wine would decrease significantly. Therefore, a decrease in the price of table wine will not influence the price of must for the production of sparkling wine because they cannot be substituted for one another.

(67) According to the import statistics of the German winegrowers association (Deutsche Weinbauverband) for the years 1998-2001, imported white wine, which due to its high quality is suitable for the production of sparkling wine, had a market price of EUR 0,38 per litre, significantly higher than the EUR 0,26 per litre quoted to table wine. In its comments, Germany concludes that two separate markets exist, one for ordinary table wine and table wine must, and another for high quality raw wine and high quality must to be used for the production of sparkling wine.

(68) According to Germany it should therefore be concluded that the relevant market for the wine not being sent for distillation is the market for high quality raw wine for the production of sparkling wine, with much higher achievable prices (EUR 0,38 per litre) and not the ordinary table wine market price (EUR 0,26 per litre). Germany therefore reasons that the price paid for the must by GfW was in conformity with the market price of the relevant market and included a normal profit margin.

(69) In addition, GfW planned to participate in EU stocking and distillation programmes (GfW had already offered such services to winegrowers before). Under the stocking programme EUR 0,06 per litre was paid for 20 % of the stocks which should later be sold as raw wine for sparkling wine production. Under the distillation programme EUR 0,50-0,55 per litre was paid for the 40 % of the stock sent for distillation.

(70) In the opinion of Germany it was possible to make a profit from these activities when WAK granted the loan to GfW. On the one hand, GfW intended to use 40 % of the must purchases for preventive distillation in December 1999 at a distillation price considerably higher than the purchase price (EUR 0,50-0,55 per litre). On the other, it was predicted that sparkling wine producers would pay relatively good prices (between EUR 0,36 and EUR 0,41 per litre) for large lots of uniform, guaranteed quality raw wine. Germany reasons that GfW could have achieved an average sales revenue of EUR 0,44 to EUR 0,46 per litre, much above the average of EUR 0,38 per litre paid to the winegrowing enterprises and merchants.

(71) The planning was based on the following assumptions of target prices:

	Volume	Price/litre (EUR)
Distillation	40 %	0,50-0,55
EU subsidy for stocking of wine/must (1 year): EUR 0,06/l and subsequent sale as raw wine for sparkling wine	20 %	0,435
Sale as raw wine for sparkling wine	40 %	0,375

(72) Based on these assumptions an average sales price of 0,44 to 0,46 EUR /l was expected.

(73) The above sales forecast results in the following profit calculation:

	Price/litre (EUR)
Purchase price and processing	0.37-0,38
Income from sale as raw wine for sparkling wine, distillation, stocking subsidies	0,44-0,46
Expected profit	0,06-0,09

(74) Based on a total volume of some 44 million litres, a total profit between some EUR 2,64 million and some EUR 3,96 million was expected.

(75) Germany also makes reference to that the market price for table wine quoted by the European Commission in the opening decisions (EUR 0,26 per litre) is the lowest quote for November 1999 for table wine. The full quote for November 1999 is a market price for table wine between EUR 0,26 and EUR 0,56 per litre. In addition, this was the full spread for entire 1999. For 2000 the spread lay between EUR 0,20 and EUR 0,41 per litre. Germany also emphasises that 60 % of the must bought by GfW had an average degree of Oechsle of 81, much higher than the requirement for table wine of 44 and this was of course reflected in the price GfW paid for the must.

V.2. **Aid element at time of subordination of claims and waiver of claims**

(76) According to Germany, it was established that GfW was facing insolvency after an interim statement of accounts

was drawn up in November 2000. GfW then had an account deficit of some EUR 6 million which was confirmed when the annual accounts were drawing up for 2000. The reasons for the deficit was that the value of the stock still in GfW possession had fallen following a significant slump in market prices which meant that GfW would only be able to sell their stock at a lower price than first predicted.

(77) According to the information submitted by Germany, on 31 October 2000, WAK still had claims of some EUR 10 million towards GfW. As collateral WAK had GfW's secured assets, valued at EUR 5,7 million at the same moment in time. These were subject to retention of title (simple, extended or prolonged) by the winegrowing enterprises and merchants which according to Germany would give them priority in case of insolvency. So according to Germany, in case of insolvency procedure, GfW would need to settle the payment to the winegrowing enterprises and merchants, at a value of around EUR 3,5 million, before payments to any other creditor could be made.

(78) In order to remedy the deficit situation in time and avoid the opening of the insolvency proceedings in accordance with § 64 GmbHG a.F. i. V. m. § 19 InsO, immediate action was needed.

(79) Germany points out that, as principle creditor with a weaker security position, WAK had a considerable interest in avoiding the impending insolvency. It therefore tried to convince the winegrowing enterprises and merchants to waive part of their claims and also agreed to the following with GfW on 4 December 2000:

— a subordination of claims of the same amount as the deficit after the winegrowing enterprises and merchants had agreed to waive 90 % of their remaining claims,

— to, but only if necessary, waive the amount of claim they had agreed to subordinate.

(80) Despite a successful start to the negotiations with a majority of the winegrowing enterprises and merchants agreeing to waive their claims, GfW eventually failed due to concerted actions by some of the winegrowing enterprises and merchants and their lawyers. They were not willing to waive their claims because of their preferential security position as a result of their extended or prolonged retention of title and filled complaints. These complaints were treated by the court who proposed settlement agreements. According to the settlement agreements GfW should pay 70 % of the remaining claims and 30 % should be waived. The court also decided that GfW would have to carry 80 % of the court fees. Similar settlement agreements were proposed by other courts. With this in mind, it was no longer possible for GfW to expect that the winegrowing enterprises and merchants would agree to waiving 90 % of their remaining claims. In addition, several winegrowing enterprises and merchants now declared that they would demand 100 % repayment of the remaining 20 %. The fact that 1 700 out of 2 700 winegrowing enterprises and merchants had already indicated that they would be willing to waive a share of their claims was no longer of relevance as § 305a of the German insolvency law states that an out of court settlement (*außergerichtliche Einigung*) to avoid insolvency proceedings fails when one single creditor decides to proceed to enforcement after the out of court settlement negotiations have started.

(81) On 21 February 2001 WAK therefore agreed with GfW to cover the deficit of year 2000 by waiving EUR 5 005 441,60 of its claims, that no interest would be charged on the remaining debt for the time period of 1 January 2001 to 31 December 2001 and that the claims of the winegrowing enterprises and merchants would be settled in full. The security of the non-subordinated claims was guaranteed. GfW's deficit situation was remedied, insolvency proceedings were avoided and GfW could continue trading.

(82) Germany claims that the subordination and the waiver of claims are both in accordance with the private creditor test. To support this claim, Germany refers to relevant case-law.

(83) Waiving part of the claim can be required in order to increase the amount which is effectively recovered [11]. A private creditor would act so as to minimise his losses. In case a claim was not sufficiently secured, agreement to postpone the repayment would increase the chances of repayment without losses as the debtor would have the chance to overcome the crisis and improve its situation [12]. In the HAMSA judgment of the CFI, the court rejects the Commissions previous practice of requiring equal share of waivers of claims for private and public creditors in relation to their share of the debt. Instead the court established that the private creditor test can be applied also when the waivers relationship between the different creditors is asymmetric. The CFI emphasises that the creditor's status as the holder of a secured, preferential or ordinary claim, i.e. the rank of the securities of the different creditors, is decisive. The CFI established that a public creditor acts like a private creditor when he decides to waive a share

[11] ECJ, 29.4.1999, *Spain* v *Commission*, C-342/96, ECR I-2459.
[12] ECJ, 22.11.2007, *Spain* v *Lenzing*, C525/04, ECR I-9947.

of his claims, after extensive and reasonable evaluation of how much he might be able to recover, of the risk of liquidation and of the chance of the firm being restored to viability ([13]). Lastly, Germany refers to the Commission's decision in the Huta Cynku case, where the Commission decided that no advantage and thus no State aid exists where restructuring would yield better proceeds than liquidation ([14]).

(84) On these grounds Germany argues that taking into consideration WAK's position as the main creditor and its weaker security position compared to the winegrowing enterprises and merchants, both the subordination as well as the waiver of claim was in accordance with the private creditor test and do not constitute State aid. In an insolvency procedure WAK would have lost at least the same and most probably a significantly larger amount of their remaining claim.

(85) Only through avoiding the insolvency of GfW and settling the winegrowing enterprises and merchants remaining claims did WAK have full security rights to the remaining stock and could secure a higher repayment on its remaining claims than what would be realised in case of insolvency.

(86) From an *ex-ante* perspective, the behaviour of WAK was, according to Germany, correct, especially as they managed to secure a higher repayment by having converted their weak security position into a primary security right and avoided the impending insolvency of GfW. According to Germany, any private bank would have acted in the same way in the same situation.

(87) According to the German authorities, an *ex-ante* evaluation of GfW accounts would have estimated that by a continuation of GfW, WAK would have been able to realise repayments of EUR 5 112 918,81 million. On the other hand, if GfW had entered into insolvency proceedings, WAK would only have been able to realise a repayment of maximum EUR 2,4 million. This leaves a difference of minimum EUR 2,7 million.

(88) This is confirmed by a report from 3 February 2003, prepared by an independent auditor ([15]), commissioned by WAK and submitted by the German authorities. The report comes to the conclusion that it made economic sense for WAK to subordinate their claims, waive part of their claims to the abovementioned amount and to waive the future interest payments. The reasons for this conclusion were submitted by Germany and are as follows:

— If WAK had not subordinated and waived its claims and interest payments GfW would have had to apply for insolvency and GfW would have been wound up. WAK's claims would have had to be met from the sale of GfW's stocks.

— If the company had been wound up the value of GfW's stocks would have fallen. The actual proceeds from the sale of the stocks would have been only about 50 % to 70 % of the book value. Therefore, allowing for security rights, the proceeds would have amounted to between EUR 1,84 million and EUR 2,4 million.

— Insolvency proceedings are costly.

— The German Insolvency Law ('InsO') provides for a right to separation for products with retention of title; however, this is determined on the basis of the insolvency administrator's option to choose between performance of the contract and separation of assets (paragraph 103 InsO). Separation of assets is possible only if the insolvency administrator refuses to perform the contract, in which case the creditor can withdraw from the contract and demand the separation of the assets, and is entitled to compensation for non-performance of the contract. Down payments may be offset. In return, GfW can claim recovery of the payments already made, which may be offset against the compensation for non-performance of the contract.

— By contrast, after WAK subordinated part of its claims, it was legally possible for GfW to avoid insolvency proceedings and after waiving part of its claims and interest payments, WAK had outstanding claims of EUR 5,15 million which it could expect to recover as a result of the fact that GfW could continue trading.

— It is also pointed out that if insolvency proceedings had been opened the repayments on the loan of EUR 1 440 476,92 made by GfW to WAK in the period 1 November to 31 December 2000 could have been contested by GfW under the insolvency rules. This would have led to WAK being obliged to repay these funds.

([13]) CFI, 11.7.2002, *HAMSA* v *Commission*, T-152/99, ECR II-3049.
([14]) Commission decision, 25.9.2007, on State aid C 32/06 (ex N 179/06) implemented by Poland for Huta Cynku Miasteczko Śląskie SA, 2008/142/EC.
([15]) Wirtschaftsprüfungsgesellschaft Falk & Co. GmbH.

(89) Germany emphasises that an *ex-post* evaluation shows that the subordination and waiver of claims option made more economic sense as the repayments received by avoiding the insolvency of GfW was EUR 4 670 517,65, making it superior to the maximum EUR 2,4 million which could have been secured under the insolvency proceedings.

(90) Germany concludes that as the subordination and waiver of claims was in accordance with the private creditor test, there was no aid to the winegrowing enterprises and merchants at the time of subordination and waiver of claims by WAK.

VI. ASSESSMENT OF THE AID

VI.1. Common market organisation

(91) Until the entry into force of Council Regulation (EC) No 479/2008 of 29 April 2008 on the common organisation of the market in wine [16], winegrowing and wine processing were covered by Regulation (EC) No 1493/1999. Article 71 of Regulation (EC) No 1493/1999 states that Articles 87, 88 and 89 of the Treaty (now Articles 107, 108 and 109 of the TFEU) shall apply to the production of and trade in the products covered by it. Before 31 July 2000, winegrowing and wine processing were covered by Regulation (EEC) No 822/87. Article 76 of Regulation (EEC) No 822/87 states that Articles 92, 93 and 94 of the Treaty (now Articles 107, 108 and 109 of the TFEU) shall apply to the production of and trade in the products listed in Article 1 of the Regulation. Therefore, the measures at hand have to be examined in the light of State aid rules.

VI.2. Existence of State aid within the meaning of Article 107(1) of the TFEU

(92) Pursuant to Article 107(1) of the TFEU, any aid granted by a Member State or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is prohibited, insofar as it affects trade between Member States.

(93) WAK is a public-law corporation and is financed partly from funds of the federal state of Rhineland-Palatinate and partly from parafiscal charges. The measure is therefore financed from state resources.

(94) Aid to an undertaking appears to affect trade between Member States where that undertaking operates in a market open to intra-Union trade [17]. There is a substantial intra-Union trade in agricultural products. Therefore, the present aid is liable to affect trade between Member States [18].

(95) The Court has ruled that in order to determine whether a state measure constitutes aid within the meaning of Article 107(1) of the TFEU, it is also necessary to establish whether the recipient undertaking receives an economic advantage which it would not have obtained under normal market conditions [19] and/or whether the measure enabled the undertaking to avoid having to bear costs which it would normally have had to meet out of its own financial resources [20]. This would indeed be sufficient to indicate potential distortions of competition [21].

VI.2.1. *Existence of aid to the Gesellschaft für Weinabsatz (GfW)*

VI.2.1.a. The granting of loan by WAK

(96) The WAK loan of EUR 15 302 696,25 was granted in autumn 1999. GfW was charged an interest rate between 3,28 % and 5,25 % over the period of the loan. No risk premium was charged. The reference rate for Germany for this period lay between 5,23 % and 6,33 %.

(97) Germany agrees with the Commission's view that the granting of the loan was not done on market terms. Had the loan been granted on market terms, a higher base rate would have been charged and a risk premium would have been added considering the limited security that the collateral for the loan offered.

(98) It can be concluded that the loan granted to GfW contained a State aid element within the meaning of Article 107(1) of the TFEU as GfW received an economic advantage it would not have obtained under normal market conditions. The aid element is calculated as the difference between the interest charged and the reference rate plus an appropriate risk premium.

(99) *Possible passing on of aid to legal successors*

[16] OJ L 148, 6.6.2008, p. 1.

[17] See in particular the judgment of the ECJ, 13.7.1988, *France* v *Commission*, C-102/87, ECR 4067.

[18] Germany's intra-Community trade in wine amounted to 10 364 600 litres (imports) and 1 881 900 litres (exports) in 1999. No data are available for Rhineland-Palatinate. (*Source:* Federal Statistical Office.)

[19] ECJ, 11.7.1996, *SFEI and Others*, C-39/94, ECR I-3547, paragraph 60.

[20] ECJ, 14.2.1990, *France* v *Commission*, C-301/87, ECR I-307, paragraph 41.

[21] ECJ, 17.9.1980, *Philip Morris* v *Commission*, C-730/79, ECR 2671.

(100) According to Germany, GfW was liquidated and dissolved as of 1 June 2005. All remaining stock of the remaining business areas was sold. All the proceeds were used to repay WAK. It was agreed with the buyer (a private person) that the value of all the stock remaining according to the inventory list on 31 December 2004 would be transferred to WAK at the end of 2005. The value would be the original purchase value of EUR 79 579,79. GfW was deleted from the trade registry during the course of 2006 and there is neither a legal successor nor any legal entity from which the aid could be recovered. In accordance with settled case-law ([22]) recovery is according to Germany therefore not possible.

(101) As the remaining assets of GfW were sold off, the person who purchased them could possibly have benefited from the aid granted to GfW. However, as the person paid the original purchase price and the market had slumped over the passed years, it is clear that the price paid by the purchaser was at least the market prices. Therefore, the Commission concludes that no aid was passed on to the purchaser of GfW's remaining stock. At the same time, GfW ceased to exist and therefore there is no aid to be recovered.

VI.2.1.b. The subordination and waiver of claims by WAK

(102) The subordination of claims and the waiver of claims and interest payments were financed by WAK's own resources and a corresponding loan taken out by WAK and are therefore to be considered to be financed through State resources.

(103) To establish whether the subordination of claims and the waiver of claims and interest payments constitute State aid in the meaning of Article 107(1) of the TFEU to GfW it is necessary to establish whether GfW receives an economic advantage which it would not have obtained under normal market conditions and/or whether the measure enabled GfW to avoid having to bear costs which it would normally have had to meet out of its own financial resources. This assessment has to be done using the private creditor test. The private creditor test assesses whether, under the same market conditions, a private creditor would have acted or has acted in the same way as the public creditor.

(104) According to settled case-law, waiving part of the claim can be required in order to increase the amount which is effectively recovered. A private creditor would act so as to minimise his losses ([23]). In case a claim was not sufficiently secured, agreement to postpone the repayment would increase the chances of repayment without losses as the debtor would have the chance to overcome the crisis and improve its situation ([24]).

(105) In the HAMSA ([25]) ruling of the CFI, the court rejects the Commissions previous practice of requiring equal share of waivers of claims for private and public creditors in relation to their share of the debt. Instead the court established that the private creditor test can be applied also when the waivers relationship between the different creditors is asymmetric. Paragraph 168 and 169 of the judgment reads:

'(168) *When a firm faced with a substantial deterioration of its financial situation proposes an agreement or series of agreements for debt arrangement to its creditors with a view to remedying the situation and avoiding liquidation, each creditor must make a decision having regard to the amount offered to it under the proposed agreement, on the one hand, and the amount it expects to be able to recover following possible liquidation of the firm, on the other. Its choice is influenced by number of factors, including the creditor's status as the holder of a secured, preferential or ordinary claim, the nature and extent of any security it may hold, its assessment of the chances of the firm being restored to viability, as well as the amount it would receive in the event of liquidation. If it turned out, for example, that in the event the firm was liquidated, the realisation value of its assets was only sufficient to cover mortgage and preferential claims, ordinary claims would have no value. In such a scenario, acceptance by an ordinary creditor of the cancellation of a major part of its claim would not really be a sacrifice.*

(169) *It follows that, in the absence of knowledge about the factors which determine the respective values of the choices offered to creditors, the mere fact that there is an apparent lack of proportion between the amounts which the various creditors have written off is not in itself conclusive as to the reasons which led them to accept the debt remissions proposed.*'

(106) In addition, in the HAMSA ([26]) case the CFI established that, a public creditor acts like a private creditor when he decides to waive a share of his claims, after extensive and reasonable evaluation of how much he might be able to recover, of the risk of liquidation and of the chance of the firm being restored to viability. Lastly, in the Commission's decision in the Huta Cynku ([27]) case, the Commission decided that no advantage and thus no State aid exists where restructuring would yield better proceeds than liquidation.

([22]) See footnote 10.
([23]) See footnote 11.
([24]) See footnote 12.
([25]) See footnote 13.
([26]) See footnote 13.
([27]) See footnote 14.

(107) With reference to the case-law quoted above, when assessing whether a private creditor would have acted or has acted in the same way as WAK, it is necessary to examine the choices that WAK had when it was concluded that GfW was facing insolvency and what the economic implications connected to these choices would be. As a second step, it is also necessary to carry out the same examination for the winegrowing enterprises and merchants and then to evaluate whether the situation faced by WAK can be compared to and evaluated based on the actions of the winegrowing enterprises and merchants.

(108) When informed that GfW was facing insolvency, WAK had two choices. It could either allow for insolvency proceedings to be opened, or it could try to avoid this by reaching an agreement with GfW which would enable GfW to continue trading. Based on the information submitted by Germany and supported by a report from 3 February 2003 prepared by an independent auditor (see recital 88), the economic implications connected with these two decisions are according to Germany as follows. Ex-ante, in case of insolvency proceedings, WAK could expect to recover a maximum of about EUR 2,4 million of its claims. In the case WAK signed an agreement with GfW, waiving part of its claims and thereby enabling GfW to continue trading, WAK could *ex-ante* expect to recover some EUR 5,1 million of its claims. This leaves a difference of EUR 2,7 million in favour of enabling GfW to avoid insolvency proceedings. Whether the winegrowing enterprises and merchants were willing to do the same, only had a slight impact on the recovery calculations, but did not change the outcome on the comparison of the two alternatives.

(109) The estimate of a recovery rate in case of insolvency of EUR 2,4 million in the report is based on the German assumption that the claims of the winegrowing enterprises and merchants of EUR 4,4 million would have to be settled before those of WAK. However, according to the European Commission, the German insolvency law states that only the debt to those winegrowing enterprises and merchants with prolonged retention of title would have had to be settled before the debts of WAK. The other debts would be on an equal standing with the debt of WAK. The European Commission's own calculations show however that even in the case where the claims of WAK and the winegrowing enterprises and merchants would all have equal standing, WAK could expect to recover the maximum of EUR 4,7 million in case of insolvency (based on a maximum total repayment of EUR 6,8 million in case of insolvency and that WAK and the winegrowing enterprises received repayment in proportion to what they were owed — EUR 10 million and EUR 4,4 million respectively for WAK and the winegrowing enterprises and merchants). It can therefore be concluded that *ex ante* the more favourable option for WAK would be to enable GfW to avoid insolvency.

(110) The winegrowing enterprises and merchants on the other hand faced a very different calculation. Firstly, they had already received 80 % of the payment for their delivered goods. Secondly, according to the offer by GfW they would only receive 10 % of the 20 % still owed to them. In effect this meant that they would only receive an additional 2 % of the agreed purchase price if they signed the agreement. This is certainly less than what they could expect in insolvency proceeding, irrespectively of their security standing (simple, extended or prolonged retention of title). In average they could expect to receive 48 % of their remaining claims (EUR 2,1 million of the total EUR 4,4 million owed them). It is therefore no surprise that some of the winegrowing enterprises and merchants refused the offer by GfW. Thirdly, it must have been evident that it would be in WAK's interest to waive part of its claims and avoid insolvency even if the winegrowing enterprises and merchants did not do the same, which again would enable the winegrowing enterprises and merchants to get a larger share of their remaining claims back than the offered 10 %. Fourthly, several of them had already taken GfW to court and the court had rules in their favour, obliging GfW to settle 80 % of the remaining claims.

(111) It can be concluded that despite the fact that the winegrowing enterprises and merchants and WAK were all creditors to GfW, the choices and outcome of those choices for WAK and the winegrowing enterprises and merchants were so dissimilar that they are not comparable. The fact that the winegrowing enterprises and merchants chose not to waive their claims should not have a negative bearing when analysing whether WAK acted in accordance with the private creditor test.

(112) Weighing the different options for WAK against each other the Commission concludes that the partial subordination and waiver of claims of 4 December 2000 and of 21 February 2001 totalling of EUR 5 005 441,60 and waiver of interest payments as from 31 December 2000 was the most favourable option for WAK and is therefore in accordance with the private creditor test. The subordination and waiver of claims make out a debt deferral, which is more advantageous to the creditor compared to liquidation. In accordance with settled case-law ([28]), a public creditor will balance the advantage inherent in obtaining the offered sum under the restructuring plan and the sum they would be able to recover via the firm's liquidation. Hence, GfW did not

([28]) ECJ, 29.4.1999, *Spain* v *Commission*, C-342/96, ECR I-2459, paragraph 46; ECJ, 29.6.1999, *DMT*, C-256/97, ECR I-3913, paragraph 24; and CFI, 11.7.2002, *HAMSA* v *Commission*, T-152/99, ECR II-3049, paragraph 168.

receive any advantage it would not have received under normal market conditions and thus no State aid was awarded to GfW as a result of WAK's decision to subordinate and waive part of its claims.

(113) In the opening of procedures doubt was expressed as to whether WAK kept the subordination and waiver of claim to a strict minimum. However, according to the comments of Germany, WAK waived the share of its claims needed to cover GfW's deficit for 2000, which was necessary according to German insolvency law (see recital 25) in order to avoid insolvency proceedings and enable GfW to continue trading. In the first contract (signed on 4 December 2000) between GfW and WAK, in order to avoid GfW's insolvency, WAK agrees with GfW on a subordination of claims of the same amount as GfW's deficit after the winegrowing enterprises and merchants had agreed to waive 90 % of their remaining claims and to, if necessary, waive the amount of claim they had agreed to subordinate (see recitals 79 and 80). The reason for the waiver being larger than first expected was that despite WAK's and GfW's efforts to convince the winegrowing enterprises and merchants to contribute their part in helping GfW to avoid insolvency (see recitals 79 and 80 of the German comments), the winegrowing enterprises and merchants' decision to not waive any of their claims for the reasons mentioned in recital 110 above. As mentioned in recital 108, the decision by the winegrowing enterprises and merchants to not waive a share of their remaining claims only had a limited impact on WAKs economic assessment and did not change the outcome of this assessment: that it was economically preferential for WAK to enable GfW to avoid insolvency proceedings.

(114) The Commission therefore concludes that WAK's partial subordination and waiver of claims was the most favourable option for WAK and is therefore in according with the private creditor principle and are therefore not to be considered State aid within the meaning of Article 107(1) of the TFEU to GfW.

VI.2.2. *Existence of aid to winegrowing enterprises and merchants*

(115) In the opening and subsequent extension of the formal investigation procedure questions were raised regarding possible aid to the winegrowing enterprises and merchants. Firstly, the security position awarded the winegrowing enterprises and merchants by GfW at the time of purchase seemed relatively strong and doubts were raised whether the awarded security position was really in accordance with normal business practice. Secondly, the price paid for the purchased must was estimated to be above the market price. Thirdly, the winegrowing enterprises and merchants decision to not waive any of their claims when GfW was faced with insolvency was put into question together with WAK's decision to subordinate and then waive a share of its claims even though the winegrowing enterprises and merchants decided not to waive the 90 % of their remaining claims (20 % of value of stock).

VI.2.2.a. At the time of purchase of must — security position awarded

(116) In their comments, Germany has given their assurances that that simple, extended or prolonged retentions of title awarded to the different winegrowing enterprises and merchants in connection with the purchase of must, was indeed in accordance with normal business practise. This means that though it gave the winegrowing enterprises and merchants a relatively strong security position, especially those awarded prolonged retention of title, it was in accordance with normal business practise and was not stronger than had they made arrangements with a private purchaser.

(117) The Commission makes reference to the recommendations ([29]) registered by the Federation of German wineries and wine retailers, Trier, the Federation of German wine merchants, Mainz and the German Winegrowers' Association, Bonn (*Der Bundesverband der Deutschen Weinkellereien und des Weinfachhandels e.V., Trier, der Bundesverband der Deutschen Weinkommissionäre e.V., Mainz und der Deutsche Weinbauverband e.V., Bonn*) with the German competition authorities (*Bundeskartellamt*) in accordance with § 22 Abs. 3 Nr. 2 of the Act against Restraints of Competition (*des Gesetzes gegen Wettbewerbsbeschränkungen*) ([30]). The first version of the recommendations was registered in 1990 and the current version in 2005. These recommendations make it clear that in cases where the full purchase price is not paid at the time of transfer of the merchandise the seller should retain the title of ownership until the full price has been paid. The security positions awarded the winegrowing enterprises and merchants in the case at hand gave varying degree of security. Only the ones with prolonged retention of title had the full security for

([29]) http://www.doerr-weinkommission.de/fileadmin/user_upload/agb_doerr.pdf

([30]) http://www.bundeskartellamt.de/wDeutsch/download/pdf/Merkblaetter/Merkblaetter_deutsch/Konditionenempfehlungen0509.pdf

payment. This means that the security position for the winegrowing enterprises and merchants were in average not as strong as recommended in the recommendations mentioned above. The Commission therefore accepts, with reference to the recommendations and the actual security position awarded, Germany's assurances that it is normal business practice to award security positions as was done to the winegrowing enterprises and merchants in this case and that the security position awarded was not stronger than under a normal contract between two private actors and therefore do not constitute State aid in the meaning of Article 107(1) of the TFEU.

VI.2.2.b. At the time of purchase of must — the price paid for the purchased must

(118) In the opening of procedures, the price paid by GfW for the must bought was said to be above the market price. As market price the price for table wine was used and the price quoted as reference price was EUR 0,26 per litre. In their comments, Germany has supplied substantial information on the business strategy of GfW, which shows that the ordinary table wine market is not the relevant market and that the strategy of GfW was threefold. First, to buy table wine must with which to participate to the EU's distillation programme (40 % of the stock). Second, to buy high quality must with the intention to sell it on the market for high quality raw wine to be used for the production of sparkling wine (60 % of the stock). Third, to participate to the EU's stocking programme with 20 % of the stock before it was sold for production of sparkling wine. When analysing whether two products belong to the same market, the Commission makes use of the *Commission Notice on the definition of relevant market for the purposes of Community competition law* ([31]). According to point 7 of the note, 'a relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use'.

(119) The market for the must bought for taking advantage of the EU's distillation programme is of course that for ordinary table wine. However, the relevant price must be the price paid for wine sent for distillation.

(120) As all traditional intervention measures on agricultural markets, preventive distillation of wine according to Article 38 of Regulation (EEC) No 822/87 has as its main aim to remove over-supply from the wine market and thus the price of this voluntary distillation had to be high enough to give producers the incentive to send wine for distillation. The actual yearly price of the distillation measure was defined by the Council as 65 % of the so called guide price.

([31]) OJ C 372, 9.12.1997, p. 5.

(121) The guide price itself was decided upon by the Council once a year and the price was expressly set to support the market. To do this it obviously had to be set at a high enough level. Council Regulation (EC) No 1676/1999 of 19 July 1999 fixing the guide price for wine for the 1999/2000 wine year ([32]) fixed the guide prices for the different categories of wine. The price for category AII (white table wine from vine varieties of the Sylvaner or Müller-Thurgau type) was set at EUR 82,81 per hectolitre and the one for AIII (white table wine from vine varieties of the Riesling type) at EUR 94,57 per hectolitre. According to Annex III of Commission Regulation (EC) No 1681/1999 of 26 July 1999 fixing the buying-in prices, aids and certain other amounts applicable for the 1999/2000 wine year to intervention measures in the wine sector ([33]), the exact amount paid for distillation depended on the degree of alcohol of the wine delivered because the price for preventive distillation (65 % of the guide price) was calculated by the Commission not per hectolitre but by degree of alcohol per hectolitre that year.

(122) The Commission's main role in relation to distillation of wine was to assess the actual market situation and accordingly fix the quantities admitted for preventive distillation each year in each Member State. Commission Regulation (EC) No 2367/1999 of 5 November 1999 introducing preventive distillation as provided for in Article 38 of Council Regulation (EEC) No 822/87 for the 1999/2000 wine year ([34]) allocated 148 000 hectolitres to the German market for the wine year 1999/2000. Commission Regulation (EC) No 546/2000 of 14 March 2000 amending Regulation (EC) No 2367/1999 introducing preventive distillation as provided for in Article 38 of Council Regulation (EEC) No 822/87 for the 1999/2000 wine year ([35]) increased this to 468 000 hectolitres. Regulation (EC) No 2367/1999 limited the quantity of wine sent for distillation to 40 % of the production. According to the Commission's records German producers distilled around 400 000 hectolitres under this scheme.

(123) According to Germany the price paid for the wine sent for distillation was EUR 0,50-0,55 per litre. Taking the calculation method above into consideration, the Commission finds the price quoted by Germany to be realistic.

(124) The Commission concludes that because of the EU's market intervention for a substantial share of the wine two separate markets were created. One where the reference price was that paid for wine sent to distillation, in this case EUR 0,50-0,55 per litre, and another where the reference price was that of the market. The EUR 0,26 per litre as quoted in the opening of procedure decision can therefore not be seen as the relevant reference price for the must bought to be sent for distillation.

([32]) OJ L 199, 30.7.1999, p. 7.
([33]) OJ L 199, 30.7.1999, p. 15.
([34]) OJ L 283, 6.11.1999, p. 10.
([35]) OJ L 67, 15.3.2000, p. 7.

(125) In order to establish what was the relevant market for the must bought in order to turn it into raw wine for the production of sparkling wine it is first necessary to evaluate if separate markets exist for wine and if whether the must bought by GfW belongs to the same market as table wine or not. It will also be necessary to decide whether higher quality wine could achieve higher prices. The Commission in its statistics always refer to different prices depending on the quality of the wine. According to the Commission's in-house wine experts the price of wine is not the same for each batch and the wine statistics available only give average prices for different quality of wine. The actual price is influenced by several elements. The main elements are the quality, the aging, the reputation, the demand and the alcoholic degree/degrees of Oechsle. The degree of Oechsle indicates the ripeness and the level of sugar which is present in the grapes. It is important as it determines the final natural alcoholic degree of a wine. According to the Deutsches Weininstitute (German wine institute) the production of sect/sparkling wine requires a high degree of alcohol content in the raw wine ([36]).

(126) This supports Germany's claims that the degree of Oechsle in the must needs to be higher if the final product is to be sparkling wine than if it is to be table wine and that a premium had to be paid for the must with a higher degree of Oechsle. The Commission therefore accepts Germany's arguments that separate markets exist and that the price must indeed have been higher for must to be used for the production of sparkling wine rather than for must used for the production of table wine. As a result, the Commission also accepts that the price paid by GfW at the time of purchase cannot be compared to the price for table wine, EUR 0,26 per litre, as done in the opening of the procedure.

(127) Germany goes on to provide information regarding the achievable price on the relevant market, the market for high quality must to be used for the production of sparkling wine. Pursuant to this information, on the market of raw wine for sparkling wine, the basic price paid for one litre of must of 60 degrees Oechsle was EUR 0,312 per litre. For each additional degree Oechsle (up to a maximum of 80 degrees Oechsle) EUR 0,005 per litre was paid. The winegrowing enterprises and merchants were paid for their high quality must, 60 % of the must purchased, in accordance with this principle. Also, according to the import statistics of the German winegrowers association (Deutsche Weinbauverband) for the years 1998-2001, submitted by Germany, imported bulk white wine, which due to its high quality is suitable for the production of sparkling wine, had a market price of EUR 0,38 per litre.

(128) The Commission is willing to accept the arguments of Germany for a relevant market price of around EUR 0,38 per litre, based on the information from its in-house wine experts regarding how the price of wine is determined, the information from the Deutsches Weininstitute as stated above and the profit calculation in GfW's business plan.

(129) The business plan of GfW, submitted by Germany, shows that at the time of purchasing the must, GfW was expecting to be able to send 40 % of the stock for preventive distillation at a price of EUR 0,50-0,55 per litre, to sell 60 % of the stock at a price of EUR 0,375 per litre and for 20 % of the stock, they expected to get an additional EU subsidy for stocking of wine of EUR 0,06 per litre before selling it at EUR 0,375 per litre a year later. In total, they expected to sell the stock at an average price of EUR 0,44 to EUR 0,46 and to make a profit of between EUR 0,06 and EUR 0,09 per litre. This would leave a total profit of between some EUR 2,64 million and EUR 3,96 million.

(130) In 1999, GfW sent 40 % of its stocks to preventive distillation for which it received a price of EUR 0,50-0,55 per litre. In view of a fall in prices on the market in wine at the end of 1999 — which had not been expected by GfW considering the higher prices the year before — GfW decided not to sell its remaining stock that year but to store it and sell it in 2000, or if the prices on the market would remain low, to take advantage of a second round of preventive distillation. This decision was based on the assumption that preventive distillation would be continued. However, the new Regulation (EC) No 1493/1999 on the common organisation of the market in wine abolished preventive distillation. Instead it introduced the option of voluntary distillation to supply the potable alcohol market. The newly introduced crisis distillation measure can only be used in exceptional cases of market disturbance. Recital 35 of Regulation (EC) No 1493/1999 explicitly refers to the elimination of the distillation system as an artificial outlet for surplus production. The new Regulation entered into force on 31 July 2000.

(131) For GfW this meant that the distillation measures in the 2000/01 wine year were considerably less favourable than those in previous years. In distillation to supply the potable alcohol market only around half of the previously achieved average price of EUR 0,50-0,55 per litre could be achieved.

(132) In the view of Germany this development could not have been predicted when GfW decided to keep the wine in storage. The Commission, on the other hand, believes that this development was in fact foreseeable. The new common organisation of the market in wine explicitly set out to eliminate the distillation system. Thus it ought to have been clear to GfW, at the time it was decided to go for a second round of distillation, that distillation measures in the second part of 2000 and onwards would not provide any relief from the falling prices on the wine market.

([36]) http://www.deutscheweine.de/icc/Internet-EN/nav/0f2/0f207d71-9ffe-401e-76cd-461d7937aae2&sel_uCon=02a235d6-994d-7017-288b-5952196117f5&uTem=0e3307d7-19ff-e401-e76c-d461d7937aae

(133) However, the arguments around whether GfW should have known about the change in the Regulation are irrelevant. The business plan at the time of purchase, against which GfW's behaviour as a private investor should be judged, only included a first round of preventive distillation, which did take place and for which GfW received EUR 0,50-0,55 per litre. It did not include a second round of preventive distillation and therefore the expected profit from such distillation was not a part of the overall profit calculation at the time of purchase. It was not part of the business plan and though there is no doubt that GfW's decision to go for a second round of distillation when the market price fell was a bad one, it cannot be seen as State aid to the winegrowing enterprises and merchants at the time of purchase.

(134) Based on the above, the Commission concludes that GfW paid the market price for the must purchased in the autumn of 1999 and that therefore, no State aid in the meaning of Article 107(1) of the TFEU was awarded the winegrowing enterprises and merchants.

VI.2.2.c. At the time of subordination and waiver of claims by WAK

(135) In recital 114 it was concluded that the subordination and waiver of claims by WAK was done purely out of self interest and in accordance with the private creditor test and that there therefore was no State aid to GfW. The fact that the decision by WAK favoured the winegrowing enterprises and merchants has no relevance as this was not the intention, but just a consequence of WAK trying to maximise the recovery of its own funds.

(136) The Commission concludes that when subordinating and waiving its claims, WAK did not award any State aid in the meaning of Article 107(1) of the TFEU to the winegrowing enterprises and merchants.

VI.3. **Classification of the aid as illegal aid**

(137) Since the aid element contained in the loan by WAK in favour of GfW was granted and paid without prior notification to the Commission, it is illegal within the meaning of Article 1(f) 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 ([37]).

VI.4. **Exemptions provided for in Article 107 of the Treaty regarding the loan to GfW**

(138) It must therefore be examined whether one of the exemptions to the prohibition of State aid under Article 107(1) of the TFEU applies.

(139) From the current viewpoint, the exemptions provided for in Article 107(2) and (3)(a), (b) and (d) are not applicable, since the aid in question is neither:

— aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, nor

— aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State, nor

— aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest.

(140) Article 107(3)(c) of the TFEU is therefore the only exemption which might possibly apply.

(141) At the time of the granting of the aid, aid to primary producers was evaluated directly under Article 107(3)(c) of the TFEU. In accordance with the praxis at the time, aid for investments, credit, the livestock sector, producer organisations, publicity and promotion, compensation for damages caused by diseases, insurance premiums and technical assistance could when fulfilling certain criteria be deemed compatible with the internal market. None of the mentioned forms of compatible aid can however be used to exempt the aid in question.

(142) In addition, concerned not to leave any avenue unexplored, the Commission has examined whether the guidelines for rescuing and restructuring firms in difficulty might not be applicable to the case in question. The first condition to be fulfilled by an undertaking if it is to benefit from rescuing or restructuring aid is that it should be considered as being in difficulty within the meaning of the guidelines on State aid for rescuing and restructuring firms in difficulty ([38]). There is no indication from the information held by the Commission that the undertaking was in difficulty within the meaning of the abovementioned guidelines when the aid was granted. It is only a year later due to a slump in the market that GfW finds itself in difficulty.

([37]) OJ L 83, 27.3.1999, p. 1.

([38]) OJ C 288, 9.10.1999, p. 2.

(143) In any case, the Commission wishes to point out that it is up to the Member State concerned to fulfil the duty of cooperation it has towards the Commission by providing all the elements required for the Commission to be able to check that all the conditions of the derogation from which it is asking to benefit have been met ([39]). In the case in question, Germany has not supplied sufficient information enabling the Commission to assess the data in the light of these guidelines, nor has the German authorities supplied sufficient documentation to enable the Commission to evaluate the aid in the light of the other forms of compatible aid mentioned in paragraph 126, and this in spite of the information provided by the Commission in point 44 of the decision to initiate the investigative procedure.

(144) Aid measures which compatibility is to be assessed directly under Article 107(3)(c) of the TFEU has to be done so restrictively. It must be clearly demonstrated that the positive effects of the aid measure outweigh the damaging effects the aid could have on competition and the proper functioning of the internal market. Unilateral State aid measures which are simply intended to improve the financial situation of producers but which in no way contribute to the development of the sector are not considered to fulfil these criteria and hence constitute operating aid which is incompatible with the internal market.

(145) For the above reasons, the aid granted to GfW as an element of the loan does not comply with any of the possible exemptions to Article 107(3). It therefore constitutes aid incompatible with the internal market.

(146) No other exceptions under Article 107(3)(c) of the TFEU are applicable.

VII. **CONCLUSIONS**

(147) For the above reasons, the Commission finds that the loan granted to GfW may not be considered to be compatible with the internal market. The Commission also finds that Germany implemented the measure unlawfully.

(148) For the above reasons, the Commission finds that the subsequent subordination of claims and waiver of claims and future interest payments does not constitute State aid in favour of GfW nor in favour of the wine-growing enterprises and merchants.

(149) For the above reasons, the Commission finds that the purchase of must was done at market prices and in accordance with common business practice and therefore does not constitute State aid to the wine-growing enterprises and merchants.

(150) Where illegally granted State aid is found to be incompatible with the internal market, the natural consequence is that the aid should be recovered in order — as far as possible — to restore the competitive position that existed before the aid was granted.

(151) As no legal successor to GfW exists, recovery is not possible in accordance with settled case-law ([40]),

HAS ADOPTED THIS DECISION:

Article 1

The State aid, amounting to the difference between the interest rate charged on the loan to GfW and the market interest rate plus the risk premium which should have been charged on the loan, unlawfully granted by Germany, in breach of Article 108(3) of the Treaty on the Functioning of the European Union, in favour of *Gesellschaft für Weinabsatz Pfalz GmbH* is incompatible with the internal market.

Article 2

The subordination and waiver of claims by WAK does not constitute aid to GfW or the winegrowing enterprises and merchants within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

Article 3

The purchase of must in 1999 by GfW does not constitute aid to the winegrowing enterprises and merchants within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

Article 4

Germany shall not need to recover the aid referred to in Article 1 from the beneficiary as the beneficiary is insolvent and has been dissolved and deleted from the trade registry and there is no legal successor.

Article 5

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 29 June 2011.

For the Commission

Dacian CIOLOŞ

Member of the Commission

([39]) CFI, 15.6.2005, *Regione autonoma della Sardegna* v *Commission*, T-171/02, ECR II-2123, paragraph 129.

([40]) ECJ, 2.7.2002, *Commission* v *Spain (Magefesa)*, C 499/99, ECR I-6031.