Subject: N 729/2006 and N 339/2006 IBG Risk capital fund Sachsen-Anhalt - Germany

Sir,

1. PROCEDURE

1. By letter dated 30 May 2006, registered at the Commission on the same day, the German authorities, having regard to Article 88 (3) EC Treaty, notified to the Commission the part of the above-mentioned measure, concerning investments considered *pari passu* by the German authorities, registered by the Commission as case N 339/06.

2. By letter dated 13 July 2006, the German authorities provided additional information requested by the Commission in a letter dated 22 June 2006.

3. The Commission asked for supplementary information on 31 August 2006 and received an answer in a letter dated 22 September 2006, registered by the Commission on 25 September 2006.

4. The Commission asked again for additional information on 11 October 2006 and received an answer from the German authorities dated 6 November 2006.
5. The German authorities notified the second part of the same measure concerning other investments by letter dated 9 November 2006, registered by the Commission on the same day as case N 729/2006.

6. Since the subject matter of the two notifications was overlapping, the Commission in a letter dated 6 December 2006 proposed to merge the two notifications and treat all correspondence as relating both to case N 339/06 and N 729/2006. Moreover, the Commission asked for additional information.

7. By letter dated 23 January 2007, registered by the Commission on the same day, the German authorities responded to the questions sent by the Commission.

8. The Commission asked for additional information on 28 February 2007. The German authorities requested the prolongation of the deadline for providing information on 12 March 2007. By letter dated 11 April 2007, registered by the Commission on the same day, the German authorities provided requested information.

9. The Commission requested additional information on 4 May 2007. The German authorities asked on 5 June 2007 for a prolongation of the deadline until 29 June 2007, which was granted on 7 June 2007.

10. The German authorities submitted the information on 29 June 2007.

2. DESCRIPTION OF THE SCHEME

2.1. Background of the scheme

11. This measure is the prolongation of the risk capital scheme N 280/2003 Innovationsfonds der IBG Sachsen-Anhalt approved by the Commission as compatible with common market\(^1\), which expired on 31 December 2006. The latter scheme foresaw lower investment tranches of open participations (EUR 1 million) and in some cases no private participation in risk capital investments in comparison with the currently notified scheme.

12. According to the German authorities there are virtually no private investors interested in making investments in the SMEs up to their expansion stage. In 2005 only 1,3% and in 2006 0,9% of all risk capital investments in Germany were made in Sachsen-Anhalt.

13. According to the German authorities there is no developed market for venture capital investments especially in Land Sachsen-Anhalt. Investment funds become interested in SMEs investment only after their expansion stage when the investment risk is significantly lower.

\(^1\) OJ C 67 of 17.03.2004
14. The aim of the notified scheme is to support innovative and growth-oriented small and medium-sized enterprises (‘SMEs’)
2 established in Sachsen-Anhalt, which is an assisted region.

2.2. Mechanism of the scheme

15. The IBG Fund - *Investitionsbeteiligungsgesellschaft mbH* - is the public investor in the scheme. The Land Sachsen-Anhalt is so far the sole shareholder of the IBG. However, the fund is open to private investors. The IBG is now under the restructuring process which will transfer it into *GmbH&Co KG* which is typical in venture capital industry. This process is due to finish by the end of 2007.

16. The sole objective of the IBG Fund is to administer the provision of financial support directly to undertakings established in Sachsen-Anhalt, and especially in technology-oriented innovative enterprises. The state resources will be channelled through this fund directly to SMEs.

17. The IBG will choose the best applicants which should meet the following criteria:

- the innovation project will result in new, as yet unused techniques being applied or research and development projects being carried out in the firm itself,

- the new product (process, service) brings competitive advantages and market opportunities for the firm,

- a detailed business plan which includes detailed description of financing, costs and investments to be made, establishing the *ex ante* viability of the project. In other words investments should be made on the basis of a business plan reliably drawn up which will include a detailed product or service analysis and sales and profits prognoses

18. The IBG invests in selected SMEs in conformity with its statute. It finances the following activities of selected undertakings:

- research and development work, including the production and testing of prototypes and the carrying out of demonstration and pilot projects;

- adaptation and development work up to the marketing stage of technically new or fundamentally improved products, processes or technical services;

- market launch and the financing of expansion (*Markteinführung*)

19. The German authorities confirmed that there are restrictions in place, which form part of labour contracts, guaranteeing that the persons taking investment decisions on behalf of the IBG are not in any way related to the chosen SMEs.

2.2.1. Investment instruments

20. The IBG grants financial support to private risk capital funds by way of:

- Open participations (*offene Beteiligungen*), that is ownership interest in a company;
- Convertible bonds (*Wandelanleihen*) and warrant bonds (*stock purchase warrants - Optionsanleihen*);
- Silent participations (*stille Beteiligungen*);
- Market-conform Conversion measures (*Marktkonforme Wandlugsmassnahmen*) which will consist in the conversion of already existing silent participations into open participations (*Wandlung bereits bestehenden stille Beteiligungen in offene Beteiligungen*).

21. As far as open participations are concerned there will be two forms of this type of investment – open participations and *pari passu* open participations.

22. With regard to aided open participations they can only constitute minority participation (*Minderheitsbeteiligung*) up to 25% of the capital of the enterprise and up to EUR 1.5 million per enterprise within the period of 12 months.

23. The detailed conditions of investment through open participations will be determined in the agreement between the IBG and an investee. In the same agreement a clear exit strategy will be established. It may differ from investment to investment, depending on particular market conditions, but the strategy will be fixed from the outset. The IBG presumes that at least 60% of open participations will be exited before the end of a 5-year period.

24. In all phases up to and including an expansion stage private participation must amount to at least 30% of investments into target SMEs by means of open participations. The scheme is limited to an expansion stage.

25. There is also an additional possibility of the IBG to make new investment up to 10 million Euro per each enterprise by means of open participations provided that such participations in equal amounts are *pari passu* between private investors and IBG. The same applies to *Wandel* and *Optionsanleihen*. According to German authorises such investment does not constitute state aid. By *pari passu* investment is meant that the IBG invests on the same conditions as private investors. The IBG investment in a target SME cannot exceed the corresponding private investment. All investment conditions will be agreed with private investors. In all cases every IBG investment in form of open participation, *Wandel* and *Optionsanleihen* will be accompanied by exactly the same type of private investment, subordinated to the same conditions and risks. Private investors who will invest on the same conditions as the IBG will be independent from the companies in which investment is made. The independence is measured in line with the "independence criterion" mentioned in the EU SME definition³.

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26. Moreover, the IBG can on its own, independently of private investors, newly invest up to EUR 5 million per enterprise by means of silent participations. The silent participations may be held for up to ten years. This period may be extended for further five years. It is always laid down in the agreement between the IBG and a target SME.

27. The silent participations are bought back on their nominal value (Nominalwert), that is the value which was fixed in the investment agreement. A profit-linked one-off remuneration (Exitvergütung) may be agreed, calculated on the basis of the increase in the company’s value, with the details being set out in a contract between the IBG and a target SME. The IBG charges a fixed interest (not linked to annual profits) on the invested capital (Festverzinsung). It must be at least 400 basis points above the reference interest rate determined by the European Commission for the Federal Republic of Germany (the so-called “reference rates used by the Commission to measure the aid element of state subsidies”)

28. In addition to this fixed interest, an annual profit-linked interest (Erfolgsabhängige Verzinsung) is agreed on the invested capital. Both components amount now to at least 13% a year (current proportion is 8,36% fixed, 4,64% variable). The relationship between remuneration based on profits and fixed remuneration is established in such a way that the latter is always higher than a former.

29. According to the German authorities, a due diligence will be conducted for each investment. The results of the due diligence will be used in a rating system that was developed to assess the investment risk. There will be a number of parameters to assess the risk, which will then influence the interest rate applicable to the IBG silent participations. These parameters will be divided into 5 groups relating to: intellectual property rights, the situation on the relevant market, the internal organisation of the target enterprise, the management of the latter and an expected profitability. Each group of parameters will be assigned a maximum number of points. In total the most promising enterprises can receive maximum 100 points. This will be considered as the least risky investment, triggering the lowest interest rates. The smaller the number of points the target enterprise receives, the higher interest rate will be proposed.

30. Each silent participation has to be secured by a guarantee of minimum 10% of the capital contribution (Vermögensinlage) by the shareholders of the applicant company.

31. According the German authorities in case of insolvency IBG silent participations are subordinated to loans, but not to equity. There are certain rights for a silent participation holder. The IBG possess in connection with silent participations access to market information, control and agreement rights. Major decisions of investees concerning its capital structure are only possible with a prior agreement of IBG. According to the German authorities similar rights are granted to banks giving loans, if the provisions of latter include control/ownership clauses.

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According to the German authorities, the table below shows similarities and differences between equity, the IBG silent participations granted in this case and ordinary loans as far as market information and supervisory rights are concerned:

<table>
<thead>
<tr>
<th>Supervisory rights</th>
<th>IBG silent participation</th>
<th>Shareholder in the context of equity investment</th>
<th>Loan including ownership clause, change of control clause</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) Change to the object of the company or its legal form;</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>(b) Sale of the company as a whole or parts thereof and also leasing of the company;</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>(c) Conclusion, amendment and cancellation of relevant company contracts and agreements (control, profit transfer, corporate governance contracts, licence and patent licensing agreements);</td>
<td>Yes</td>
<td>Yes</td>
<td>Partially, only special agreement</td>
</tr>
<tr>
<td>(d) Suspension of business;</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>(e) Approval of the annual accounts at the suggestion of the management;</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>(f) Use of the balance-sheet profit, including appropriation of profits;</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>(g) Discharge of the management;</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>(h) Appointment of the auditor;</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>(i)</td>
<td>Appointment and dismissal of executive directors and changes to the rules of procedure for the management;</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>(j)</td>
<td>Conclusion, amendment and cancellation of directors' contracts of employment;</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>(k)</td>
<td>Nomination and removal of proxies;</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>(l)</td>
<td>Changes to the elective supervisory board, its constitution and resolutions governing its remuneration;</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>(m)</td>
<td>Amendment of the memorandum and articles of association;</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>(n)</td>
<td>Dissolution of the company;</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>(o)</td>
<td>Conversions as defined by Art. 1 Conversion Law;</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>(p)</td>
<td>Sale of 50% of the assets (economic unit of property, rights and other goods) of the company or more (according to market values);</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>(q)</td>
<td>Capital procurement measures with a volume of over €..........., capital increase and capital reduction;</td>
<td>No</td>
<td>Yes</td>
</tr>
</tbody>
</table>
(r) Approval of the conclusion, amendment or cancellation of company contracts as defined by Arts. 291 ff Law on Limited Companies [AktG];  
|   | No | Yes | No |

(s) Establishment or issuing of new shares, including the granting of subscription rights to new shares;  
|   | No | Yes | No |

(t) Approval of share disposals;  
| Yes | Yes | Yes |

(u) Collection and transfer of shares;  
| No | Yes | No |

(v) Exemption from the restraint of trade under company law;  
| No | Yes | No |

(w) Approval of the business plan, including the annual budget;  
| No | Yes | No |

(x) Waiver of the right to inspect the annual accounts;  
| No | Yes | No |

33. According to the German authorities the IBG can terminate the holding if the company invested in is in breach of the contract. In the table below the German authorities provided information on similarities and differences with regard to possibilities of the termination of contact by the IBG and credit institutions.

<table>
<thead>
<tr>
<th>Scope for termination with fixed term or other termination arrangements</th>
<th>Termination rights - silent participations IBG</th>
<th>Termination rights - credit agreement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Termination without notice</td>
<td>(a) the conditions for the acquisition of a participation were not met, have changed or subsequently ceased to apply, e.g. because of the</td>
<td>(a) the conditions for the disbursement of the loan are not met despite instruction being given and a time limit set</td>
</tr>
</tbody>
</table>
sale by the investee of (parts of) its business or because of a change in the ownership and shareholding structure of the investee

(b) the investee is in gross breach of its obligations under the contract, in particular by getting into arrears in the payment of the agreed investment remuneration and failing to pay within the additional period allowed by the investor, or

(c) the dividend payouts to the investee's shareholders are disproportionate to the investee's profitability and own capital resources

(d) resources are not used according to purpose, in particular where fixed assets acquired with resources of the investor are removed from the company within the purview of the Land of Saxony-Anhalt before the expiry of the mandatory 10-year period as from the time of acquisition

(e) as regards the assets of the investee, its legal successors or its estate:
   incorrect information was given;
   insolvency proceedings have been initiated, or have been dismissed due to

(b) the borrower is in breach of key contractual obligations despite written instruction to cease and desist; the borrower is at least one month in arrears with an interest or redemption instalment despite a written request to pay

(c)

(d) the borrower departs significantly from the investment project without the bank having agreed to such change

(e) the borrower obtained the loan wrongfully, in particular by providing incorrect information, or where it does not carry out the assisted project; if there is, or threatens to be, a substantial deterioration in the customer's financial situation or in the value of
insufficient assets;
an out-of-court settlement
(composition proceedings
based on deferment of
creditors' claims, on quotas
or on the winding-up of the
company) has been concluded
to which all or a group of
mutually comparable creditors have
agreed;
a compulsory enforcement
for repayment of the
investment has not met with
full satisfaction;
the business situation is, or
is expected to become, so
unfavourable that the
investee has suspended or
will suspend its payments in
whole or in part.

(f) sale of the company in
whole or in part or its
leasing without prior
agreement of the IBG

(f) a change of control
occurs and no agreement is
reached in time among the
parties on continuation
under possibly new terms,
e.g. as regards interest,
provision of collateral or
other agreements

| Contractual notice of termination | The investee can terminate the silent partnership at any time subject to one month's notice; the IBG has no contractual right of termination. | Customer can terminate only on serious grounds; bank has no contractual right of termination. |

34. According to the German authorities the IBG silent participations used in this case can be treated as debt by the investee company for the following reasons:
a) Laws and regulations

A silent participation within the meaning of Arts. 230 to 237 Commercial Code refers to the capital contribution of a so-called silent partner, which becomes part of a company’s working capital and increases it. The partner does not have an interest in the working capital.

Under civil law, the silent participation is a partnership structured as an undisclosed partnership under civil law, as defined by Art. 705 Civil Code. This means that the silent partner is simply a lender who participates in the profits and losses of the investee company, depending on how the contract is put together, but is not outwardly disclosed.

b) Financial and accounting regulations

German Commercial Law (HGB)

Under commercial law, silent participations must generally be shown in the investee company’s balance sheet not as equity capital, but as borrowed capital in the form of an “other liability” with the repayment figure.

In exceptional cases, a silent partnership may be treated as equity capital in the balance sheet or as “special investment items”. This requires that there is no possibility of silent participations being cancelled in the long term and that the silent partner has a right of repayment only once all creditors have been paid and, in the event of insolvency, that it does not represent an insolvency debt and the initial capital contribution participates fully in the loss. All of these is precluded in IBG contracts, which means that IBG interests must always appear in the balance sheet as borrowed capital by the investee company and must always lead to insolvency debts in cases of insolvency.

c) International accounting standards (IAS/IFRS)

According to German authorities the financial instruments such as the IBG silent participations are dealt with for accounting purposes according to their structure or “economic substance”. Mezzanine forms of finance such as the IBG silent participations) represent financial liabilities according to International Accounting Standards point 32.11. This is based on the fact that any financial instruments establishing either a compulsory or optional repayment claim should not be treated as equity capital, even in the event of deferred repayment or subordination to loans.

d) Tax law

According to the German authorities a silent participation may be treated in a wide variety of ways, based on individual contractual provisions.

According to the German authorities the IBG’s silent participations are basically entered into in the form of typical silent partnerships. The tax treatment of this form of investment by the investee company is based on an assessment of the silent participation as genuine borrowed capital. Consequently, the silent partner’s share of profits represents an operating cost, whereas the assumption of any losses (precluded
in the case of IBG) is operating revenue. The share of profits such as in this case is therefore treated as a normal borrowed capital return.

35. With regard to conversion measures (*Marktkonforme Wandlungmassnahmen*), the IBG can convert existing silent participations with conversion options (*stille Beteiligungen mit Wandeloptionen*) into open participations while private investors do the same or acquire the corresponding amount of open participations. According to the German authorities such investment is *pari passu* between public and private investors and does not constitute state aid.

36. According to the German authorities for such investment not to constitute state aid the following conditions must be met:

- the IBG will not provide its investments on more favourable economic terms for the recipients than a private co-investor,
- the conditions of the contract must be the same in economic terms as between the IBG and the private co-investor,
- the IBG’s equity stake volume cannot exceed that of private co-investors,
- the determination/valuation of terms, the structuring and (*inter alia* contractual) shaping of any (financing) measure are essentially carried out by the private co-investors.

37. If simultaneous conversion of privately and publicly held silent participations with conversion option (accompanied conversion) cannot take place – the IBG being in some cases the only holder of silent participations in target companies – the German authorities argued that such investment will effectively meet the criteria of being *pari passu*.

38. When the IBG receives an offer of investment from private investors, it calculates the equity equivalent of its silent participations. It takes place according to the following formula:

\[
\text{All IBG claims from silent participations (nominal value + fixed and variable interest + exit remuneration ) divided by:}
\]

\[
\text{The value of undertaking as provided for in the offer of a private investor (this is the value proposed by a private investor for its own equity investment in a given undertaking)}
\]

39. The concrete establishment of the equity value of silent participations is normally done at the moment of first silent participations investment. Therefore, silent participations have set price as from the beginning and cannot change their value over time. The fixed elements are: nominal value + fixed and variable interest + exit remuneration. By conversion the value of all the above claims will be converted into open participations.

40. The IBG has the choice to make conversion. It has a possibility to refuse the offer made by private investors, if it does not find it financially attractive.
2.2.2. Fund management

41. At present there is no agreement between a professional management company and the IBG. However, the IBG is now under the restructuring process which will finish by the end of 2007. The German authorities committed themselves to organise an open public and non-discriminatory tender for the management of the IBG. The decision to privatise the management of the IBG is already taken. The invitation to tender has already been published and is to be found in the supplement to the EU OJ (process TED/2006/S 158-170811 supplemented by TED 2006/S 168-179519). After the tender there will be an agreement between the fund and the chosen management company.

42. The remuneration of fund managers will be profit-based and will be one of the most important criteria when choosing the best bidder together with the experience in risk capital investments. The remuneration subject to tender will comprise two parts a fixed remuneration and variable remuneration amounting to 20% from the profits after the exit from any investment? Managers are obliged to apply best practices elaborated in venture capital industry.

43. The fund management company will be supervised by the IBG, whose shareholder rights are exercised by the Saxony-Anhalt Ministry of Finance. Furthermore, checks are carried out by the IBG supervisory board. According to the German authorities the Land therefore exercises regulatory supervision applicable by law to such investment funds.

44. There is no specific investors' or advisory committee. It can be explained that currently there are no private investors in the fund. However, private investors have full influence on their own decisions to co-invest together with the fund in target SMEs. Therefore, any decisions where private money is involved require a private investor's involvement.

45. The enterprises to be invested into can only be SMEs operating in regions eligible for assistance under Article 87 (3) (a) or (c) EC. Undertakings in difficulty, in the sense of the ‘Community guidelines on State aid for rescuing and restructuring firms in difficulty’⁵, are not eligible.

46. The aid cannot be conditioned upon export activities of the targeted SMEs or their use of domestic in preference to imported goods.

2.3. Legal basis of the scheme

47. The following was put forward by the German authorities as a legal basis:

- Modified principles of participation of the IBG (Modifizierte Beteiligungsgrundsätze der IBG)

2.4. Funding of the scheme

48. The total amount of funding equals amounts to around EUR 130 million.

⁵ OJ C 244, 01.10.2004, p.2.
2.5. Duration of the scheme

49. The duration of the scheme is 6 years, until 31 December 2013. Within these 6 years the money can be invested and then reinvested (revolving fund). Therefore, not all exits from investments will take place before 31 December 2013. The German authorities have, however, confirmed that any money received after 31 December 2013 cannot be reinvested again without the prior approval of the European Commission.

50. The German authorities have confirmed that no state aid can be granted before the decision approving the measure is taken by the European Commission by making any investments under the new scheme conditioned on the approval of the European Commission.

2.6. Cumulation of aid under the scheme

51. Where capital provided to a target enterprise under a risk capital measure covered by these guidelines is used to finance initial investment or other costs eligible for aid under other block exemption regulations, guidelines, frameworks, or other state aid documents, the relevant aid ceilings or maximum eligible amounts will be reduced by E20% for target enterprises located in the assisted areas during the first three years of the first risk capital investment and up to the total amount received. This reduction does not apply to public aid granted on the basis of Community framework concerning state aids for research and development or any successor framework or block exemption regulation in this field.

3. PRELIMINARY ASSESSEMENT OF THE SCHEME

52. According to Article 6 of the Procedural Regulation, the decision to initiate the formal investigation procedure shall summarise the relevant issues of fact and law, shall include a preliminary assessment of the Commission as to the aid character of the proposed measure, and shall set out the doubts as to its compatibility with the common market.

3.1. Legality

53. By notifying the scheme before its implementation, the German authorities respected their obligations under Article 88(3) of the EC Treaty.

3.2. Existence of State aid and compatibility with the common market

54. The Commission has examined the scheme in the light of Article 87(1) et seq. of the EC Treaty and Articles 61 et seq. of the EEA Agreement, and in particular on the basis of

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the ‘Community Guidelines on State aid to promote risk capital investment in small and medium-sized enterprises (hereafter referred to as ‘the RCG’).8

55. Since the investment by silent participations differs from the rest of the scheme, the Commission, for the reason transparency, will split its analysis into two parts. The first part will concern the scheme and investment by open participations together with conversion measures, including the conversion from silent to open participations, whereas the second part will concern the IBG investments in the form of silent participations and the character of the latter. Both scenarios will be considered further below.

3.2.1. State aid character of the scheme, part 1 - the scheme and investment by open participations together with conversion measures,

56. In order for a risk capital measure to fall within the scope of Article 87(1) EC Treaty, four cumulative criteria must be met:

- the measure must involve the use of State resources;
- the measure must distort or threat to distort competition by conferring an advantage on the beneficiary;
- the advantage must be selective in that it is limited to certain undertakings or sectors;
- the measure must affect trade between Member States.

57. In line with point 3.2. of the RCG, the assessment of the presence of State aid within the meaning of the Treaty will consider the possibility that the measure may confer aid on at least three different levels:

- aid to investors;
- aid to an investment fund, investment vehicle and/or its manager;
- aid to the enterprises in which investment is made.

3.2.1.1. Aid to investors

58. As regards the measure in question, there are two categories of investors to be looked at: Firstly, investors who directly acquire interests in the fund, and secondly those who invest alongside the IBG. In its present structure, the IBG only shareholder is the state.

59. The IBG will be open to direct private participations. The German authorities assured that all investors who wish to invest directly into the fund will be treated equally and that no investor will be excluded and that private investors into the fund will not be conceded any conditions more advantageous than those the state is subject to.

60. Beyond that, the fund will only invest in an SME if at least 30% of the overall financing into SMEs will be provided by one or more private investors, in accordance with point 4.3.4 of the Guidelines. According to the German authorities, such private investment alongside the fund will be in the form of open participations mentioned in paragraph 22.

Private investors will be independent of the SMEs invested in and will share exactly the same upside and downside risks and hold the same level of subordination.

61. Pursuant to point 3.2.of the RCG the Commission will consider the investment to be effected pari passu between public and private investors, and thus not to constitute state aid, where its terms would be acceptable to a normal economic operator in a market economy in the absence of any state intervention. This is assumed to be the case only if public and private investors share exactly the same upside and downside risks and rewards and hold the same level of subordination and normally where at least 50% of the funding of the measure is provided by private investors, which are independent from the companies in which they invest.

62. The analysis will differ according to the type of investment at stake.

63. As far as the open participations and the Wandel and Optionsanleihen up to a total of EUR 10 million, mentioned in paragraph 25, are concerned these investments will be done in such a way that public and private investors will share exactly the same upside and downside risks and rewards and hold the same level of subordination. Moreover, at least 50% of such investments will be provided by private investors, who are independent from the companies into which they invest. Therefore, since these investments are made on equal terms between the IBG and private investors, the Commission considers these investments as pari passu and thus do not constitute state aid.

64. As far as the conversion from silent to open participations, mentioned above in paragraph 35, is concerned we have to distinguish between two scenarios.

65. First, there will be cases in which both private and public investors convert the same type of instruments into open participations and do that on precisely the same conditions. These investments will then be done in such a way that public and private investors will share exactly the same upside and downside risks and rewards and hold the same level of subordination. Also, at least 50% of such investments will be provided by private investors, who are independent from the companies in which they invest. Under these circumstances, the Commission considers such investments as pari passu.

66. Second, there will be cases in which the IBG is the sole holder of silent participations. In this case it was confirmed by the German authorities that the IBG converts its silent participations into open participations at the same time when a private investor invests by way of open participations. If the amount of open participations is the same for the IBG and private investors, it could be argued that, after the conversion of the IGB's silent participation into an open one, this open one is invested pari passu with a private investment equivalent in terms of size and risk. Indeed once the investment is made in open participations, the German authorities confirmed that public and private investors would share exactly the same upside and downside risks and rewards and hold the same level of subordination. The conversion therefore results in the same amount of open participations subject to the same conditions both for the IBG and for private investors.

67. However, in order to exclude any other possible aid to private investors, the Commission has to verify whether all remuneration connected with silent participations is converted into open participations, so that no advantage is granted to private investors in the process of conversion and that the resulting open participations are properly valued. This is assumed to be the case, since at the moment of conversion all
remuneration linked to the silent participations is converted as well. This includes the nominal value together with fixed and variable interest due at the moment of conversion and exit remuneration.

68. Furthermore, the German authorities confirmed that the value of all remuneration due at the moment of conversion would be relevant for the IBG conversion pricing. Moreover, a nominal value of a silent participation is always established at the time when the IBG invests into an SME by silent participation and according to the German authorities this nominal value cannot fluctuate over time. The nominal value is the basis, together with any remuneration due, for the pricing of the conversion. On this basis there is no evidence, at this stage, that any, even indirect, advantage is granted to private investors through possible undervaluation of silent participations. The Commission can, therefore, accept that the conversion of IBG silent participations to open participations to match any corresponding private investment on equal terms can be seen to be *pari passu* between public and private investors.

69. Therefore, at the level of investors, the Commission considers that there is no state aid within the meaning of Article 87(1) EC Treaty.

3.2.1.2. Aid to fund or management

70. At the level of the fund, the Commission in general tends to take the view, as outlined in point 3.2. of the RCG, that a fund is a vehicle for the transfer of aid to investors and/or enterprises in which the investment is made, rather than being an aid beneficiary itself. In this case, the Commission has, however, doubts whether there is no state aid at the level of the fund. The IBG was established as a fund in which the Land Sachsen-Anhalt has paid-up 100% of the capital and through which it channels aid to investees. Since it is a revolving fund and the funds are constantly reinvested, the Commission cannot exclude that this fund is in competition with other funds which cannot benefit from the direct state support. Since it is not excluded at this stage that the fund has the character of an independent enterprise and there is no confirmation that it will not in future diversify into other activities, the Commission cannot exclude state aid on the level of the fund at this stage.

71. As far as the fund management is concerned, point 3.2. of the RCG provides that aid to the fund's managers or the management company will be considered to be present if their remuneration does not fully reflect the current market remuneration in comparable situation. Taking into account the commitment of the German authorities that the management will be privatised and managers will be chosen in an open public tender (already published), there is no indication at this stage that their remuneration will not be market-conform, once these changes have been implemented. It is noted that the published tender confirms that the managers' remuneration and experience will be one of the most important criteria in the selection of the successful bidder. Therefore, the Commission takes the view at this stage that provided the tender effectively leads to the selection of managers in an open transparent and non-discriminatory way and that their remuneration is fully market-conform, there will be no aid to the fund management.

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9 In line with Commission Decision N 330/2006 Risk Capital Fund ‘*Berlin Kapital Fonds*’
72. In light of the above, the Commission considers that there is no aid on the level of the fund management once the changes have been implemented. However, aid to the fund itself is not excluded as already established in the previous decision concerning the IBG\(^{10}\). Indeed the IGB may be considered as a state owned undertaking and it is likely that its capital was raised at conditions that were not available to private market operators.

3.2.1.3. Aid to undertakings in which investment is made

73. According to point 3.2. of the RCG the Commission will normally consider that if aid is present at the level of the investors, the investment vehicle or the investment fund it is at least partly passed on to the target enterprises and thus it is also present at their level. This is the case even where investment decisions are being taken by the managers of the fund with a purely commercial logic.

74. In this case, aid could not be excluded at the level of the investment fund. Furthermore, since it is possible that only 30% of the funding provided under the measure will be provided by private investors (see point 2.2.1.above), the Commission cannot establish that the SMEs would receive the risk capital at the same terms in case that the state would not invest public money. The provision of risk capital from state resources in this case will amount to an advantage granted to the SMEs. Only SMEs from Sachsen Anhalt will benefit from the measure. Hence, the measure is selective.

75. The target SMEs are not prevented from engaging in competition and trade among Member States, hence, competition and trade could be affected. The aid can strengthen the position of aided undertakings vis-à-vis their competitors in intra-Community trade which may threaten to distort competition. In conclusion, the Commission can not exclude the presence of State aid in the sense of Article 87(1) of the EC Treaty at the level of the enterprises invested in.

76. The Commission therefore considers that there is state aid within the meaning of Article 87(1) EC Treaty at the level of undertakings in which the investments by open participations or conversions, as described in paragraph 25 are made.

3.2.2. State aid character of the scheme, part 2 - investments by silent participations,

77. The Commission considers, as it did in previous decisions\(^{11}\), that the Notice on the method for setting the reference and discount rates (thereafter referred to as "the Notice")\(^{12}\) can be applied in order to be able to establish whether there is an advantage

\(^{10}\) See N 280/2003 Innovationsfonds der IBG Sachsen-Anhalt, point 3.1.1.


within the meaning of Article 87 (1) EC in favour of undertakings which obtain the IBG silent participations.

78. However, the Notice can only be applicable to debt instruments. It must therefore first be established whether the silent participations used in this scheme can be classified as debt instruments.

79. The Commission has doubts whether new silent participations, as investment instruments used by the IBG, can be regarded as debt rather than quasi-equity.

80. In assessing the nature of instruments such as the IBG silent participations, the Commission gives regard to the economic substance of the instrument rather than to its name and the qualification attributed to it by the investors. In particular, the Commission takes into account the degree of risk in the target company's venture borne by the investor, the potential losses borne by the investor, the predominance of profit-depandan remuneration versus fixed remuneration and the level of subordination of the investor in the event of the company's bankruptcy. The Commission may also take into account the treatment applicable to the investment instrument under the prevalent domestic legal, regulatory, financial, and accounting rules, if these are consistent and relevant for the qualification (point 4.3.3. of the RCG).

81. From the description provided by the German authorities in paragraphs 26-34 it appears that there are differences between debt and the IBG silent participations. These differences can be summarised in the following way:

   a) subordination - silent participations are subordinated to loans and other liabilities (fremdverbindlichkeiten) and in case of company's bankruptcy are just above equity;
   b) security - they are partly secured (10%), although this security is far from the one which would be required for loans;
   c) repayment - they are re-paid differently than normal bank loans, where normally part of capital and interest is re-paid every month;
   d) information and control rights - they are similar as far as silent participations and debts are concerned (only debts with "ownership/control clauses"). There are, however, some differences as showed in the table in the description part. Moreover, the Commission does not have information how often these types of clauses are negotiated in debts used in risk capital business. Normal loans have different information and control rights as confirmed by the German authorities. However, the General Conditions of some German banks include such ownership/control clauses in their standard credit contracts.
   e) termination of contract (Kündigungsrecht) - although at first sight similar, there appear to be differences also in this field as presented in the table in the description part;
   f) remuneration - taking into account that a profit-linked one-off exit remuneration (Exitvergütung) is regularly agreed, without knowing its exact amount, it cannot be said with 100% certainty that there is a predominant component of fixed remuneration.

82. In the light of the above characteristics the Commission has doubts whether the IBG silent participations such as used in this scheme can be classified as debt.
83. If the IBG silent participations, due to their characteristics, should be considered as
debt, then the Notice may apply. The Commission considers that in principle no
advantage is granted to beneficiary SMEs if the latter are charged with interest rates set
at least at the relevant EU reference rate for Germany plus 400 basis points or more on
unsecured loans.

84. In the present case, the German authorities confirmed that all silent participations would
be charged fixed interest rates set at least at the relevant EU reference rate for Germany
plus 400 basis points or more. To set an appropriate interest rate above of the EU
reference rate plus 400 basis points for each undertaking the IBG will use a rating
(scoring) mechanism developed following the rating systems of private banks. Each
investment will be attributed a rating, which will determine the final interest rate. On
the basis of information provided by Germany, the result is a risk-related market
conform final rate. The current rates charged: fixed interest rate at 8,36% and profit
related interest rate at 4,64% - in total 13 % - are substantially above of the approved
minimal interest rate of reference rate for Germany (4.03%) plus 400 basis points.

85. On that basis the Commission would consider, at this stage, provided the silent
participations were to constitute debt, that no advantage is given to beneficiary SMEs
by silent participations and therefore granting them does not represent state aid within
the meaning of Article 87 (1) EC .

86. If the IBG silent participations should be considered as quasi-equity, the Notice does
not apply. Then it cannot be excluded that the undertakings in which the investment is
made (beneficiary SMEs) receive an advantage which they would not otherwise receive
on normal market conditions. In such a case the Commission cannot establish that the
SMEs would receive the risk capital at the same terms in case that the state would not
invest public money. As the Commission cannot exclude the aid on the level of the fund
in this case, it could not exclude then that this aid would be at least partly passed on the
target enterprises by the quasi-equity investments of the IBG. In such a case the
Commission would have to assess the compatibility of the IBG investments by silent
participations in the same way as it will assess the compatibility of IBG investments by
open participations, and assess the granting of silent participations in addition to
investments by means of other instruments.

87. As the Commission has doubts about the nature of the silent participations, it has to
open the investigation procedure on this point, in order to be able whether they could be
assessed as non-aid under the Notice or whether the IBG silent participations would
have to be assessed as additional quasi-equity type investments alongside of the other
instruments assessed further below. If silent participations were to be considered as
quasi-equity, then the size of investment tranches, together with open participations,
would rise up to the level of EUR 6.5 million per undertaking per year. This is above
the limit laid down in point 4.3.1. of the RCG. The German authorities have not
presented so far any evidence that the size of a market failure requires tranches above
EUR 1.5 million to tackle it.

3.3. Assessment of the compatibility of the scheme with regard to open
participations

88. Insofar as the measure involves State aid, the Commission has to examine whether this
State aid is compatible with the common market.
With regard to open participations the RCG are applicable to the case at hand, since the measure concerns the provision of risk capital to SMEs. It falls within the scope of the RCG as set out in section 2.1. of the RCG. The latter section requires the exclusion of aid to enterprises:

a) in difficulty;

b) in the shipbuilding, coal and steel industry.

The Guidelines do not apply to aid to export-related activities, namely aid directly linked to the quantities exported, to the establishment and operation of a distribution network or to other current expenditure linked to the export activity, as well as contingent upon the use of domestic in preference to imported goods.

The measure excludes the aid to enterprises in difficulty and in the shipbuilding, coal and steel industry. It cannot be conditioned upon export activities of the targeted SMEs or their use of domestic in preference to imported goods.

Therefore, the measure complies with point 2.1 of the RCG.

3.3.1. Criteria for assessing the compatibility of the measure

The Commission will consider that the incentive effect, the necessity and proportionality of aid are present in a risk capital measure and that the overall balance is positive where all the conditions in section 4.3 of the RCG are met.

3.3.2. Maximum level of investment tranches

According to point 4.3.1. of the RCG the risk capital measure must provide for tranches of finance, whether wholly or partly financed through state aid, not exceeding EUR 1.5 million per target SME over each period of twelve months. Insofar the measure limits the size of investment tranches by open participations to EUR 1.5 million per target SME over the whole duration of the scheme, it complies with point 4.3.1. of the RCG. If the IBG silent participations were to be considered as quasi-equity (see point 3.2.2. above), granted in addition to open participations, then any amount of quasi equity above EUR 1.5 million would require a more detailed assessment given the less obvious evidence of a market failure.

3.3.3. Restriction to seed, start-up and expansion financing

In line with point 4.3.2. of the RCG the risk capital measure must be restricted to provide financing up to the expansion stage for small enterprises, or for medium-sized enterprises located in assisted areas. The measure provides financing up to the expansion stage for SMEs located in assisted areas. Therefore, it complies with point 4.3.2. of the RCG.
3.3.4. Prevalence of equity and quasi-equity investment instruments

95. Point 4.3.3. of the RCG requires that the risk capital measure must provide at least 70% of its total budget in the form of equity and quasi-equity investment instruments into target SMEs. In any case the scheme fulfils this requirement. If the IBG silent participations were to be considered as debt, then, as mentioned in point 3.2.2 above, such debt would be aid-free and the RCG would not apply. If the silent participations were to be considered as quasi-equity, then 100% of the total budget of the scheme is in a form of equity and quasi-equity investment instruments into target SMEs in line with point 4.3.3. of the RCG.

96. Therefore the measure in any event complies with point 4.3.3. of the RCG.

3.3.5. Participation by private investors

97. In line with point 4.3.4. of the RCG at least 50% of the funding of the investments made under the risk capital measure must be provided by private investors, or for at least 30% in the case of measures targeting SMEs located in assisted areas.

98. In the case at hand at least 30% of the funding of the investments made under the scheme by means of open participations is provided by private investors for target SMEs which are only located in the assisted area. Therefore, the measure complies with point 4.3.4 of the RCG on condition that silent participations were to be considered as debt investment instruments. If silent participations were to be considered as quasi-equity, then the Commission does not have at present any confirmation whether 30% of the funding of all investments made under the scheme would be provided by private investors.

3.3.6. Profit-driven character of investments decisions

99. Point 4.3.5 of the RCG requires that the risk capital measure must ensure that decisions to invest into target companies are profit-driven. This criterion is considered to be met if all the following conditions are fulfilled:

a) the measure have significant involvement of private investors, providing investments on a commercial basis; and
b) a business plan exists for each investment containing details of product, sales and profitability development and establishing the ex ante viability of the project; and
c) a clear and realistic exit strategy exists for each investment.

The measure provides for 30% private involvement. Private investments will be done on a commercial basis. It is stipulated in criteria for selecting the investee that there must be a business plan for each investment containing details of product, sales and profitability development and establishing the ex ante viability of the project together with a clear and realistic exit strategy for each investment. It must be concluded then that the measure is in line with point 4.3.5 of the RCG.
3.3.7. **Commercial management**

100. According to point 4.3.6. of the RCG the management of a risk capital measure or fund must be effected on a commercial basis. This criterion is considered to be present where all the following conditions are fulfilled:

   a) there is an agreement between a professional fund manager or a management company and participants in the fund, providing that the manager's remuneration is linked to performance and setting out the objectivities of the fund together with proposals for investment; and

   b) private market investors are represented in decision-making, such as through an investor's or advisory committee; and

   c) best practices and regulatory supervision apply to the management of funds.

101. The German authorities committed to privatise the management of the fund and make it subject to an open tender procedure which has already been published. Pursuant to the results of the tender there will be individual agreements between the IBG and the selected management. The manager's remuneration will be linked to performance. This, in itself, is an indication that the fund management will then be commercial. It is uncertain, however, whether it is the case at present.

102. When private investors will invest directly into the fund, they will be represented in the Investment Committee, which approves the decisions on the fund level. However, until there are such investors in the fund, the private investors co-investing with the fund will not be directly represented in the decision making process within the fund. The second condition is therefore not met.

103. Moreover, best practices of the risk capital industry will be applied and the regional Ministry of Finance through the IBG will have a regulatory supervision over the chosen commercial management.

104. As not all of the conditions laid down in point 4.3.6 of the RCG are fulfilled, the fund at this stage cannot be considered to be managed on a commercial basis.

3.3.8. **Sectoral focus**

105. According to point 4.3.7. of the RCG the measures should not be sector specific. The Commission may accept a sectoral focus for risk capital measures. The measure does not have a sectoral focus, thus is in line with point 4.3.7 of the RCG.

3.3.9. **Detailed assessment**

106. Even in case the Commission were to consider the IBG silent participations as debt, at present not all conditions of point 4 of the RCG are met. Therefore, the Commission shall apply the detailed assessment of point 5 of the RCG. According to this point the analysis will be based on a number of positive and negative elements. No single element is determinant, nor can any set of elements be regarded as sufficient on its own to ensure compatibility. In some cases, their applicability, and the weight attached to them, may depend on the form of the measure.
107. Point 5, third paragraph, of the RCG states: "The level of evidence required and the Commission assessment will depend on the features of each case and will be proportionate to the level of market failure tackled and to the risk of crowding out private investment." In this case, all points of the assessment under point 4 of the RCG are fulfilled except of point 4.3.6 (b) of the RCG, which relates to the commercial management, in particular to the representation of private investors in the decision making of the fund.

108. According to point 5.2.1 of the RCG, for risk capital measures envisaging investment tranches into target enterprises beyond the conditions laid down in point 4 of the RCG, in particular those providing for tranches above EUR 1.5 million per target SME over each period of twelve months, follow-on investments or financing of the expansion stage for medium-sized enterprises in non-assisted areas, the Commission will require additional evidence of the market failure being tackled at each level where aid may be present before declaring the proposed risk capital measure compatible with the common market. The measure aims at the provision of risk capital that would alleviate the market failure that exists for start-up and expansion SME in general and in particular in Sachsen-Anhalt. As the present measure allows to provide risk capital to SMEs that are not beyond the requirement of point 4 as concerns the size of investment tranches and the stage of the SMEs, additional evidence of market failure is not required in this case.

109. According to point 5.2.2 of the RCG, an important element in the balancing test is whether and to what extent a state aid measure can be considered an appropriate instrument to encourage private risk capital investment. Firstly, the IBG will co-investment with private investors, thus rendering at least 30% investment by private investors a prerequisite to its activities. Secondly, through the co-investment it will share the risks and thus diminish the exposure of private investors to a single SME. Thus, it will encourage private risk capital investment and have a positive impact on the alleviation of market failure by providing risk capital to SMEs, which will be regarded positively.

110. According to point 5.2.3 of the RCG, to establish whether the aid will provide an incentive effect and be necessary the Commission will, where relevant, take into account the criteria of points 5.2.3.1 to 5.2.3.4 of the RCG, showing the profit driven character of investment decisions and the commercial management of the measure. Taking into account the initial lack of participation of private investors in the decision-making of the fund, the essential criteria to consider in this case are commercial management (points 5.2.3.1 of the RCG) and the presence of an investment committee (points 5.2.3.2 of the RCG). On the one hand, it cannot be regarded positively that private investors are not represented in the decision making of the fund. On the other hand, it follows from the nature of the measure, that the private investors will make their own independent decision whether to co-finance an SME at the same conditions with the fund. The fund will not be able to invest without a corresponding decision of the private investors, who consequently have, essentially, an indirect veto on the fund’s investment decisions. Moreover, private investors are allowed to participate directly in the fund, in which case they will be represented in the Investment Committee approving the management decisions. It is also noted that private investors must be independent of

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the target SMEs and, that, as private investors, they will take a profit-driven and commercial decision. Overall the Commission considers the aid to be necessary and the incentive effect to be present.

111. According to point 5.2.4 of the RCG the Commission shall examine the proportionality of the measure including whether the investors as well as the management are not overcompensated. Taking into account that the fund will co-invest with private investors on the same conditions or, in case that private investors will invest directly into the fund, they will do so on the same terms as the public hand, the measure will provide no compensation to the private investors into the SMEs, which is to be regarded positively. Since the presence of aid should be excluded at the level of the management company, once the changes resulting from the tender procedure are implemented and led to the selection of the economically most interesting management company offering the most advantageous terms, the Commission does not then have to examine the proportionality of its compensation. In any event the German authorities confirmed that the remuneration of the management would reflect current market rates as evidenced by the on-going tender. At the moment the risk of losses is not borne entirely by the public sector and the benefits do not flow entirely to other investors, which has to be regarded positively. The already published tender for managers in this case would be, if carried out, regarded positively as it represents a best-practice approach (point 5.2.4 of the RCG). Therefore, the Commission considers that at present the aid meets the proportionality criterion as provided for in point 5.2.4. of the RCG.

112. According to point 5.3 of the RCG, the Commission shall examine the negative effects of the aid on the levels, where aid may be present. As concerns the risk of crowding-out (point 5.3.1 of RCG) at the level of the fund as well as the target SMEs, the IBG has to co-invest with other private investors. Consequently, it will reinforce the possibility for private funds managed by different managers to invest into SMEs and for SMEs to receive investment from other private sources as well. Pursuant to point 5.3.2 of the RCG, the Commission shall also examine, as concerns other distortions of competition, whether the measure might keep inefficient firms or sectors afloat. The fund will only invest into equity of small enterprises up to their expansion stage for which the business plans show positive prospects of future profitability. The fund is not sector specific in its focus on SMEs. Moreover, the equity investment tranche of open participations is limited to EUR 1.5 million over any period of 12 months. Consequently, the possible negative effects of the measure up to EUR 1.5 million will be limited.

113. On balance, therefore, it is considered that the positive effects outweigh the possible distortions of competition that in any case do not affect trading conditions to an extent contrary to the common interest.

3.3.10. Cumulation

114. Each scheme, in accordance with point 6 of the RCG, must comply with cumulation rules. They stipulate that where capital provided to a target SME is used to finance initial investment or other costs eligible for aid under other block exemption regulations, guidelines, frameworks, or other State aid documents, the relevant aid ceilings or maximum eligible amounts will be by 20 % for target SMEs - all located in assisted areas - during the first three years of the first risk capital investment and up to the total amount received. This reduction does not apply to aid intensities provided for
in Community framework for State aid for Research and Development and Innovation or any successor framework or block exemption regulation in this field.

115. The German authorities confirmed that they would apply the above cumulation rules. Therefore, the measure complies with point 6 of the RCG in respect of open participations.

4. CONCLUSION

116. Insofar as the scheme involves only investment by open participations limited to EUR 1.5 million in total, it complies with all the conditions of section 4.3 and points 5 and 6 of the RCG. Thus, the Commission concludes for this part of the measure *IBG Risk capital fund Sachsen-Anhalt* that it fulfills the conditions as set out in the Community Guidelines on State aid to promote risk capital investment in small and medium-sized enterprises and finds the measure to be compatible with the common market pursuant to Article 87(3)(c) of the EC Treaty.

117. Insofar as the nature of silent participation is concerned, the Commission has doubts and therefore has decided to open an investigation procedure in line with Article 88 (2) EC. If silent participations were to be considered as quasi-equity, then the Commission, at this stage, cannot conclude that the scheme complies with the all points of the RCG and therefore it cannot be considered as compatible with the common market pursuant to Article 87(3)(c) of the EC Treaty.

118. The Commission invites, therefore, the German authorities and interested parties to comment on the nature of silent participations used in this scheme, their similarities and differences to debt and quasi-equity. *Inter alia*, it would be helpful for the Commission to receive the answers to the following questions:

a) Are silent participations, such as the ones described in the decision, used to raise in later stages more debt for a company?

b) Are silent participations, such as the ones described in the decision, treated as quasi-equity by potential lenders/investors?

c) Do banks or other private investors provide silent participations such as the ones described in this decision? How do they treat them – as debt, quasi equity or equity?

d) Do banks or other private investors have any rating system when providing silent participations such as the ones described in this decision?

e) Is it common to secure loans for SMEs with ownership/control clauses? In what circumstances?

**DECISION**

On the basis of the foregoing assessment, the Commission concludes that the measure *IBG Risk capital fund Sachsen-Anhalt*, as described above, is compatible with the common market pursuant to Article 87(3) (c) EC Treaty insofar as it concerns

investment by means of open participations limited to EUR 1.5 million in total. In this regard the Commission has decided not to raise objections.

With regard to new investment by silent participations in the amount of up to EUR 5 million, in the light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 88(2) of the EC Treaty, requests the German authorities to submit their comments and to provide all such information as may help to assess the measure, within one month of the date of receipt of this letter.

The Commission wishes to remind Germany that Article 88(3) of the EC Treaty has suspensive effect with regard to silent participations, and would draw your attention to Article 14 of Council Regulation (EC) No 659/1999, which provides that all unlawful aid may be recovered from the recipient.

The Commission warns Germany that it will inform interested parties by publishing this letter and a meaningful summary of it in the Official Journal of the European Union. It will also inform interested parties in the EFTA countries which are signatories to the EEA Agreement, by publication of a notice in the EEA Supplement to the Official Journal of the European Union and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication.

The Commission reminds the German Government to submit an annual report on the implementation of the scheme.

The Commission further reminds the German Government that all plans to modify this aid scheme have to be notified to the Commission.

If this letter contains confidential information which should not be published, 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 publication of the full text of this letter. Your request specifying the relevant information should be sent by registered letter or fax to:

European Commission  
Directorate-General for Competition  
State Aid Greffe  
B-1049 Brussels  
Fax No: (32).2.296.12.42

Yours faithfully,  
For the Commission

Neelie KROES  
Member of the Commission