EUROPEAN COMMISSION

Brussels, 07.03.2012
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In the published version of this decision, some information has been omitted, pursuant to articles 24 and 25 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, concerning non-disclosure of information covered by professional secrecy. The omissions are shown thus […].

PUBLIC VERSION

WORKING LANGUAGE

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Subject: SA.30015 – (ex N 688/2009) – Germany: ERP Unternehmenskapital Kapital für Gründung

Dear Sir,

(1) The Commission wishes to inform you that it has decided not to raise objections to the notified measure, because the aid can be found compatible with the internal market in accordance with Article 107 (3) (c) the Treaty on the Functioning of the European Union (hereinafter TFEU) and Article 61 (3) (c) of the EEA Agreement.

1. PROCEDURE

(2) By electronic notification of 11 December 2009, registered at the Commission on the same day, the German authorities notified to the Commission, according to Article 108 (3) of the above-mentioned measure.

(3) As the information received was not sufficient, the Commission considered the notification to be incomplete. By letter of 11 January 2010, the Commission asked the German authorities for additional information. By letter of 5 March 2010, registered at the Commission on the same day, the German authorities asked for an extension of the deadline to reply to the Commission's questions. By letter dated 9 March 2010 the Commission granted the requested delay extension until 7 April 2010. On 8 April 2010, a first meeting between the German authorities and Commission services took place in Brussels. By letter of 12 April 2010, registered at the Commission on the same day, Germany asked for an additional extension of the deadline until 1 May 2010 in order to

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address questions raised during the meeting. By letter of 16 April the Commission granted the requested extension. By letter of 30 April 2010, registered at the Commission on the same day, Germany provided additional information. As there was still information lacking, Commission services requested, by letter of 11 June 2010, further information. By letter of 8 July 2010, registered at the Commission on the same day, Germany asked for an extension of the deadline until 15 July 2010 which was granted by the Commission by letter dated 13 July 2010. On 23 July 2010 Germany provided the Commission with additional information by means of a letter, registered at the Commission on the same day. By letter of 24 September 2010, the Commission asked for additional information, as the notification was still not complete. By letter of 18 October 2010, registered at the Commission on the same day, Germany asked for an extension of the deadline until 12 November 2010. By letter of 29 October 2010 the Commission granted the extension. By letters of 12 November and 2 December 2010, registered on the same days, Germany submitted additional information. By letter of 16 December 2010, Commission services suggested to discuss information still lacking during a meeting. On 10 January 2011 a second meeting between the German authorities and Commission services took place in Brussels. Following the meeting, Germany submitted on 28 January 2011, 4 and 8 February 2011 additional information that was registered at the Commission at the same days. On 16 March 2011, the Commission sent additional questions to Germany that where answered by letter, dated 4 April 2011, registered at the Commission the same day. Germany provided additional information by letter, registered at the Commission the same day. On 19 July 2011, Germany agreed to extend the deadline for a decision to be taken until 1 October. On 29 September 2011, the Commission services asked additional questions to which Germany replied on 3 November. Further questions where asked by Commission services on 20 December 2011. Germany replied by letter dated 19 January 2012.

2. DESCRIPTION OF THE MEASURE

2.1. Beneficiaries

(4) The measure consists in a subsidized loan scheme. The loans are granted to natural persons planning to create or buy enterprises or which have done so up to 3 years prior to applying for funding under the programme. The natural person in turn is obliged to re-invest the loan into the enterprise in question.

(5) The German authorities specify that the scheme is designed to support the creation of small and medium sized enterprises (SMEs) in line with the EU definition.[1]

(6) Beneficiaries can not use funding in companies in difficulties within the meaning of the Community Guidelines on State aid for rescuing and restructuring firms in difficulties.[2]

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[1] OJ L 124, 20.05.2003, p. 39.
[2] OJ L 244 , 01.10.2004 p. 0002 - 0017

2.2. Budget

(7) The measure has a volume of EUR 800 million of subsidized loans to be disbursed over four years. The financial means are provided out of the federal German budget.

2.3. Legal basis

(8) The German authorities informed the Commission that the legal basis under which it intends to grant the funding is the KfW Statute (KfW-Gesetz)[3] together with the applicable KfW provisions on the measure, Merkblatt KfW-Unternehmerkapital Programmnummer 058 ERP-Kapital für Gründung (bis 3 Jahre).[4]

2.4. Aid instrument and specific conditions

(9) Funding will be disbursed by means of subsidized subordinated loans of up to EUR 500,000 per applicant, with a fixed interest rate for 10 years. The actual subsidized interest rate will be calculated by first establishing the maximum aid amount on the basis of the eligible costs, and then deducting this amount from the overall amount of interest rate to be paid under normal market conditions.

(10) The beneficiary has to finance a minimum of 15% (*Alte Länder* and Berlin) or 10% (*Neue Länder)* respectively of the eligible costs through an equity contribution from its own means. The subsidized loan can make up a maximum of 30% (*Alte Länder* and Berlin) or 40% (*Neue Länder*), respectively, of the eligible costs. The remaining 50% to 55% of the eligible costs have to be covered by a non-aided bank loan.

(11) The beneficiary, in order to be eligible for the scheme, needs to have obtained the non-aided bank loan prior to his application for the aid, and the non-aided bank loan may not be conditioned by the approval of application for funding under the scheme.

(12) In addition to the beneficiary's contractual liability for the aided loan, spouses of the beneficiary have to be a guarantor of the loan, so as to provide further safeguards for its re-payment and in order to avoid any circumvention of the contractual liability.

2.5. Eligible costs and aid intensities

(13) Under the measure, several types of costs are eligible for State funding with specific maximum funding intensities.

(14) Costs for investments in tangible and intangible assets are eligible with a maximum funding intensity of 20% in the case of small enterprises or 10% in the case of medium-sized enterprises respectively, as stipulated in Article 15 number 2 and 3 (a) of the GBER.

(15) Costs for consultancy by outside providers in favour of SMEs are eligible with a maximum funding intensity of 50%, provided the services shall not be a continuous or periodic activity nor relate the undertakings usual operating costs such as routine tax

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[3] Gesetz vom 5. November 1948 in der Fassung vom 23. Juni 1969 (BGBl. I S. 573), zuletzt geändert durch die Neunte Zuständigkeitsanpassungsverordnung vom 31. Oktober 2006 (BGBl. I S. 2427).

[4] http://www.kfw.de/kfw/de/I/II/Download_Center/Foerderprogramme/versteckter_Ordner_fuer_PDF/

consultancy services, regular legal services or advertising, as stipulated in Article 26 of the GBER.

(16) Costs for participation in fairs incurred for renting, setting up and running the stand for the first participation of an undertaking in any particular fair or exhibition are eligible as stipulated in Article 27 of the GBER.

(17) Costs for stock of merchandise and spare parts (*Material-, Waren- und Ersatzteillager)* can be eligible if required as first or long term stock (*Erstausstattung oder betriebsnotwendige langfristige Aufstockung)*. The total aid amount granted to one undertaking shall not exceed a ceiling of EUR 200,000 over any period of three fiscal years. As regards undertakings in the road transport sector, this ceiling will be EUR 100,000. According to the German authorities, public funding of these costs does not constitute State aid in line with the *de-minimis* Regulation.[5]

2.6. Gross grant equivalent

(18) The measure's gross grant equivalent is the difference between the interest rate that a private market operator would have charged and the actual interest rate agreed for a subsidized loan between KfW and the beneficiary under the programme.

2.6.1. Establishing the interest rate a private market operator would have charged for the subsidized loan

(19) KfW has developed the following method for establishing the interest rate a private market operator would have charged for the subsidized loan: It calculates a base rate, which reflects refinancing costs for banks on the financial wholesale market, and a loan margin, reflecting borrower-specific characteristics such as the risk of default, administrative costs for granting the loan and, finally, the cost of capital (an appropriate rate of return on capital).

2.6.1.1. Establishing the appropriate base rate

(20) As for the base rate, KfW will apply the 10-year swap rate[6] for Germany, reflecting the fact that under the measure the maturity of the loans is 10 years, during which the interest rate is fixed.

2.6.1.2. Establishing the appropriate margin for loans covering costs for costs for investments, external consultancy and fairs

(21) According to Germany, a private market operator would add a margin of 450 basis points for loans covering costs for investments, external consultancy and fairs as described above in recitals (14) to (16).

[5] OJ L 379, 28.12.2006, p. 5.

[6] The swap rate is the interest rate associated with the fixed part of a fixed-versus-floating interest rate swap (IRS). In the financial markets it is used as a benchmark for establishing the funding rate for instruments with a maturity above 1 year. As such it can be viewed as the equivalent of the IBOR for longer maturities.

(22) Germany argues that the loan margin of 450 basis points results from experience with two predecessor schemes, the notified equity aid programmes ("Eigenkapitalhilfeprogramm"), N 463/98 and N 464/98, where loan amounts and conditions of granting, such as eligible applicants, eligible investments, subordination, collateralisation, and the percentage of eligible costs funded by the loan were comparable. To support its arguments, Germany has submitted empirical data covering almost 200,000 loans amounting to more than EUR 10 billion granted between 1989 and 1997, which have largely fallen due now. The data covered the years up to 2009, i.e. including also years considered likely to be affected by the financial crisis.

(23) As to default risk, Germany reports for a time span of ten years a total cumulative default rate of […][*]% and a loss given default of […][*]% and concludes from the provided empirical data an appropriate credit risk premium of 240 to 270 basis points to cover expected losses.

(24) Other cost elements than those resulting from default which a market operator would have to cover and reflect in his loan margin are administrative cost and an appropriate rate of return on capital.

(25) For administrative costs, Germany takes into account 50 to 80 basis points. This is the normal range for administrative costs in Germany in case of senior loans. Germany argues that this is also applicable for subordinated loans which are less costly as regards the initial assessment of collaterals (which are uniformly only personal guarantees) but require a closer and therefore somewhat more expensive monitoring during their lifetime.

(26) As to costs of capital, reflecting a reasonable profit margin in line with market principles, Germany argues that the capital necessary for a bank to provide the kind of loans granted under the scheme can be estimated at 8% of the loan amount[7]. Together with an average return on equity of capital of 12.5%[8] in the German banking sector, 100 basis points (i.e. 8% times 12.5%) would be the appropriate profit margin.

(27) Taking together these elements, a market conform loan margin would be situated in the range of 390 to 450 basis points. Germany takes into account the higher end of this range, i.e. 450 basis points.

(28) As an additional safeguard in order to ensure that the interest rate corresponds to what a private market operator would have charged as interest, Germany committed to ensure

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∗ Business secret

∗ Business secret

[7] Based on a risk weighting factor of 100% under the standardized approach of Basel II capital adequacy rules. The 8% is also referred to in McKinsey, "Basel III: What the draft proposals might mean for European Banking", Summer 2010 (http://www.mckinsey.com/clientservice/Financial_Services/Knowledge_Highlights/Recent_Reports/~/media/Reports/Financial_Services/MoCIB10_Basel3.ashx).

[8] The German benchmark of 12,5 % for the return on equity is based on the study "Gutachterliche Stellungnahme zur Marktmäßigkeit der im Rahmen des Risikogerechten Zinssystems (RGZS) sowie für KfW-Nachrangkapitalprodukte berechneten Margen" Deloitte & Touche 15 July 2008. The estimate is consistent with the long term historical average of 15% reported in McKinsey (2010) for the European banking sector as a whole and its estimate of 10% for the years to come, in anticipation of the impact of the new Basel III package.

that the interest used as reference to determine the gross grant equivalent must not be lower than the interest rate of the non-aided bank loan mentioned in recital (11).

2.6.1.3. Establishing the appropriate margin for loans covering costs for stock of merchandise and spare parts

(29) Germany informed the Commission that, in order to meet the requirements stipulated in Article 4 (2) a and Recital 12 of the *de-minimis* Regulation,[9] the appropriate margin for said loans will be calculated using the table included in the Reference Rate Communication (RRC).[10]. The starting point for establishing the loan margins that are to be added on top of the base rate will be the "low collateralisation" column.

(30) The established premiums charged from the beneficiaries will reflect the higher risk of subordination compared to normal senior debt. They will be established according to the KfW method described above. On the basis of the one year probability of default, the KfW will then assign the beneficiaries into an internationally used rating sub-category, e.g. the one developed by S&P.

(31) The established risk premium, reflecting the beneficiaries' probability to default as well as the increased risk of the loan's subordination, will then ensure compliance with the loan margins in the RRC's table.

2.6.2. Establishing the appropriate discount on the applicable market rate for loans covering costs for costs for investments, external consultancy and fairs

(32) Germany committed to limit the discounted advantage resulting from a reduced interest rate granted over the duration of the loan in line with the maximum aid intensities compatible under Article 15, 26 and 27 of the General Block Exemption Regulation (GBER).[11]

2.6.2.1. Establishing the appropriate discount on the applicable market rate for loans covering costs for stock of merchandise and spare parts

(33) With reference to the appropriate discount on loans for stock of merchandise and spare parts, Germany committed to respect the provisions of the *de-minimis* Regulation in order to exclude State aid.

2.7. Administration of the measure

(34) Contracts providing aided loans will be signed between beneficiaries and their regular banks (*Hausbanken*). KfW will fix reduced interest rates conditions of these contracts and borrow the money necessary for the loan to the *Hausbank*. In case of default, the

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[9] OJ L 379, 28.12.2006, p. 5.

[10] Communication from the Commission on the revision of the method for setting the reference and discount rates, OJ C 14, 19.1.2008, p. 6

[11] Commission Regulation (EC) Bo 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation), OJ L 214, 9.8.2008, p. 3

Hausbank does not have to pay back the loan granted by KfW. For handling the loans, *Hausbanken* receive an administrative fee of 40 basis points of the administered loan.

2.8. Monitoring and Individual Notification

(35) Germany committed to submit annual reports in line with chapter 3 of the Implementing Regulation 794/2004[12].

(36) When under the scheme, the gross grant equivalent of funding to a single beneficiary exceeds EUR 7.5 million, Germany committed to individual notification.

3. ASSESSMENT

3.1. Presence of State aid pursuant to Article 107 (1) TFEU

(37) In order for a measure to constitute State aid in the sense of Article 107(1) TFEU it has to fulfil four conditions. Firstly, the aid is granted by Member State or through State resources. Secondly, the measure confers a selective advantage to certain undertakings or the production of certain goods. Thirdly, the measure is liable to affect trade between Member States. Fourthly, the measure distorts or threatens to distort competition in the internal market.

3.1.1. SME investment aid, aid for consultancy in favour of SMEs and aid for SME participation in fairs

(38) When assessing the presence of State aid the Commission has first analyzed SME investment aid, aid for consultancy in favour of SMEs and aid for SME participation in fairs. The measure is granted using funds from the federal German budget, and therefore financed by State resources. The decision to use the State resources for this purpose is imputable to the German State, as KfW as a development bank is part of the State administration for the purpose of State aid assessment. The loans are granted at an interest rate which is below the market rate. The initial beneficiaries are contractually bound to invest the loan granted into an undertaking. Only undertakings of up to 3 years of existence can benefit from the measure that has a limited budget. Therefore, the measure confers a selective advantage upon these undertakings. The undertakings in question will be active in markets open to competition and subject to intra-Union trade. The measure therefore contains State aid in the sense of Article 107 (1) TFEU.

3.1.2. Funding of costs for stock of merchandise and spare parts

(39) As pointed out above, the measure foresees funding of costs for stock of merchandise and spare parts (*Material-, Waren- und Ersatzteillager)* if required as first or long term stock (*Erstausstattung oder betriebsnotwendige langfristige Aufstockung).* The total aid amount granted to one undertaking shall not exceed EUR 200,000 over any period of three fiscal years. Germany has committed to respect the provisions of the *de-minimis* Regulation.

[12] OJ L 140, 30.4.2004, p. 1

(40) Therefore, the Commission has found that funding of costs for stock of merchandise and spare parts as foreseen under the measure does not constitute State aid in the sense of Article 107(1) TFEU, as it is granted in line with the *de minimis* Regulation.

3.2. Notification of the aid and applicability of the GBER

(41) In line with what is pointed out in Article 108(3) TFEU, the State aid is subject to notification to the Commission prior to application unless explicitly exempt from notification in the GBER.

Applicability of the GBER

(42) The Commission notes that the aid scheme is designed to meet a number of specific requirements for State aid stipulated in the GBER; notably those referring to SME investment aid, aid for consultancy in favour of SMEs and aid for participation in fairs, Art. 15, 26, 27 GBER, which are among the criteria set in the GBER to be exempt from the duty of notification.

(43) However, under Article 5 No 1 (b) GBER it is foreseen, that the GBER is only applicable to transparent aid, i.e. to aid comprised in loans, where the gross grant equivalent has been calculated on the basis of the reference rate prevailing at the time of the grant. In consideration (2) it is further pointed out that in order to be transparent, aid comprised in loans has to be calculated ex ante "…*on the basis of the Communication from the Commission on the revision of the method for setting the reference and discount rates [i.e. the RRC]*."[13]

(44) The Commission observes that the method used by KfW is not based on the RRC. Therefore, the condition of Article No 1 (b) GBER is not met.

(45) The Commission therefore concludes that the measure, comprising subordinated loans, does not meet the transparency criterion of Article 5 GBER and therefore does not fall within the regulation's applicability. It is therefore subject to notification to the Commission.

3.3. Compatibility Assessment under Article 107(3) of the TFEU

(46) It results from recital 7 of the GBER that in the absence of specific guidelines or frameworks adopted by the Commission for the compatibility of aid, the Commission will assess the compatibility of any aid that falls within the scope of application of the GBER in particular on the basis of the conditions set out in the GBER.

(47) There are no specific guidelines or frameworks in force for SME investment aid, aid for consultancy in favour of SMEs and aid for SME participation in fairs. Therefore, the Commission will assess the proposed aid on the basis of Article 107(3) (c) of the TFEU, as interpreted by the GBER.

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[13] OJ C 14, 19.1.2008, p. 6

3.4. Gross Grant Equivalent

(48) In order to establish the Gross Grant Equivalent, the Commission has had to assess to what extent the (subsidized) interest rates under the scheme differ from interest rates charged for comparable loans under normal market conditions, without any State intervention.

(49) For this purpose, Germany has notified to the Commission, as pointed out in recital (20) to (27), a methodology including the appropriate base rate as well as the loan margin covering default risk, administrative costs and costs of capital that would be charged from a market participant granting the loan. This method departs from the method set out in the RRC.

(50) The Commission considers that, when assessing aid on the basis of Article 107(3) (c) of the TFEU, as interpreted by the GBER, it can in principle accept that a Member State uses a method different from the method set out in the RRC for establishing the Gross Grant Equivalent. Such aid is not notification-exempted, and the Commission has the possibility to verify, in its assessment, whether the alternative method can be accepted.

(51) The Commission therefore needs to assess whether the alternative method notified by Germany allows establishing in a reliable manner the gross grant equivalent of the aid.

(52) As to the base rate, reflecting notably the refinancing costs for the bank granting the loan, Germany has decided to use the 10 year SWAP rate for Germany. Given that the loans granted under the measure have a maturity of 10 years during which the interest rate is fixed, the Commission has found Germany's approach correct.

(53) As regards the specific default risk of the loans under the scheme, Germany has concluded, as pointed out in recitals (22) and (23) that a credit risk premium of 240 to 270 basis points would be appropriate to cover expected losses, based on empirical data from previous schemes (pointing to a cumulative default rate of 31.8% and a loss given default of 94%).

(54) The Commission has verified the relevance of the empirical data, notably the comparability of loan amounts and conditions of granting, such as eligible applicants, eligible investments, subordination, collateralisation, and the percentage of eligible costs funded.

(55) In addition, the Commission notes the significant volume of empirical data submitted in the particular case, covering almost 200,000 loans amounting to more than EUR 10 billion granted between 1989 and 1997, which have largely fallen due until today, including data covering the years up to 2009, considered likely to be affected by the financial crisis.

(56) As regards administrative costs, the Commission notices that the banks actually administering the loans only charge 40 basis points as handling fees.

(57) As to costs of capital, including a reasonable profit margin in line with market practice, Germany has, as pointed out in recital (26), referred inter alia to recent studies by

McKinsey and Deloitte & Touche. The Commission has verified the relevance of that argumentation.

(58) Furthermore, the Commission has considered that, as pointed out in recital (28), the margin established using the method assessed in the previous paragraphs can never result in an interest rate lower than the interest rate charged by the Hausbank, which co-finances the investment. The Commission considers that the interest rate charged by the Hausbank, which is a real interest granted by a market operator, can serve as benchmark for establishing the market interest rate. Consequently, in as far as the credit risk of the subsidized loan is comparable to the credit risk of the loan granted by the Hausbank, this ensures that the starting point for calculating the gross grant equivalent is the interest observed in the market.

(59) For these reasons, the Commission considers that the alternative method notified by Germany allows establishing in a reliable manner the gross grant equivalent of the aid.

3.5. Eligible costs and aid intensities

(60) The experience gained by the Commission in numerous decisions on State aid in favour of SMEs has led to general compatibility criteria reflected e.g. in Articles 15, 26 and 27 GBER. As set out in recital 7 of the GBER, the Commission therefore bases its assessment in the present case on these articles. .

(61) As pointed out above, the scheme foresees aid for investments in tangible and intangible assets with a maximum aid intensity of 20% in the case of small enterprises or 10% in the case of medium-sized enterprises respectively, in line with what is stipulated in Article 15 number 2 and 3 (a) of the General Block Exemption Regulation (GBER). Given the compliance with the relevant article of the GBER, the Commission finds this aid compatible with Article 107(3) of the TFEU, as interpreted by the GBER.

(62) Under the scheme, aid is provided in order to cover costs for consultancy by outside providers in favour of SMEs with a maximum aid intensity of 50%, provided the services shall not be a continuous or periodic activity nor relate the undertakings usual operating costs such as routine tax consultancy services, regular legal services or advertising, as stipulated in Article 26 of the GBER. Given the compliance with the relevant article of the GBER, the Commission finds this aid compatible with Article 107(3) of the TFEU, as interpreted by the GBER.

(63) As stated above, the notified measure foresees aid for SME participation in fairs incurred for renting setting up and running the stand for the first participation of an undertaking in any particular fair or exhibition with a maximum aid intensity as stipulated in Article 27 of the GBER. Given the compliance with the relevant article of the GBER, the Commission finds this aid compatible with Article 107(3) of the TFEU, as interpreted by the GBER.

4. DECISION

(64) As far as the measure foresees subsidized loans for SME investment aid, aid for consultancy in favour of SMEs and aid for SME participation in fairs the Commission has decided not to raise objections to the notified measure, because the aid can be found compatible with the internal market in accordance with Article 107(3) (c) TFEU, as interpreted by the GBER.

(65) As far as the measure foresees funding of costs for stock of merchandise and spare parts (*Material-, Waren- und Ersatzteillager)* if required as first or long term stock (*Erstausstattung oder betriebsnotwendige langfristige Aufstockung)*, the Commission finds that this funding does not constitute State aid in the sense of Article 107(1) of the TFEU.

(66) The Commission reminds the German authorities that, in accordance with Article 108 (3) TFEU, plans to refinance, alter or change this aid have to be notified to the Commission pursuant to Commission Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty[14] (now Article 108 TFEU)

(67) If this letter contains confidential information which should not be disclosed to third parties, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the Internet site:

http://ec.europa.eu/eu_law/state_aids/state_aids_texts_de.htm

Your request should be sent by registered letter or fax to:

European Commission
Directorate-General for Competition
Directorate for State Aid
State Aid Greffe
B-1049 Brussels
Fax No: (0032) 2-296.12.42

Yours faithfully,
For the Commission

Joaquín ALMUNIA
Vice-President

[14] OJ L 140, 30.4.2004, p. 1.