SUBJECT: State aid SA.31690 (N 438/10) – Germany

Subordinated loans scheme for undertakings with a rating in Sachsen-Anhalt

Sir,

1. PROCEDURE

(1) By electronic notification registered on 7 October 2010 at the Commission (SANI/4997), the German authorities notified, pursuant to Article 108(3) TFEU, an aid scheme of the Land Sachsen-Anhalt comprising subordinated loans.

(2) By letters of 29 October 2010, 1 February 2011 and 2 May 2011 the Commission asked for supplementary information. Germany submitted the requested information, after the Commission had granted an extension of the first deadline, by letters dated 1 December 2010, 23 February 2011, 14 April 2011 and 25 May 2011.

2. DESCRIPTION

2.1. Objective of the measure

(3) The Land Sachsen-Anhalt aims at providing subordinated loans by means of a fund to beneficiary undertakings in the Land Sachsen-Anhalt in order to improve the access to capital for these undertakings.
2.2. Budget and duration of the measure

The budget of the fund reaches EUR 40 million and will be covered by resources from the European Regional Development Fund (hereinafter "ERDF"). The national co-financing will be provided by the Land. The majority of the budget will be granted in favour of SMEs. The respective operational programme defines the objective of the measure as follows:


Gründung, Festigung und Wachstum von Unternehmen, insbesondere durch Auftrags-vorfinanzierung, Investitionsfinanzierung und Mezzanine-Darlehen.

Entwicklung neuer Verfahren und deren Einführung in den Markt durch Darlehen, um den häufig auftretenden Problemen bei der Innovationsfinanzierung zu begegnen."

The amount of the individual subordinated loans will vary between EUR 25 000 and EUR 1.5 million. The maximum loan duration is ten years, combined with a 5 years grace period.

Loans may be granted until 31 December 2013. In principle they will be granted at the interest rate which the Commission reference rate communication foresees for a loan with low collateralisation, with an additional adjustment that takes into consideration the fact that subordinated loans have no collateralisation at all, and therefore have a higher default risk than loans with low collateralisation. However, under exceptional circumstances the interest rate might be slightly reduced.

2.3. Administration of the measure

The fund will be administered by the public support bank of Sachsen-Anhalt ("Investitionsbank Sachsen-Anhalt", hereinafter "ISA") in compliance with its function as the main support institute of the Land.

2.4. Legal basis

The national legal basis for the measure is the budget regulation of the Land Sachsen-Anhalt (Haushaltsgesetz 2010-2011 and Haushaltsordnung des Landes Sachsen-Anhalt) together with the applicable administrative directives

(9) In accordance with Article 43(3) of Commission Regulation (EC) No 1828/20061, the fund will be set up as a separate block of finance and it will be ensured that separate accounts within the ISA are kept with regard to the fund.

2.5. Beneficiaries

(10) The scheme targets primarily small- and medium-sized undertakings in virtue of the EU definition² (including natural persons engaged in liberal professions) but large undertakings may also be eligible exceptionally. Start-up companies and special purpose vehicles for which no company rating is available are not eligible under the scheme. The eligible undertakings must be established in a Member State and carrying on economic activity in Sachsen-Anhalt through a branch, agency or fixed establishment.

(11) The German authorities stated that all applicable ERDF-rules will be respected including provisions laid down in Article 45 1st subparagraph of Commission Regulation (EC) No 1828/2006 stipulating that loans may only be granted at the establishment, in the early stages, or on expansion of the enterprises concerned, and only for activities which are judged potentially economically viable.

(12) The German authorities stated that no loans will be granted to firms with a rating below B- (Standard & Poor's) and no loans will be granted to firms in difficulty in the meaning of the Community guidelines on State aid for rescuing and restructuring for firms in difficulty³.

(13) Germany expects that the number of beneficiaries is in the range between 101 and 500.

2.6. Sectoral scope

(14) The applicability of the scheme will not be limited to any specific sectors of the economy, with the exception of undertakings active in the primary production of agricultural products, forestry and fishery, which will be excluded from the scope of the scheme.

(15) Germany has committed that ineligible is the financing of export-related activities, i.e. financing 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. Loans contingent on the use of domestic over imported goods are also excluded.

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3 OJ C 244, 1.10.2004, p. 2.
2.7. Loan conditions

(16) The subordinated loans are not backed by collaterals, therefore, the starting point for establishing the loan margins that come on top of the base rate is always the "low collateralisation" column of the table included in the reference rate Communication.

(17) In addition, in order to reflect the higher risk of subordination compared to normal senior debt, ISA will apply a system by which it is ensured that the additional risk resulting from the subordination is taken into account.

(18) The rating of the beneficiaries will be carried out by the ISA itself to the moment of granting for the loan, according to its internal rating method based on the rating modules applied by the DSGV (Deutscher Sparkassen- und Giroverband). This rating system is in compliance with Basel-II. On the basis of the one-year probability of default determined by the ISA it is then possible to assign the beneficiary into an international rating (e.g. S&P) sub-category which, however, does not take into account the subordinated character of the loan.

(19) This S&P rating sub-category, identified by the ISA and adjusted to take into account the increased risk of subordination, will then be used to determine the applicable loan margin according to the loan margins table in the reference rate Communication.

(20) The loan is paid out with 100%; the undertakings will pay an administrative fee of 0.25% per month for the amount of a loan which was granted but not used after the expiration of two months following the granting decision.

(21) The German authorities explained that the interest rate to be charged will be established according to the mechanism explained in section 2.7 above. Nevertheless, they maintain the possibility that under certain circumstances the actual interest rate may be slightly lowered in some individual cases: in these cases, the German authorities committed that the eventual benefit will remain within the limits established by the de minimis Regulation\(^4\). In such cases the aid element of the loan is calculated by discounting the annual aid elements (which equal to the difference between (i) the base rate defined by the reference rate Communication plus the top up depending on the rating of the beneficiary, corrected to reflect the higher risk due to the subordination and (ii) the interest rate actually charged) to the moment of granting the loan. For discounting purposes a uniform top up of 100 basis points on the base rate is used, in accordance with the reference rate Communication.

(22) Germany committed that all other conditions of the de minimis Regulation (e.g. scope, maximum amount, cumulation, monitoring) will be respected.

3. **ASSESSMENT**

3.1. **Legality of the measure**

(23) By notifying the aid measure before putting it into effect, the German authorities respected their obligations under Article 108 (3) TFEU.

3.2. **Existence of state aid**

(24) The fund for financing of the subordinated loans was established by legal act of the Land Sachsen-Anhalt. It is administered by the ISA and financed from State resources involving also the ERDF. Any financial contributions from the ERDF are first transferred to the body designated by the respective Member State, pursuant to Article 76(2) of Council Regulation (EC) No 1083/2006, which subsequently becomes a part of the budget of the Member State. The Member States then transfer these funds onto the beneficiaries, in this case to the fund. The ERDF resources therefore constitute State resources.

(25) The Commission observes that ISB is a special credit institution in the sense of decision E 10/2000. Special credit institutions are particularly closely linked to the State, because they enjoy the benefits of **Anstaltslast** and/or **Gewährträgerhaftung**. Their activities are limited to promotional tasks, which support the structural, economic and social policies and the public tasks of their public owners in accordance with their public mission. Due to this particular structural set-up, the Commission considers that any decision by such a special credit institution is imputable to the State.

(26) The measure is selective since it will be granted only to certain firms in the Land Sachsen-Anhalt. Certain sectors are not eligible under the scheme and the number of beneficiaries is limited given the budget of the fund.

(27) Most, if not all beneficiaries are active in sectors where competition and intra-Union trade exists.

(28) Germany argues that the aid measure does not constitute State aid in the meaning of Article 107(1) TFEU since it either does not confer an advantage (in absence of an interest rate reduction) or falls under the **de minimis** Regulation and neither affects trade nor distorts competition.

3.2.1. **The scheme grants an advantage**

(29) In order to decide whether the measure conveys an advantage on the loan beneficiaries, it has to be established whether the interest rate to be paid by the beneficiaries corresponds to the market price of the loan.

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Germany considers that in those cases where the interest rate is calculated based on the applicable Commission reference rate for loans with low collateralisation, adjusted for the specific risk of subordinated loans, no advantage is granted to the undertakings in question.

The Commission does not share this view. As explained in the Reference Rate Communication, the Communication establishes only a proxy for the market interest rate. It results from the proxy nature of the Commission reference rate that where the Commission is in the presence of other indicators in a concrete file, these other indicators may prevail.

In the present case, the Commission observes that the loans in question are granted by a special credit institution in the sense of decision E 10/2000. It results from the useful measures accepted by Germany in that decision that the intervention of special credit institutions is confined to situations where the borrower cannot obtain a loan at all, or where the State considers that for reasons of supporting structural, economic and social policies, the loan should be granted at more favourable than market conditions. Therefore, the Commission takes the view that the very fact that the loans are granted by a special credit institution shows that they are not granted at market conditions.

This finding is confirmed by the fact that the operational programme, on the basis of which the loan scheme is created, justifies the creation of the measure under assessment with "problems in accessing capital markets" and "higher risk premiums and interest rates" for undertakings in Eastern Germany.7

For these reasons, the Commission considers that the notified scheme confers an advantage upon the undertakings which are granted subordinated loans.

3.2.2. The scheme respects the de minimis Regulation

The Commission considers that the methodology to take into account the higher risk of subordination applied by Germany is in conformity with Article 2 point 4 (a) of the de minimis Regulation, read in the light of its recitals 12 and 13.

Recital 12 of the de minimis Regulation reads as follows:

"Calculation of the grant equivalent of transparent types of aid other than grants or of aid payable in several instalments requires the use of market interest rates prevailing at the time of granting such aid. With a view to a uniform, transparent and simple application of the State aid rules, the market rates for the purposes of this Regulation should be deemed to be the reference rates periodically fixed by the Commission on the basis of objective criteria and published in the Official Journal of the European Union or on the Internet. It may, however, be necessary to add additional basis points on top of the floor rate in view of the securities provided or the risk associated with the beneficiary."

The de minimis Regulation is binding in its entirety (Article 288 TFEU). Therefore, even where the Commission finds in its assessment of an advantage that in the concrete case, the interest rate resulting from the application of the Reference Rate Communication is not the market rate, it is still bound, for the application of the de minimis Regulation, by the rates established by the Reference Rate Communication, adjusted, where appropriate, by additional basis points to reflect additional risk.

The Commission notes that Germany has committed to respect the provisions of the de minimis Regulation, i.e. to ensure that the resulting aid element, calculated on the basis of the Reference Rate Communication and adjusted for the additional risk of subordinated loans, granted to any one undertaking will not exceed EUR 200 000 over any period of three fiscal years (EUR 100 000 for undertakings in the road transport sector) and that all other conditions of the de minimis Regulation (e.g. scope, cumulation, monitoring) will be respected.

4. CONCLUSION

The Commission has accordingly decided that the measure does not constitute State aid within the meaning of Article 107(1) TFEU since it meets the conditions of the de minimis Regulation and does not affect trade or distorts competition between Member States.

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:

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Yours faithfully,
For the Commission

Joaquin Almunia
Vice-President