



2025/2127

28.10.2025

COMMISSION DECISION (EU) 2025/2127

of 16 May 2025

**on the State aid SA.24030 (2016/C) (ex N 512/2007 ex 2015/NN) implemented by Germany for
Abalon Hardwood Hessen GmbH**

(notified under document C(2025) 3022)

(Only the German text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

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

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

Whereas:

1. PROCEDURE

- (1) On 6 September 2007, the German authorities notified measures, in accordance with Article 88(3) of the Treaty establishing the European Community (now Article 108(3) of the TFEU), granted in 2006 by the *Land* of Hesse in favour of Abalon Hardwood Hessen GmbH ('Abalon DE') to support the setting up of a sawing mill for hard wood (State aid N 512/2007). On 6 August 2007, Pollmeier Massivholz GmbH & Co. KG ('Pollmeier') had lodged a complaint to the Commission in relation to aid to Abalon DE.
- (2) On 21 October 2008, the Commission adopted Decision C(2008) 6017 final ⁽²⁾ ('the 2008 Decision') finding that the measures, among them two guarantees, notified by Germany either do not constitute aid (two guarantees granted by the *Land* of Hesse, 'the two guarantees') or constitute existing aid (other measures of the support package).
- (3) On 25 February 2009, Pollmeier brought an action for annulment of the 2008 Decision before the General Court, registered under case number T-89/09.
- (4) By judgment of 17 March 2015 ⁽³⁾ ('the 2015 judgment'), the General Court considered that the Commission's failure to examine the legality of using the rate of 0,5 % of the guaranteed amount to determine the aid element of the two guarantees in the light of the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees ⁽⁴⁾ ('the 2000 Guarantee Notice') was an indication of the existence of serious difficulties as to whether the contested guarantees could be classified as *de minimis* aid. In the view of the General Court, the existence of such difficulties should have led the Commission to initiate the formal investigation procedure. For that reason, it annulled the 2008 Decision in so far as that Decision concluded that the two guarantees did not constitute State aid within the meaning of Article 87(1) of the Treaty establishing the European Community (now Article 107(1) of the TFEU). The General Court upheld the other elements of that Decision.
- (5) On 26 May 2015, both Pollmeier and the *Land* of Hesse appealed the 2015 judgment, respectively challenging the upheld elements of the 2008 Decision and the aid nature of the two guarantees. The Commission did not appeal.

⁽¹⁾ OJ C 4, 6.1.2017, p. 17.

⁽²⁾ OJ C 12, 17.1.2009, p. 1. The non-confidential version of the Decision is publicly available on the following Commission website: <https://competition-cases.ec.europa.eu/cases/SA.24030>.

⁽³⁾ Judgment of the General Court of 17 March 2015, *Pollmeier Massivholz v Commission*, T-89/09, ECLI:EU:T:2015:153.

⁽⁴⁾ OJ C 71, 11.3.2000, p. 14.

- (6) As the two guarantees had been put into effect before an authorisation by the Commission, the Commission registered them as non-notified aid (SA.24030 (2015/NN)).
- (7) Germany submitted further information to the Commission on 28 May and 27 July 2015, including an expert opinion by Professor Csoklich regarding the SME qualification of the beneficiary ('the Csoklich report').
- (8) By letter of 17 February 2016 ('the Opening Decision'), the Commission informed Germany that it had initiated the procedure laid down in Article 108(2) of the TFEU, to determine the compatibility of the two guarantees with the internal market.
- (9) On 19 February 2016, Germany asked the Commission to suspend its formal investigation until the Court of Justice had ruled on the appeals. On 24 February 2016, the Commission agreed to extend the deadline to submit comments until the day after the rulings on the appeals.
- (10) The Court of Justice dismissed the two appeals by order of 14 July 2016 ⁽⁵⁾ and judgment of 12 October 2016 ⁽⁶⁾.
- (11) On 12 October 2016 and 11 November 2016, Germany submitted its comments to the Commission.
- (12) On 6 January 2017, the Commission published the Opening Decision in the *Official Journal of the European Union* ⁽⁷⁾ and invited interested parties to submit their comments.
- (13) The Commission received observations from Pollmeier on 6 February 2017 and forwarded them to Germany for comments. Germany submitted its comments on 27 March 2017.
- (14) On 8 May 2017, 14 June 2017, 5 December 2017 and 26 February 2018, the Commission services requested Germany to provide additional information, which Germany submitted on 24 May 2017, 21 June 2017, 12 December 2017 and 26 March 2018.
- (15) On 22 November 2018, the Commission services met representatives of Pollmeier.
- (16) On 17 February 2020, the Commission requested additional information from Germany, which was submitted on 9 March 2020. On 8 December 2022, the Commission services requested additional information from Germany as regards the calculation of the gross grant equivalent of the aid contained in the two guarantees, which was submitted on 8 February 2023.

2. DETAILED DESCRIPTION OF THE TWO GUARANTEES

2.1. Objective of the two guarantees

- (17) By supporting Abalon DE's investment into a sawing mill for hard wood in 2006, the *Land* of Hesse and Germany aimed at promoting and facilitating regional development of the Schwalm-Eder-Kreis area. This NUTS III area was eligible for regional aid pursuant to Article 107(3), point (c), of the TFEU under the applicable regional aid map for Germany 2004-2006 ⁽⁸⁾. The applicable investment aid intensity ceiling in the area was 18 % for large undertakings, and, in line with point 4.9 of the 1998 Regional Aid Guidelines ⁽⁹⁾ ('the 1998 RAG'), 28 % for small and medium-sized enterprises ('SMEs').

⁽⁵⁾ Order of the Court of Justice of 14 July 2016, *Pollmeier Massivholz v Commission*, C-246/15/P, ECLI:EU:C:2016:568.

⁽⁶⁾ Judgment of the Court of Justice of 12 October 2016, *Land Hessen v Pollmeier Massivholz*, C-242/15 P, ECLI:EU:C:2016:765.

⁽⁷⁾ Cf. Footnote 1.

⁽⁸⁾ Commission Decision C(2003)904fin of 2 April 2003 on the State aid N 641/2002 — Regional aid map for Germany 2004-2006 (OJ C 186, 6.8.2003, p. 18). The non-confidential version of the Decision is publicly available on the following Commission website: <https://competition-cases.ec.europa.eu/cases/SA.14304>.

⁽⁹⁾ Guidelines on national regional aid (OJ C 74, 10.3.1998, p. 9).

2.2. The two guarantees

- (18) On 28 December 2006, as part of a larger aid package ⁽¹⁰⁾, Investitionsbank Hessen (a public law entity (*Anstalt des öffentlichen Rechts*) owned 50 % by the *Land* of Hesse and 50 % by Landesbank Hessen-Thüringen, another public law entity), acting in the name of and on behalf of (*im Namen und im Auftrag*) the Hesse Ministry of Finance (*Hessisches Ministerium der Finanzen*), granted two guarantees to cover two loans issued by a consortium composed of three banks, Kreissparkasse Schwalm-Eder ('KSK'), Landesbank Hessen-Thüringen ('Helaba') and Raiffeisenzentralbank Österreich AG ('RZB'), in favour of Abalon DE:
- (a) a guarantee with a duration of 10 years covering 70 % of an investment loan (*Investitionskredit*) of EUR 19,5 million (corresponding to an initial risk exposure of EUR 13,65 million, gradually reduced in subsequent years ⁽¹¹⁾) ('the investment loan guarantee'). The loan had a duration of 10 years with a repayment in half-yearly instalments ⁽¹²⁾;
 - (b) a guarantee with a duration of five years (until 31.12.2012) for an overdraft facility of up to EUR 10 million to cover working capital requirements (working capital loan, *Betriebsmittelkredit*, i.e. loan that is taken to finance a company's everyday operations) ('the working capital loan guarantee'). In the first year, the guarantee coverage was 50 %; in subsequent years, it was gradually reduced ⁽¹³⁾.

In both cases, Abalon DE paid an annual guarantee premium of 1 % on the outstanding guaranteed amounts. Abalon DE paid interests on the underlying loans (credit risk margin of 225 basis points, in addition to the 6-month Euribor interest rate).

- (19) During the loan application review process, the lending banks rated Abalon DE's credit strength. KSK, Helaba and RZB assigned to Abalon DE a rating category corresponding to an annual default rate of, respectively, 2 %, 1,32 % and 0,832 %.
- (20) Through the consortium structure, RZB provided 50 %, and the two other banks each 25 % of each of the two loans.

2.3. Legal basis and the aid granting authority

- (21) The national legal basis for the two guarantees is the letter of 28 December 2006 sent by the Investitionsbank Hessen to Abalon DE and the 2006 Guidelines of the *Land* of Hesse on the granting of guarantees for the industrial sector (*Richtlinien für die Übernahme von Bürgschaften und Garantien durch das Land Hessen für die gewerbliche Wirtschaft*) ('the 2006 Hesse Guidelines') ⁽¹⁴⁾. Those guarantees were put into effect, in the view of Germany, in compliance with the provisions of Commission Regulation (EC) No 69/2001 ⁽¹⁵⁾ ('the 2001 *de minimis* Regulation').
- (22) The aid granting authority was the Hesse Ministry of Finance.

2.4. The recipient

- (23) The aid recipient Abalon DE is a company established on 5 December 2006, registered at *Amtsgericht* Marburg (local court of Marburg), with seat in Schwalmstadt (Hesse, Germany). It manufactures, sells and distributes beechwood products worldwide.

⁽¹⁰⁾ This aid package was notified under State Aid N 512/2007. It consisted of a EUR 4,5 million regional investment grant (based on the aid scheme N 642/2002 — The Joint Task Scheme 'Improvement of the regional economic structure' — 'Gemeinschaftsaufgabe Verbesserung der regionalen Wirtschaftsstruktur') and the two guarantees here in question.

⁽¹¹⁾ Guarantee coverage reduced in half-yearly reductions as from 2010: in 2010 reductions by EUR 350 000, in 2011 and 2012 by EUR 875 000, in 2013 by EUR 1,05 million, as of 2014 by EUR 1,225 million.

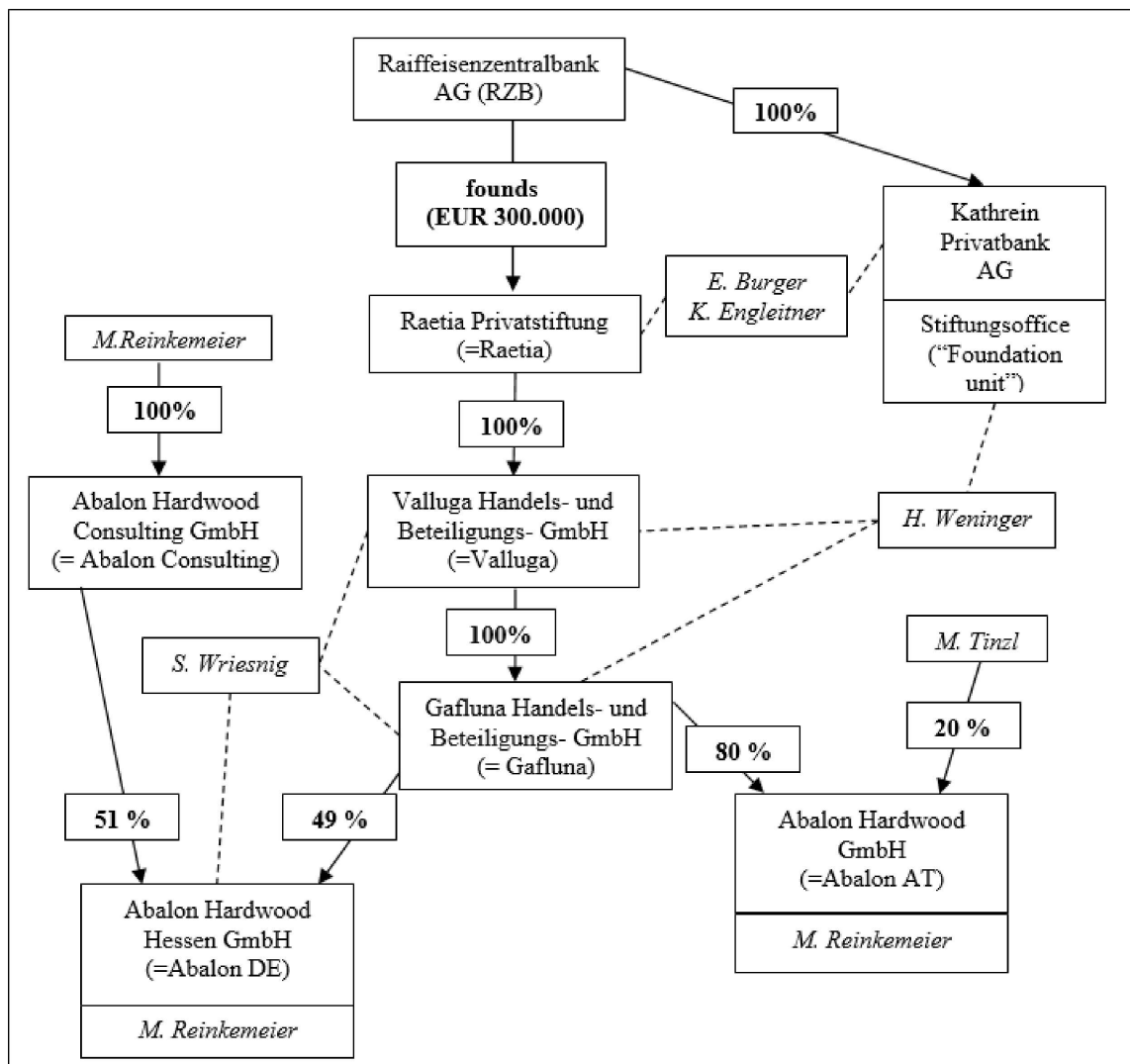
⁽¹²⁾ Loan repayment: half-yearly instalments, first payment in 2010 at EUR 500 000; in 2011 and 2012 at EUR 1,25 million; in 2013 at EUR 1,5 million; in 2014, 2015 and 2016 at EUR 1,75 million; last instalment of EUR 1,75 million on 31.12.2016.

⁽¹³⁾ On 31.12.2009 reduction by EUR 500 000; on 31.12.2010 by EUR 1 million; on 31.12.2011 by EUR 1,5 million, and on 31.12.2012 by EUR 2 million.

⁽¹⁴⁾ Hesse Government Gazette (*Staatsanzeiger für das Land Hessen*) No 30, 24.7.2006, p. 1587.

⁽¹⁵⁾ Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid (OJ L 10, 13.1.2001, p. 30, ELI: <http://data.europa.eu/eli/reg/2001/69/oj>).

- (24) When the two guarantees were issued on 28 December 2006, Abalon Hardwood Consulting GmbH ('Abalon Consulting'), was owned by Manfred Reinkemeier. Abalon Consulting held 51 % of the shares of Abalon DE. Gafluna Handels- und Beteiligungsgesellschaft mbH ('Gafluna') held 49 % of Abalon DE's shares and the corresponding voting rights. Gafluna also held 80 % of Abalon Hardwood GmbH in Austria ('Abalon AT'). Gafluna is a 100 % subsidiary of Valluga Handels- und Beteiligungsgesellschaft mbH ('Valluga'). Valluga is a 100 % subsidiary of Raetia Privatstiftung ('Raetia'), a foundation created by RZB on 11 June 2001.
- (25) RZB has a wholly owned subsidiary, Kathrein Privatbank AG ('Kathreinbank'), which is by its own statement, specialised in offering services for setting up and running private foundations ⁽¹⁶⁾. In 2006, Ernst Burger and Kurt Engleitner were members of Kathreinbank's supervisory board (*Aufsichtsrat*) and of Raetia's three-person governing board (*Stiftungsvorstand*) (the third member being Karl Pistotnik). Heinrich Weninger headed in 2006 Kathreinbank's foundation unit (*Stiftungsoffice*) that advises clients on how to set up foundations and other foundation-related issues. He was simultaneously one of the managing directors (*Geschäftsführer*) of Valluga and Gafluna. Manfred Reinkemeier was managing director of both Abalon DE and Abalon AT.
- (26) The above-mentioned structure is presented below:



⁽¹⁶⁾ According to its website, Kathreinbank is particularly specialised in the needs of entrepreneurs, families of entrepreneurs and private foundations. Their range of services covers all services that are important for these clients. This includes advice on setting up and running a foundation ('Die Kathrein Privatbank hat sich in besonderem Maße auf die Bedürfnisse von Unternehmern, Unternehmerfamilien und Privatstiftungen spezialisiert. Unser Leistungsspektrum umfasst alle für diese Klientel wichtigen Dienstleistungen: Dazu zählen die Beratung bei Gründung und Führung einer Stiftung, ...'), see Kathreinbank's website accessed on 4 September 2019, <https://www.kathrein.at/en/?+Die-Privatbank+&id=2500,1001311>.

2.5. Grounds for initiating the formal investigation procedure

- (27) In its Opening Decision, the Commission provided a preliminary assessment of the two guarantees and raised doubts as to their compatibility with the internal market.

2.5.1. Existence of aid

- (28) The Commission preliminary established that the two guarantees constituted State aid unless they qualified as *de minimis* aid. It however preliminarily considered that the two guarantees did not meet the relevant requirements laid down in Commission Regulation (EU) No 1407/2013⁽¹⁷⁾ ('the 2013 *de minimis* Regulation'). The Commission then examined whether, in line with the transitional rules laid down in Article 7 of the 2013 *de minimis* Regulation, the guarantees could fall under the 2001 *de minimis* Regulation 2001, applying the method in point 3.2, first paragraph, second indent, of the 2000 Guarantee Notice⁽¹⁸⁾, which the General Court in paragraphs 167, 175 and 186 of the 2015 judgment had found to form part of the relevant legal framework under which the Commission had to assess the guarantees at stake. Based on a maximum default rate (worst-case scenario of the three banks) of 2 % and an annual guarantee fee of 1 %, the Commission concluded that the resulting aid elements exceeded both in combination, and for each of the individual guarantees, the threshold of EUR 100 000 laid down in the 2001 *de minimis* Regulation. The Commission therefore expressed doubts that the 2013 and 2001 *de minimis* Regulations were applicable and took thus the preliminary view that the two guarantees, alone, and in combination, constituted State aid.

2.5.2. Lawfulness

- (29) To determine the lawfulness of the aid in the form of the two guarantees, the Commission assessed whether each of those guarantees falls under a regulation exempting the aid from notification obligations.
- (30) Regarding the working capital loan guarantee, the Commission noted that its purpose is to provide operating aid to Abalon DE. The Commission preliminarily concluded that such operating aid complied neither with Article 15 of Commission Regulation (EU) No 651/2014⁽¹⁹⁾ ('the 2014 GBER') on regional aid, nor with Article 22 of the 2014 GBER on start-up aid.
- (31) The Commission further preliminarily concluded that such operating aid did not comply with past block exemptions (that, pursuant to Article 58 of the 2014 GBER, might be applicable to individual aid put into effect before the entry into force of the 2014 GBER if the conditions of the 2014 GBER were not met).
- (32) The Commission therefore raised doubts as to whether the aid in form of the working capital loan guarantee was compatible aid exempted from notification obligations.
- (33) Regarding the investment loan guarantee, the Commission preliminarily considered that it could in principle be declared retroactively compatible and exempted from notification in application of Article 58 of the 2014 GBER and of the exemption laid down in Article 14 of the 2014 GBER (regional investment aid) if Abalon DE constituted an SME.
- (34) However, as the Commission considered the information submitted by Germany on the SME status of Abalon DE to be incomplete, it could not conclude on the SME status. The Commission therefore raised doubts as to whether the individual investment loan guarantee was compatible aid exempted from notification obligations under the 2014 GBER or under Commission Regulation (EC) No 70/2001⁽²⁰⁾ ('the SME block exemption Regulation'), which was applicable at the time of granting the two guarantees.

⁽¹⁷⁾ Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid (OJ L 352, 24.12.2013, p. 1, ELI: <http://data.europa.eu/eli/reg/2013/1407/oj>).

⁽¹⁸⁾ 'The cash grant equivalent of a loan guarantee in a given year can be: ... taken to be the difference between (a) the outstanding sum guaranteed, multiplied by the risk factor (the probability of default) and (b) any premium paid, i.e. (guaranteed sum × risk) – premium ...'.

⁽¹⁹⁾ Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (OJ L 187, 26.6.2014, p. 1, ELI: <http://data.europa.eu/eli/reg/2014/651/oj>).

⁽²⁰⁾ Commission Regulation (EC) No 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises (OJ L 10, 13.1.2001, p. 33, ELI: <http://data.europa.eu/eli/reg/2001/70/oj>).

- (35) The Commission was therefore unable to conclude that the two guarantees were exempted under the 2014 GBER, or any other exemption regulation in force at the date when the two guarantees were issued.

2.5.3. Compatibility

- (36) As the two guarantees were not exempted from notification and constituted *prima facie* regional aid, the Commission then assessed their compatibility under the applicable 1998 RAG.
- (37) As regards the investment loan guarantee, the Commission found that, in accordance with the applicable regional aid map for Germany, investment aid for the setting up of a new establishment in the Schwalm-Eder-Kreis area could not exceed an aid intensity of 18 % for large undertakings and 28 % for SMEs. Since Abalon DE had in 2006 already received an EUR 4,5 million direct grant for an investment of EUR 26 million ⁽²¹⁾, up to the ceiling of 18 % for large enterprises, the guarantee (or at least a part of it) for the investment loan could only be compatible if Abalon DE could qualify as an SME and therefore benefit from the higher aid intensity. In 2006, Germany did not apply the higher aid intensity to Abalon DE. In its Opening Decision, the Commission could not conclude that the information submitted by Germany on the SME status of Abalon DE allowed excluding without doubt that Abalon DE constituted a large undertaking at the time the guarantees were issued. The Commission left open the question of whether Abalon DE constituted an SME or not, and raised therefore doubts as to whether the aid in form of the investment loan guarantee was compatible with the internal market.
- (38) The Commission also raised doubts as regards the compatibility of the working capital loan guarantee since the 1998 RAG did not allow to declare compatible with the internal market operating aid in an area eligible for regional aid pursuant to Article 107(3), point (c), of the TFEU, which is the case of the Schwalm-Eder-Kreis area.

3. COMMENTS RECEIVED DURING THE FORMAL INVESTIGATION

- (39) The Commission received comments from Germany and Pollmeier.

3.1. First comments from Germany

- (40) On 12 October 2016, Germany provided an expert opinion on Abalon DE's SME status, established by Hollstein & Partner mbB Steuerberatungsgesellschaft dated 28 September 2016 ('the Hollstein report'). The Hollstein report concludes that Abalon DE constituted an SME during the years 2006-2015, as, during that period, none of the three ceilings set at Article 2(1) of Annex I to the Commission Recommendation 2003/361/EC ⁽²²⁾ ('the SME Recommendation', Annex I is referred to as 'ASME') to be considered as an SME, i.e. employing fewer than 250 persons, a maximum annual turnover of EUR 50 million and a maximum balance sheet total of EUR 43 million, were exceeded. The Hollstein report finds that such a conclusion remains valid whether Abalon DE is considered on its own or as part of a larger group of entities that, besides Abalon DE, would include Abalon Consulting (including its linked and partner enterprises within the meaning of Article 3(2) and (3) of ASME), Valluga, Gafluna, Abalon AT and Raetia. For instance, in 2006 (at the time of granting), that larger group had a staff headcount of 46, an annual turnover of EUR 8,976 million and a balance sheet of EUR 10,569 million).
- (41) Germany additionally takes the view that, when the two guarantees were issued, Abalon DE constituted a newly created small enterprise within the meaning of the SME Recommendation. Germany reckons that Abalon DE would have had to deal with the handicaps typical of newly created enterprises (such as problems of access to finance) if the two guarantees in question had not been granted and that, in the absence of support through the guarantees at stake, Abalon DE would not have been founded. Finally, Germany suggests that the two guarantees have no negative effect on trade between Member States as the market for raw material sourcing was rather local.

⁽²¹⁾ For the acquisition of modern sawing machines, buildings and the purchase of land, see recital 10 of the 2008 Decision.

⁽²²⁾ Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36, ELI: <http://data.europa.eu/eli/reco/2003/361/oj>).

3.2. Comments from Pollmeier

3.2.1. Aid above the 2001 *de minimis* Regulation threshold

- (42) Pollmeier supports the Commission's conclusions in the Opening Decision that the two guarantees do not qualify as *de minimis* aid pursuant to the provisions of the 2001 *de minimis* Regulation.
- (43) Pollmeier argues that, to calculate the aid element embedded in the two guarantees, the method mentioned in point 3.2, first paragraph, first indent, of the 2000 Guarantee Notice is to be applied. In accordance with that method, 'the cash grant equivalent of a loan guarantee in a given year can be ... calculated in the same way as the grant equivalent of a soft loan, the interest subsidy representing the difference between the market rate and the rate obtained thanks to the State guarantee after any premiums paid have been deducted ...'. In Pollmeier's view, Abalon DE benefitted from a favourable credit rating only because of its link to Raetia and RZB. Also, the default risk of Abalon DE should have been higher than the default risk of 2 % attributed by KSK, to the extent point 3.3 of the 2008 Guarantee Notice ⁽²³⁾ lays down a 3,8 % safe harbour-premium for newly created SMEs.

3.2.2. No exemption under the 2014 GBER nor under the SME block exemption Regulation

- (44) Pollmeier supports the reasoning of the Opening Decision that the working capital loan guarantee can neither be block-exempted under the 2014 GBER, nor under the SME block exemption Regulation.
- (45) The investment loan guarantee, in Pollmeier's view, is neither exempted under the 2014 GBER nor the SME block exemption Regulation. Abalon DE did not qualify as an SME in 2006 as Abalon DE was part of a group of linked and partner enterprises within the meaning of Article 3(2) and (3) of ASME.

3.2.3. Abalon DE as part of a group of linked enterprises including RZB

- (46) As to the SME status, Pollmeier argues that, at the time of the granting of the two guarantees, Abalon DE was part of a group of linked enterprises including RZB, and that, at group level, the relevant SME thresholds were exceeded.

3.2.3.1. Abalon DE linked to Raetia

- (47) Firstly, Pollmeier argues that at the time when the two guarantees were issued, Abalon DE and Raetia were linked within the meaning of Article 3(3) of ASME. Raetia owned 100 % of Valluga, which owned 100 % of Gafluna, which exercised a dominant influence (within the meaning of Article 3(3), first subparagraph, point (c), of ASME) over Abalon DE, although it held only 49 % of Abalon DE's shares. On this latter point, Pollmeier argues that the right to exercise a dominant influence is sufficient, so that an actual exercise of such influence is not required.
- (48) Pollmeier highlights that pursuant to Article 5(2) of Abalon DE's articles of association (*Gesellschaftsvertrag*) dated 5 December 2006, both shareholders (Abalon Consulting and Gafluna) have the right to appoint a managing director (*Entsendungsrecht*).
- (49) Pollmeier further argues that pursuant to Article 7 of Abalon DE's articles of association, certain important business decisions by Abalon DE need to be approved by its associated management board (*Beirat*) (whose members are appointed on equal terms by Manfred Reinkemeier and Gafluna).

3.2.3.2. Abalon DE linked to RZB

- (50) Secondly, Pollmeier argues that in 2006 Abalon DE was also linked to RZB within the meaning of Article 3(3) of ASME. In Pollmeier's views, since Raetia was founded by RZB, and due to the close relationship in staffing (*personelle Verflechtungen*) between RZB and Raetia and its subsidiaries, Raetia, Valluga and Gafluna were an instrument of RZB to invest in other companies, particularly in its own borrowers.

⁽²³⁾ Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (OJ C 155, 20.6.2008, p. 10).

- (51) The Raetia foundation deed (*Stiftungsurkunde*) dated 11 June 2001 shows that RZB injected a total of EUR 300 000 as initial capital in Raetia.
- (52) Pollmeier refers to direct and indirect links between RZB and Raetia through natural persons at the time the two guarantees were granted. In particular, the members of Raetia's governing board (Ernst Burger, Kurt Engleitner and Karl Pistotnik) were holding positions in enterprises owned by RZB, in particular Kathreinbank. Also Valluga's and Gafluna's managing directors (Heinrich Weninger and Siegfried Wriesnig) were holding positions in enterprises owned by RZB in 2006.
- (53) Pollmeier considers that the evidence confirms that, on the basis of Article 3(3), first and fourth subparagraphs, of ASME, as interpreted by the Court in particular in the *HaTeFo* judgment ⁽²⁴⁾, the different enterprises concerned, from Abalon DE to RZB, were linked enterprises. This would be confirmed by the fact that Gafluna, Valluga and Kathreinbank have their place of business at the same address in Vienna, Austria.

3.2.3.3. Abalon DE did not comply with SME criteria

- (54) Pollmeier argues that, as a result, Abalon DE cannot be regarded as an SME because the thresholds are exceeded if RZB is taken into account.
- (55) Finally Pollmeier emphasises that the SME status of Abalon DE cannot be established by relying on other criteria than those laid down in the SME Recommendation. A derogation from those criteria would only be possible if Abalon DE suffered from handicaps that are typical of an SME, but the presence of such handicaps can be excluded because of its links to RZB ⁽²⁵⁾.

3.2.4. No compatibility with the internal market

- (56) Pollmeier expresses the view that the working capital loan guarantee constitutes operating aid that cannot be declared compatible under the 1998 RAG. In addition, Abalon DE is not eligible for start-up aid to a small enterprise as it does not qualify as an SME. The working capital loan guarantee cannot therefore be declared compatible as start-up aid.
- (57) According to Pollmeier, the investment aid intensity ceiling of 18 % (applicable to large undertakings) applies to Abalon DE and Abalon DE cannot benefit from the SME bonus as it does not constitute an SME. This means that the investment loan guarantee cannot be considered as compatible because the ceiling is already exceeded by the aid granted in 2006. In addition, Pollmeier alleges that the two guarantees were not conditional on the maintenance of the investment for a minimum period of five years, as required in point 4.10 of the 1998 RAG.

3.3. Germany's observations on Pollmeier's comments

3.3.1. 0,5 % flat rate-method for calculation of aid amount of the two guarantees

- (58) According to Germany, point 3.2 of the 2000 Guarantee Notice does not prescribe the use of a particular calculation method, as it refers to three calculation methods and only mentions the first method as the one that is applicable 'in principle'. Furthermore, no settled case law points to a preferred calculation option.
- (59) Germany argues that the method mentioned in point 3.2, first paragraph, third indent, of the 2000 Guarantee Notice is to be applied, i.e. the aid element is to be 'calculated by any other objectively justifiable and generally accepted method'. Germany considers that, against the backdrop of insufficient data availability and in light of the principles of legal certainty, legal expectation and non-discrimination, the 0,5 % flat rate-method (used in the 2008 Decision to establish the aid amount) represents such an objectively justifiable and generally accepted method.

⁽²⁴⁾ Judgment of the Court of Justice of 27 February 2014, *HaTeFo v Finanzamt Haldensleben*, C-110/13, ECLI:EU:C:2014:114.

⁽²⁵⁾ Pollmeier in that respect refers to the judgment of the Court of Justice of 29 April 2004, *Italy v Commission*, C-91/01, ECLI:EU:C:2004:244, paragraph 54.

- (60) Germany argues that, in its 2015 judgement, the General Court found that the Commission had failed in its 2008 Decision to assess why a flat rate of 0,5 % was in line with point 3.2 of the 2000 Guarantee Notice, but had not ruled on the legality of such an approach. Therefore, and relying on its wide discretionary power, the Commission would be allowed to apply the 0,5 % approach in this case.
- (61) Germany therefore maintains that, in application of this approach, the total advantage from both guarantees amounts to EUR 93 250, and thus lies below the *de minimis* threshold of EUR 100 000 laid down in Article 2(2) of the 2001 *de minimis* Regulation. Therefore, both the investment loan guarantee and the working capital loan guarantee do not qualify as State aid.

3.3.2. *Block exemption under the 2014 GBER*

- (62) Germany raised a subsidiary argument regarding the investment loan guarantee in case the method mentioned in point 3.2, first paragraph, third indent, of the 2000 Guarantee Notice was not applied. According to Germany, if the safe harbour-premium of 3,8 % laid down in point 3.3 of the 2008 Guarantee Notice for guarantees to newly created SMEs without a credit history was applied, the aid element embedded in the investment loan would amount to EUR 2,3 million. This amount would remain within the limits of Article 14 of the 2014 GBER and would thus be compatible and exempted from the notification requirement.

3.3.3. *SME-criteria fulfilled regardless of a link between the enterprises involved (except RZB)*

- (63) According to Germany, as evidenced in the Hollstein report (recital 40), Abalon DE would qualify as an SME, i.e. it would not exceed the thresholds of Article 2(1) of ASME, even if Abalon Consulting, Abalon AT, Gafluna, Valluga and Raetia were included in the calculation. The fact that, at the time the two guarantees were issued, Siegfried Wriesnig had been managing director of Gafluna since 2001, managing director of Valluga since 2001 and member of Abalon DE's associated management board (*Beirat*) since 2004 would therefore be irrelevant when assessing whether Abalon DE was an SME.
- (64) Germany also argues that the Commission found in the 2008 Decision that Gafluna, Abalon DE, Valluga and Raetia were only partner enterprises within the meaning of Article 3(2) of ASME. According to Germany, that alleged finding has become legally binding by virtue of the 2015 judgment ⁽²⁶⁾. Germany accepts however that – for the sake of simplicity – it can also be assumed that those enterprises were linked enterprises, and not only partner enterprises.

3.3.4. *Abalon DE constituted an SME as not linked to RZB*

- (65) Germany accepts that Abalon DE would not qualify as an SME if it was linked to RZB, directly or indirectly. Germany indeed states that RZB had a staff headcount of approximately 55 000 in 2006 and its annual balance sheet total at the end of 2006 was around EUR 115 billion. Germany however considers that no such links exist.
- (66) As regards the relationships between RZB/Raetia and Abalon DE or its shareholders via individual persons, Germany points out that this line of argumentation is brought up by Pollmeier almost 10 years after it introduced a complaint and considers that therefore the argument is to be rejected on the ground that those matters were submitted too late.

3.3.4.1. *Not linked within the meaning of Article 3(3), first subparagraph, of ASME*

- (67) According to Germany, the fact that RZB is the founder of Raetia does not lead to the conclusion that RZB and Abalon DE - are linked enterprises - in the sense of Article 3(3), first subparagraph, of ASME. In Germany's view, it follows from the Csoklich report (recital 7) that Raetia's founder RZB does not have any right to influence Raetia's nor its linked enterprises' business decisions.

⁽²⁶⁾ 2015 judgment, paragraphs 122, 124, 128, 138 f.

- (68) According to that report, a characteristic feature of the Austrian ‘private foundation’ is that it is completely separated and legally independent from the founder. The founder is only entitled to such rights expressly reserved in the foundation deed. Raetia’s foundation deed shows that RZB has practically no influence on the management of the foundation (*Trennungsprinzip*). Germany highlights in particular that the foundation deed does not provide RZB the right to approve Raetia’s decision (*Zustimmungsvorbehalte*), nor does it give RZB the power to issue instructions (*Weisungsrechte*) to Raetia. It follows that Raetia’s governing board operates completely freely from the founder. There is no indirect influence, for example by means of a right to remove the foundation’s governing board. The independence of the foundation’s governing board from the founder is expressly laid down in the foundation deed. Germany notes that RZB has not even exercised the legal possibility of reserving itself a right of cancellation (*Widerrufsrecht*, i.e. the possibility to revoke the foundation). Since RZB’s right of amendment (of the foundation deed) provided for in the foundation deed can only be invoked exceptionally, the founder cannot oppose decisions which are contrary to his interests. Any changes that would provide RZB direct or indirect influence on Raetia are expressly excluded.

3.3.4.2. Not linked within the meaning of Article 3(3), fourth subparagraph, of ASME

- (69) Germany further states that neither Abalon DE, nor Raetia, nor any of its subsidiaries is linked to RZB within the meaning of Article 3(3), fourth subparagraph, of ASME ⁽²⁷⁾ via ‘links through natural person(s) acting jointly’. Germany acknowledges that, according to the case law, enterprises which do not formally have one or other of the relationships referred to in Article 3(3), first subparagraph, of ASME above, but which, ‘because of the role played by a natural person or group of natural persons acting jointly, nevertheless constitute a single economic unit, must also be regarded as linked enterprises for the purposes of that provision, since they engage in their activities or in part of their activities in the same relevant market or in adjacent markets’ ⁽²⁸⁾.
- (70) Germany however considers that the criteria laid down in the *HaTeFo* judgment on the notion of single economic unit are not fulfilled because RZB is not active on the same (or in an adjacent) market as Abalon DE, Abalon Consulting, Abalon AT, Gafluna, Valluga and Raetia. The fact that RZB granted loans and guarantees to companies active in the wood market does not mean that RZB itself is active on that market. Therefore, that condition in Article 3(3), fourth subparagraph, of ASME is not met.
- (71) In addition, Germany holds that there is no ‘single economic unit’ because there are no relations between RZB’s staff and the staff of Abalon DE/Gafluna/Raetia enabling them to exercise an influence over the commercial decisions of the enterprises concerned. For the same reasons, the same conclusion would be reached even on the basis of the definition of control set out in paragraph 16 of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings ⁽²⁹⁾ (‘the Consolidated Jurisdictional Notice’).
- (72) In Germany’s view, the circumstance that some of the entities involved have their place of business at the same address does not prove the existence of relations between such entities or any possibility to influence business decisions.

3.3.5. Handicaps typical of an SME

- (73) Germany argues that proving the existence of handicaps typical of an SME is not always necessary for an SME qualification in cases where the formal criteria of the ASME are met. Therefore, there is no need in this case to prove that Abalon DE faced handicaps typical of an SME. In any case, Germany holds that Abalon DE has been suffering from the typical handicaps that affect SMEs, and maintains that, without the two granted guarantees, access to finance would have been insecure, which is typical of SMEs. In Germany’s view, without the two guarantees, Abalon DE would not have been incorporated. Furthermore, the complainant itself highlighted Abalon DE’s strained financial situation in 2006.

⁽²⁷⁾ ‘Enterprises which have one or other of such relationships through a natural person or group of natural persons acting jointly are also considered linked enterprises if they engage in their activity or in part of their activity in the same relevant market or in adjacent markets.’

⁽²⁸⁾ Judgment of the Court of Justice of 27 February 2014, *HaTeFo v Finanzamt Haldensleben*, C-110/13, ECLI:EU:C:2014:114, para 34.

⁽²⁹⁾ OJ C 95, 16.4.2008, p. 1.

3.4. Germany's further submissions

3.4.1. Ratings assigned to Abalon DE by the three lending banks

- (74) Germany further transmitted the credit ratings assigned to Abalon DE by the three lending banks (see recital 19 above) and provided explanations regarding these ratings. In a letter to the Commission of 15 May 2017, Raffeyenbank International ('RBI', the legal successor of RZB as from 2010) states that its assessment (credit risk of Abalon DE) at the time was based, in particular, on the growth prospects of the wood market, the excellent access to raw materials in Hesse, the short transport routes, the investment grants and the guarantees to be provided by the *Land* of Hesse.
- (75) In Germany's view, the fact that Abalon DE was rated on a stand-alone basis is another indication against any links to RZB.

3.4.2. Personal relationships between RZB and Raetia

- (76) As to the issue of personal relationships between RZB and Raetia, Germany states that the only members of the three-person governing board of Raetia between 2001 and the end of 2015 were Karl Pistotnik, Ernst Burger and Kurt Engleitner, and that none of them was ever an employee or a member of an executive body of RZB.
- (77) Germany also declares that (i) until 6 December 2017, Abalon DE (including its managing director Manfred Reinkemeier) had no contacts with any of the members of Raetia's governing board, (ii) when the guarantee was granted, Abalon DE's managing director did not know that Raetia existed, (iii) Manfred Reinkemeier learned of Raetia only through the proceedings initiated by Pollmeier, and (iv) the ownership structure of Gafluna has not been of any interest to and had no effects on Abalon DE.
- (78) Further Germany indicates that RZB never gave instructions to the managing director of Abalon DE, that RZB has no expertise regarding the hard wood market, and that no legal connections of any kind exist between Abalon DE and RZB that would allow RZB any actions beyond its function as Abalon DE's main bank (*Hausbank*).
- (79) Germany also transmitted information obtained from RBI listing the members of RZB's management in 2006 to demonstrate that there were no overlaps with the three members of the governing board of Raetia.

3.4.3. Statements by Gafluna and Raetia

- (80) Gafluna submitted statements on its own behalf (*im eigenen Namen*) and by order (*im Auftrag*) of Raetia.
- (81) Gafluna declares that, according to Raetia's foundation deed, Raetia's beneficiaries are those undertakings in which Raetia directly or indirectly holds or acquires shares.
- (82) According to Gafluna and Raetia, the only services that RZB Group provided to Raetia, Valluga or Gafluna consisted in legal support for establishing Raetia, Gafluna and Valluga and account management services (*Kontoführung*) for Raetia. In addition, Valluga held and Gafluna still holds (since its establishment) a payment transactions account (*Zahlungsverkehrskonto*) at Kathreinbank (a 100 % subsidiary of RZB).
- (83) According to the statements by Gafluna and Raetia, Raetia did not provide any services to undertakings of the RZB Group. Raetia never communicated with undertakings of the RZB Group about its strategy or orientation and was never under factual control by third undertakings.

3.4.4. *Statements by RBI*

- (84) RBI, as legal successor of RZB, informed that RZB founded Raetia in 2001 as sole founder, providing EUR 300 000 from its own assets. RZB selected and appointed the first governing board of Raetia (Ernst Burger, Kurt Engleitner and Karl Pistotnik). One of the foundation's general purposes (*Stiftungszweck*) is to promote the Austrian economy, in particular by maintaining and supporting the Austrian companies' competitiveness through the acquisition of shares of companies in financial difficulties or the supply of risk capital.⁽³⁰⁾ More precisely, RBI confirmed that Raetia was created to facilitate the restructuring of clients of RZB that were in difficulty through an indirect shareholding by Raetia in these enterprises. Based on this approach, there was no need for RZB itself to buy shares of its clients in difficulty.
- (85) During the founding process, RZB provided services to Raetia, such as legal and tax assistance, drafting of the foundation deed, entry into the Register of Companies. To RBI's knowledge, no other undertakings from RZB Group (including Kathreinbank) were involved in Raetia's founding process. Further legal assistance was provided for the creation of Valluga and Gafluna.
- (86) RBI confirms that, at the time the two guarantees were granted, the following people held the following positions within RZB and its subsidiaries :
- (a) Heinrich Weninger was the head of Kathreinbank's 'foundation Unit' and had management functions in subsidiaries of Kathreinbank;
 - (b) Ernst Burger was a member of Kathreinbank's supervisory board;
 - (c) Kurt Engleitner was a member of Kathreinbank's supervisory board;
 - (d) Karl Pistotnik could have had connections to entities of the RZB Group during his work as independent lawyer (not documented).
- (87) RBI provided lists of loans that RZB/RBI had awarded to Abalon AT (total amounts of at least EUR 21 million since 2003) and Abalon DE (at least the two loans referred to in recital 18), and of all collateral received in this context.
- (88) RBI further indicated that Gafluna had issued in 2003 and 2007 non-voting shares (*Substanzgenussrechte*) in the amount of EUR 4,99 million in order to raise capital. Germany clarifies that these non-voting shares had been purchased in a two-step system in full by the indirect 100 % subsidiary of RZB, Abies Handels- und Beteiligungsgesellschaft mbH ('Abies').⁽³¹⁾ This purchase had been financed through an indirect shareholder grant (*indirekter Gesellschafterzuschuss*) awarded by RZB to its subsidiary Abies. RBI explains that the non-voting shares issued by Gafluna entitle their buyers to obtain information and to participate in profits, but they do not confer any participatory/influence rights. Therefore, RBI is of the opinion that the purchase of said shares does not satisfy the requirements of Article 3(3), first subparagraph, of ASME.
- (89) RBI affirms that it had no knowledge of any communication between entities of the RZB Group and Raetia about Raetia's general strategy (see also statements in recital 83). RBI stresses that Raetia was fully independent in its business decisions. It also affirms that RZB/RBI – or its subsidiaries – did not exercise factual control over Raetia. Such a control would have been illegal under Austrian foundation law which required the foundation's governing board to fend off any attempt to exert influence on the part of the founder (RZB) on the activities of the foundation.

3.4.5. *Statement by Abalon DE*

- (90) Germany also provided a statement by Abalon DE, which stresses that RZB did not influence any of its business decisions. Furthermore, Abalon DE mentions that it suffered handicaps typical of an SME, due to the competitive market, and in particular take-over attempts by Pollmeier.

⁽³⁰⁾ See Article 3(a) of Raetia's foundation deed.

⁽³¹⁾ Gafluna issued the *Substanzgenussrechte* to Albona Handels- und Beteiligungsgesellschaft mbH, which issued them to Abies.

3.4.6. *Statements on the methodology to calculate the aid amount*

- (91) In its further submissions of 8 February 2023, Germany reiterates that, calculating the gross grant equivalent of the aid contained in the two guarantees at stake using the method mentioned in point 3.2, first paragraph, first indent, of the 2000 Guarantee Notice (see recital 43 above) was not possible. This would require determining the market interest rate of an equivalent loan to Abalon DE without the State guarantees, while, according to Germany, KSK could not make a statement on this matter at this stage because a replication of all parameters relevant to the decision was not possible due to the large time gap of now 17 years since the granting of the two guarantees. Against this background, Germany states that it was unable to provide information, despite all efforts and research made. Germany adds that, given that they still consider that the method mentioned in point 3.2 first paragraph, third indent, of the 2000 Guarantee Notice was to be used, a calculation following the method mentioned in point 3.2 first paragraph, first indent was not necessary.
- (92) In addition, Germany makes a similar statement as to the calculation of the gross grant equivalent of the aid contained in the two guarantees at stake using the method mentioned in point 4.2, first paragraph, of the 2008 Guarantee Notice ('the difference between the market price of the guarantee and the price actually paid'). Germany also explains that, as a consequence, it could not comment on the calculations made by the Commission (and based on the method mentioned in point 4.2, first paragraph, of the 2008 Guarantee Notice) due to the long time gap between the granting of the guarantees and the Commission's request for information.
- (93) Furthermore, Germany considers that the probability of default calculated by RZB (0,832 %, recital 19) was to be taken into account as there was no link between RZB and Abalon DE. Germany also argues that, even if there were such a link, this should have been taken into account in the credit rating of Abalon DE and would have resulted in a lower probability of default (as Abalon DE would benefit from the higher financial strength of a group including RZB).
- (94) Finally, the German authorities submitted precise information as to the effective interest rate (including all fees, especially processing and syndicate fees) that the banks charged Abalon DE for the investment loan.

4. ASSESSMENT OF THE AID

- (95) In State aid decisions, the Commission normally assesses first the existence of aid, then its lawfulness and finally its compatibility. However, as the question of whether Abalon DE qualifies as an SME is relevant for all these assessment steps, the Commission will assess first whether Abalon DE constituted an SME at the time of the grant of the two guarantees in 2006.

4.1. **SME status**

- (96) In its notification on 6 September 2007, Germany did not explicitly invoke an SME status for Abalon DE. Germany invoked an SME status only in its submission of 12 October 2016 (recital 40), after the General Court had annulled the 2008 Decision.

4.1.1. *SME criteria laid down in the SME Recommendation*

- (97) The criteria to establish whether an undertaking constitutes an SME are laid down in the SME Recommendation, as interpreted by the Court of Justice. The Court of Justice has in particular recalled that 'the SME Recommendation must be interpreted by taking into account the reasons for its adoption'⁽³²⁾ and held that 'as is apparent from recitals 9 and 12 of the SME Recommendation and from Article 1(1) thereof, that recommendation aims to adopt an SME definition used in the EU policies applied within the European Union and the EEA which takes into

⁽³²⁾ See judgment of the Court of Justice of 27 February 2014, *HaTeFo v Finanzamt Haldensleben*, C-110/13, ECLI:EU:C:2014:114, paragraph 30; judgment of the Court of Justice of 10 March 2021, *Ertico – ITS Europe v Commission*, C-572/19 P, ECLI:EU:C:2021:188, paragraph 87.

account the real economic position of SMEs in order to remove from that category groups of enterprises whose economic power may exceed that of genuine SMEs, with a view to ensuring that only those enterprises which really need the advantages accruing to SMEs from the different rules or measures in their favour actually benefit from them' ⁽³³⁾. The Court of Justice has further held that 'the advantages afforded to SMEs are in most cases exceptions to the general rules, such as for example in the area of State aid, and therefore the definition of an SME must be interpreted strictly' ⁽³⁴⁾.

- (98) Pursuant to Article 2(1) of ASME, the 'category of micro, small and medium-sized enterprises (SMEs) is made up of enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million or an annual balance sheet total not exceeding EUR 43 million'.
- (99) Article 3 of ASME provides for the types of enterprises taken into account when calculating staff numbers and financial amounts as prescribed by Article 2(1) of ASME.
- (100) Pursuant to Article 3(1) of ASME, an enterprise qualifies as an autonomous enterprise (so that only its own financial amounts and staff headcount are taken into account to assess the thresholds of Article 2 of ASME) if it is not classified as a partner enterprise within the meaning of Article 3(2) of ASME or as a linked enterprise within the meaning of Article 3(3) of ASME.
- (101) Pursuant to Article 3(2) of ASME, partner enterprises are 'all enterprises, which are not classified as linked enterprises within the meaning of [Article 3(3) of ASME] and between which there is the following relationship: an enterprise (upstream enterprise) holds, either solely or jointly with one or more linked enterprises within the meaning of [Article 3(3) of ASME], 25 % or more of the capital or voting rights of another enterprise (downstream enterprise)'.
- (102) Article 3(3), first subparagraph, of ASME identifies as linked enterprises 'enterprises which have any of the following relationships with each other:
 - (a) an enterprise has a majority of the shareholders' or members' voting rights in another enterprise;
 - (b) an enterprise has the right to appoint or remove a majority of the members of the administrative, management or supervisory body of another enterprise;
 - (c) an enterprise has the right to exercise a dominant influence over another enterprise pursuant to a contract entered into with that enterprise or to a provision in its memorandum or articles of association;
 - (d) an enterprise, which is a shareholder in or member of another enterprise, controls alone, pursuant to an agreement with other shareholders in or members of that enterprise, a majority of shareholders' or members' voting rights in that enterprise'.
- (103) Article 3(3), fourth subparagraph, of ASME adds that 'enterprises which have one or other of such relationships through a natural person or group of natural persons acting jointly are also considered linked enterprises if they engage in their activity or in part of their activity in the same relevant market or in adjacent markets.' In the *HaTeFo* judgment, on the interpretation of that provision, the Court of Justice held that that provision 'must be interpreted as meaning that enterprises may be regarded as "linked" for the purposes of that article where it is clear from the analysis of the legal and economic relations between them that, through a natural person or a group of natural persons acting jointly, they constitute a single economic unit, even though they do not formally have any of the relationships referred to in the first subparagraph of Article 3 (3) of that annex. Natural persons who work together

⁽³³⁾ See judgment of the Court of Justice of 10 March 2021, *Ertico – ITS Europe v Commission*, C-572/19 P, ECLI:EU:C:2021:188, paragraph 88.

⁽³⁴⁾ See judgment of the Court of Justice of 27 February 2014, *HaTeFo v Finanzamt Haldensleben*, C-110/13, ECLI:EU:C:2014:114, paragraph 32; judgment of the Court of Justice of 24 September 2020, *NMI Technologietransfer*, C-516/19, ECLI:EU:C:2020:754, paragraph 65; and judgment of the Court of Justice of 10 March 2021, *Ertico – ITS Europe v Commission*, C-572/19 P, ECLI:EU:C:2021:188, paragraph 89.

in order to exercise an influence over the commercial decisions of the enterprises concerned - which precludes those enterprises from being regarded as economically independent from each other - are to be regarded as acting jointly for the purposes of the fourth subparagraph of Article 3 (3) of that annex. Whether that condition is satisfied depends on the circumstances of the case and is not necessarily conditional on the existence of contractual relations between those persons or a finding that they intended to circumvent the definition of a micro, small or medium-sized enterprise within the meaning of that recommendation.’⁽³⁵⁾

- (104) Finally, to establish whether, for non-autonomous enterprises, the relevant headcount, turnover or balance sheet thresholds are exceeded, Articles 6(2) and (3) of ASME provide that the relevant data for the partner enterprises (proportional aggregation) and linked enterprises (100 % aggregation) are added to those of the enterprise under scrutiny.

4.1.2. Assessment

- (105) The Commission accepts that, as evidenced by the Hollstein report (recital 40), at the date of the granting of the two guarantees, Abalon DE, in itself or in combination with Raetia, Abalon Consulting, Valluga, Gafluna and Abalon AT, remained below the relevant staff headcount, turnover, and balance sheet thresholds of the ASME and would therefore qualify as an SME.
- (106) On the other hand, Abalon DE cannot qualify as an SME if RZB is considered as a linked or partner enterprise within the meaning of the ASME. Indeed, RZB itself did not fulfil the SME criteria since its staff headcount (55 000 in 2006) and annual balance sheet (EUR 115 billion in 2006) (recital 65) exceeded the respective thresholds of 250 employees and/or EUR 43 million annual balance sheet⁽³⁶⁾.
- (107) In order to assess whether Abalon DE can be considered as an SME, it is therefore key to assess the relationship between Abalon DE and RZB. To that end, in light of the structure presented above (recital 26), the Commission needs to assess successively the relationship between Abalon DE and Gafluna (section 4.1.2.1), the relationship between Gafluna, Abalon AT, Valluga and Raetia (section 4.1.2.2) and, finally, the relationship between those four companies and RZB (section 4.1.2.3).
- (108) The Commission preliminary notes that, contrary to Germany’s claim (recital 66), Pollmeier’s arguments on the existence of such links cannot be dismissed simply because they have been raised during the formal investigation phase, and not in the initial complaint. According to Article 24(1) of Council Regulation (EU) 2015/1589⁽³⁷⁾ (‘the Procedural Regulation’), ‘any interested party may submit comments ... following a Commission decision to initiate the formal investigation procedure. ...’. The Commission considers that that right exists irrespective of whether a party had submitted a complaint or market information before, and that that right and the scope and content of comments that a party may submit within the formal investigation are not constrained by positions taken in any earlier complaint or market information. In any event, the Commission, for the assessment of the aid measure, has to assess whether the aid beneficiary can be regarded as an SME and to that end must take account of all elements that are relevant for such an assessment.
- (109) The Commission also notes that, contrary to Germany’s claim (recital 64), the 2008 Decision cannot be regarded as legally binding in that it would have concluded that Gafluna, Abalon DE, Valluga and Raetia were only partner enterprises. First, that Decision was annulled by the Court in the 2015 judgment. Second, in its 2008 Decision, the Commission did not assess whether Abalon DE qualified as an SME at the time of granting of the two guarantees, but only assessed whether the financial difficulty of Abalon AT could lead to the conclusion that Abalon DE was to be regarded as a firm in difficulty, which the Commission concluded it could not in light of the absence of a financial link⁽³⁸⁾. The 2008 Decision can therefore not prejudice any assessment of the SME status of Abalon DE.

⁽³⁵⁾ Judgment of the Court of Justice of 27 February 2014, *HaTeFo v Finanzamt Haldensleben*, C-110/13, ECLI:EU:C:2014:114, paragraph 39.

⁽³⁶⁾ Even if RZB is to be considered as a partner enterprise, a proportional aggregation of 49 % of the data of RZB to those of Abalon DE would still rule out the SME qualification of Abalon DE. This reasoning also applies if Gafluna and its linked enterprises (Abalon AT, Valluga, Raetia) were only partner enterprises of Abalon DE (as Germany claims but as the Commission contests).

⁽³⁷⁾ Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9, ELI: <http://data.europa.eu/eli/reg/2015/1589/oj>).

⁽³⁸⁾ Recital 38 of the 2008 Decision.

4.1.2.1. Abalon DE and Gafluna are linked enterprises

- (110) The Commission examines if Gafluna qualifies as a 'linked enterprise' of Abalon DE within the meaning of Article 3(3) of ASME.
- (111) The Commission notes that Gafluna held 49 % of Abalon DE's shares in 2006 (51 % were held by Abalon Consulting which is 100 % owned by Manfred Reinkemeier). This minority shareholding results in a minority of voting rights in the shareholders' assembly according to Abalon DE's articles of association. Therefore, the relationship between Abalon DE and Gafluna does not fulfil the conditions of Article 3(3), first subparagraph, point (a), of ASME.
- (112) In accordance with Article 5(2) of Abalon DE's articles of association, both shareholders (Gafluna and Abalon Consulting) have the right to appoint one managing director each and to remove that person from that function. Since Gafluna can only appoint or remove one out of two managing directors, it does not have the right referred to in Article 3(3), first subparagraph, point (b), of ASME, to appoint or remove a majority of the managing directors. Additional managing directors can only be appointed by the general assembly, in which Gafluna has no majority of the voting rights (see above, recital 111). Therefore, the Commission concludes that the relationship between Abalon DE and Gafluna does not meet the conditions set out in Article 3(3), first subparagraph, point (b), of ASME.
- (113) Thus, the Commission assesses a possible right to exercise a dominant influence over another enterprise pursuant to a contract entered into with that enterprise or to a provision in its memorandum or articles of association as referred to in Article 3(3), first subparagraph, point (c), of ASME. To establish whether a dominant influence is exercised, the Commission relies on the case-law of the Court in the context of the SME Recommendation. In the *HaTeFo* judgment, the Court held that 'the condition that natural persons are acting jointly is satisfied where those persons work together in order to exercise an influence over the commercial decisions of the enterprises concerned which precludes those enterprises from being regarded as economically independent of one another' ⁽³⁹⁾.
- (114) It is also useful to refer to the case-law of the Court in the context of the Merger Regulation ⁽⁴⁰⁾, which also refers to an exertion of 'decisive influence' and is connected to the notion of 'single economic unit' ⁽⁴¹⁾ used by the Court when interpreting the SME Recommendation ⁽⁴²⁾. In this context, the Court held, referring to the Commission Jurisdictional Notice ⁽⁴³⁾, that decisive influence implies 'the power to block actions which determine the strategic commercial behaviour of an undertaking. Thus, joint control may result in a deadlock situation owing to the power of two or more undertakings to reject proposed strategic decisions. It follows, therefore, that those shareholders must reach understanding in determining the commercial policy of the joint venture ... [and that they] are required to cooperate' ⁽⁴⁴⁾.

⁽³⁹⁾ Judgment of the Court of Justice of 27 February 2014, *HaTeFo v Finanzamt Haldensleben*, C-110/13, ECLI:EU:C:2014:114, paragraph 35.

⁽⁴⁰⁾ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ L 24 of 29.1.2004, p. 1, ELI: <http://data.europa.eu/eli/reg/2004/139/oj>). Article 3(2), point (b), of the Merger Regulation provides that: 'control shall be constituted by rights, contracts or any other means which ... confer the possibility of exercising decisive influence on an undertaking, in particular by: ... rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.'

⁽⁴¹⁾ See also the references to 'single economic unit' in paragraphs 10 and 135 of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ C 95, 16.4.2008, p. 1).

⁽⁴²⁾ Judgment of the Court of Justice of 27 February 2014, *HaTeFo v Finanzamt Haldensleben*, C-110/13, ECLI:EU:C:2014:114, paragraphs 34, 38 and 39.

⁽⁴³⁾ Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ C 95, 16.4.2008, p. 1).

⁽⁴⁴⁾ Judgment of the Court of First Instance of 23 February 2006, *Cementbouw v Commission*, T-282/02, ECLI:EU:T:2006:64, paragraphs 42 and 67. See also paragraph 52.

- (115) In the present case, as mentioned in recital 112, both shareholders of Abalon DE have the right to appoint or remove one managing director. Although Gafluna did not make use of this right, Gafluna could have blocked management decisions of Abalon DE, had it appointed a second managing director, in addition to Manfred Reinkemeier, who was appointed by Abalon Consulting. In that case, the two managing directors would collectively represent Abalon DE and take strategic decisions, unless a qualified majority of 2/3 of shares/votes entrusted only one of them with that power ⁽⁴⁵⁾. However, such a 2/3 majority cannot be reached against Gafluna, which holds 49 % of the shares. Similarly, the shareholders' assembly can appoint or remove additional managing directors only with a 2/3 majority. As a consequence, Gafluna could have blocked management decisions and therefore, because of the equality of rights between Gafluna and Abalon Consulting, it should be concluded that Gafluna can exercise a dominant influence over Abalon DE. The fact that Gafluna did not make use of this right does not call into question this conclusion as the dominant influence does not need to be exerted, only the right to exercise dominant influence conferred by the article of association matters according to the ASME.
- (116) Furthermore, the articles of association of Abalon DE provide for a so-called 'Beirat' (an associated management board) of two to four members, to be appointed by Gafluna and Abalon Consulting in equal parts, if it consists of two or four members ⁽⁴⁶⁾. In case the *Beirat* consists of three members, Gafluna and Abalon Consulting each appoint independently one member; the third member is appointed by mutual consent between both shareholders. This *Beirat* is to monitor and advise the management; its unanimous approval is required for certain transactions or business decisions (the *Beirat* decides which transactions or decisions require its own approval, so that it can for example decide that all strategic transactions should be subject to its approval) ⁽⁴⁷⁾. According to Germany, from Abalon DE's incorporation until 2014, the company's *Beirat* had two members, one appointed by Gafluna and one appointed by Abalon Consulting. This also shows that Gafluna exercised a dominant influence over Abalon DE.
- (117) In the light of the above, Gafluna in 2006 could exercise dominant influence over Abalon DE; this derives from the joint control of Gafluna over Abalon DE, through the appointment of senior management and veto rights on strategic decisions on the business policy of Abalon DE. The Commission thus concludes that Gafluna and Abalon DE are linked enterprises within the meaning of Article 3(3), first subparagraph, point (c), of ASME.
- (118) This conclusion is reinforced by an assessment based on Article 3(3), fourth subparagraph, of ASME that focusses on relationships through a natural person. In that regard, paragraph 37 of the *HaTeFo* judgment recalls the relevance of personal links via simultaneous management of enterprises.
- (119) The Commission notes that, at the time of granting the guarantees in 2006, there was an overlap in the management of Abalon DE and Abalon AT (held at 80 % by Gafluna) as both companies had Manfred Reinkemeier as managing director. If he decided against Gafluna's will in Abalon DE matters (of which Gafluna only holds 49 %), Manfred Reinkemeier would have to fear disadvantages in his position as managing director of Abalon AT (of which Gafluna owns 80 %). In practice, these companies, both controlled by Gafluna and both active in the same hardwood market, can therefore be regarded as linked, through Manfred Reinkemeier. In light of the 80 % capital link between Gafluna and Abalon AT, Abalon DE and Gafluna are also to be considered as linked.
- (120) In light of the above, the Commission considers that Abalon DE and Gafluna are linked enterprises within the meaning of Article 3(3) of ASME.

⁽⁴⁵⁾ Article 5(1) and Article 6(1) of the articles of association of Abalon DE.

⁽⁴⁶⁾ Article 7(1) to (3) of the articles of association of Abalon DE.

⁽⁴⁷⁾ In accordance with Article 7(7) of the articles of association of Abalon DE, the associated management board establishes the catalogue of transactions requiring approval by the associated management board: 'The associated management board monitors and advises the management. It gives itself rules of procedure in which it ... establishes rules for the supervision of the management. This includes ... the creation of a catalogue of transactions requiring approval, which the management may only carry out after prior approval by the associated management board.' ('Der Beirat überwacht und berät die Geschäftsführung. Er gibt sich eine Geschäftsordnung, in der er ... Regularien zur Überwachung der Geschäftsführung festlegt. Hierzu gehört ... die Erstellung eines Kataloges von zustimmungspflichtigen Geschäften, die die Geschäftsführung nur nach vorheriger Zustimmung durch den Beirat durchführen darf.').

4.1.2.2. Abalon AT, Gafluna, Valluga and Raetia ('the Raetia linked entities') are linked enterprises

- (121) In 2006 (at the time of granting), Raetia owned 100 % of Valluga. In turn, Valluga owned 100 % of Gafluna, which itself owned 80 % of Abalon AT. In light of those majority of shareholders' voting rights, all four entities qualify as 'linked enterprises' within the meaning of Article 3 (3), first subparagraph, point (a), of ASME.

4.1.2.3. Links between the Raetia linked entities and RZB

4.1.2.3.1. Direct link between RZB and Raetia

- (122) Raetia is a foundation (*Privatstiftung*) established under Austrian law, namely the Federal Act on Private Foundations⁽⁴⁸⁾. RZB founded Raetia with an initial foundation capital of EUR 300 000. The relationship between RZB as the founder and Raetia as the foundation is governed by the Federal Act on Private Foundation and the relevant foundation deed⁽⁴⁹⁾. According to Article 3(a) of that deed, one of Raetia's purposes is 'the promotion of Austria's economy, in particular by maintaining and supporting Austrian companies' competitiveness through the acquisition of shares of companies in financial difficulties or the supply of risk capital' (recital 84).
- (123) The Commission notes that, according to the Csoklich report, under Austrian law, foundations are considered as legal personalities in principle independent from their founder and that the founder has generally no rights *vis-à-vis* the foundation, its bodies, nor the foundation's assets (so-called separation principle (*Trennungsprinzip*), see recitals 67 and 68. However, the Commission assesses the links between the foundation and its founder against the ASME and the related case law of the Union Courts, not against Austrian law.
- (124) In accordance with Article 3(3), first subparagraph, point (b), of ASME, the assignment of rights of appointment indicates that two enterprises are linked. Raetia's foundation deed creates a governing board of the foundation, composed of three members⁽⁵⁰⁾. The foundation is legally represented jointly (*gemeinsame Vertretung*) by two members of this board, whilst only all three board members jointly are entitled to manage the foundation's business (*gemeinschaftliche Geschäftsführung*)⁽⁵¹⁾. In accordance with the foundation deed⁽⁵²⁾, RZB as founder appointed the first governing board (Ernst Burger, Kurt Engleitner and Karl Pistotnik) for an unlimited period of time. Subsequent members can be appointed by unanimous decision of the foundation's governing board itself⁽⁵³⁾. Until at least 2006, the composition of the foundation's governing board remained unchanged.
- (125) Therefore, when the two guarantees were issued in 2006, Raetia's governing board was composed exclusively of RZB appointees. As RZB was entitled to appoint and did appoint all initial members of Raetia's governing board responsible for managing its business, the Commission concludes that RZB and Raetia are linked enterprises within the meaning of Article 3(3), first subparagraph, point (b), of ASME.

4.1.2.3.2. Indirect links between RZB and some of the Raetia linked entities via Kathreinbank (a subsidiary of RZB)

- (126) The conclusion that RZB and Raetia are linked enterprises based on their direct links is reinforced by the indirect links between RZB and some of the Raetia linked entities via Kathreinbank.
- (127) Kathreinbank is a 100 % subsidiary of RZB and is therefore linked to RZB within the meaning of Article 3(3), first subparagraph, point (a), of ASME. Although there was no shareholding links or voting rights between Kathreinbank and the Raetia linked entities in 2006, there are personal links between them that are relevant for the assessment of the qualification as SME (recital 103).

⁽⁴⁸⁾ Federal Act on private foundations ('the Private Foundation Act') (*Bundesgesetz über Privatstiftungen (Privatstiftungsgesetz – PSG)*).

⁽⁴⁹⁾ Articles 33 and 34 of the Private Foundation Act.

⁽⁵⁰⁾ See Article 7(a) of Raetia's foundation deed.

⁽⁵¹⁾ See Article 8 of Raetia's foundation deed.

⁽⁵²⁾ See Article 7(d) of Raetia's foundation deed.

⁽⁵³⁾ See Article 7(d) of Raetia's foundation deed.

- (128) In particular, RBI, the legal successor of RZB, confirmed that there was a certain overlap of personnel in the management and supervisory bodies of Raetia and Kathreinbank when the two guarantees were issued in 2006. At that time, the governing board of Raetia was composed of Ernst Burger, Kurt Engleitner and Karl Pistotnik. At that time, Ernst Burger and Kurt Engleitner were also members of the supervisory board of Kathreinbank. In addition, Germany submitted comments by RZB acknowledging that the activity as lawyer of the third member of Raetia's governing board, Karl Pistotnik, may have resulted in connections with RZB.
- (129) In addition, at the time when the two guarantees were issued, one of the two managing directors of Valluga and Gafluna, Heinrich Weninger, led the 'foundation unit' of Kathreinbank. Finally, Gafluna, Valluga and Kathreinbank had their place of business at the same address when the guarantees were issued.
- (130) In the Commission's view, which is based on a global assessment of all factual circumstances mentioned above, the overlap in the management between Kathreinbank, on the one hand, and, on the other hand, Raetia, Valluga and Gafluna constitutes links through natural persons within the meaning of Article 3(3) of ASME.
- (131) In accordance with Article 3(3), fourth subparagraph, of ASME, enterprises which have links through natural persons are considered 'linked enterprises' if they engage in their activity or in part of their activity in the same relevant market or in adjacent markets. An 'adjacent market' is considered to be the market for a product or service situated directly upstream or downstream of the relevant market. In that regard, the Commission notes that Raetia and Kathreinbank (via its foundation unit) are active in adjacent market (Raetia is a foundation and Kathreinbank provides services to foundations (recital 25, which constitutes an upstream market) and can thus be regarded as linked enterprises. In addition, it is important to point out that linked holding companies, which control (are linked to) a subsidiary that is active in the same relevant market or in adjacent markets as the beneficiary, are themselves in principle to be considered as engaging in their activity or in part of their activity in that market. This is because the notion of links necessarily entails the lack of full autonomy of the subsidiary from the linked holding company, therefore the holding is itself involved in determining, or at least in approving, the strategy and other aspects of the commercial policy of the subsidiary directly present on the market. This is a consequence of the Court's case law on the notion of a single economic unit ⁽⁵⁴⁾, which is the predominant logic behind Article 3(3), fourth subparagraph, of ASME. Furthermore, in a group there is generally a distribution of tasks between entities. One entity may only produce the goods, another may sell them, while a third acts as the managerial holding entity. All these have a functional link to the relevant market. All of these entities are hence captured by the phrase 'if they engage in their activity or part of their activity in the same relevant market or in adjacent markets'. On this basis, the Commission concludes that the group of linked enterprises (RZB, Raetia, Valluga, Gafluna, Abalon AT and Abalon DE) engaged in its activity or in part of its activity in the same relevant market or in adjacent markets when the guarantees were issued.
- (132) The Commission concludes that, at the time the two guarantees were granted, Raetia, Valluga and Gafluna were linked to Kathreinbank and thus to RZB.

4.1.2.4. Conclusion

- (133) When assessing the SME status of an enterprise, 100 % of the data of any linked enterprise is added to its own data ⁽⁵⁵⁾. Since Abalon DE was linked to Gafluna (section 4.1.2.1), which was linked to Abalon AT, Valluga and Raetia (section 4.1.2.2) while the latter were linked to RZB (recital 121, RZB has to be considered when assessing Abalon DE's SME status.
- (134) Given that RZB was not an SME when the two guarantees were issued, its linked enterprises, in particular Abalon DE, were also not SMEs at that point in time.

⁽⁵⁴⁾ Judgment of the Court of Justice of 27 February 2014, *HaTeFo v Finanzamt Haldensleben*, C-110/13, ECLI:EU:C:2014:114, paragraph 34.

⁽⁵⁵⁾ Article 6(2) and (3) of ASME, see recital 104.

4.1.2.5. Abalon DE does not suffer handicaps typical of an SME

- (135) In addition to the above-mentioned links, the Commission, in its assessment of Abalon DE's SME status in 2006, examined if it suffered handicaps typical of an SME. Measures intended for SMEs should genuinely benefit the enterprises for which size represents a handicap and not enterprises belonging to a large group which have access to funds and assistance not available to competitors of equal size (recital 97). It also follows that, in order to ensure that only genuinely independent SMEs benefit from the advantages related to their status, there should be a way of eliminating legal arrangements in which SMEs form an economic group much stronger than such an SME. It should also be ensured that the definition of an SME is not circumvented on formal grounds ⁽⁵⁶⁾. If an enterprise does not in reality suffer from the handicaps typical of an SME, the Commission is entitled to refuse an increased aid ⁽⁵⁷⁾. In spite of the alleged fact that Raetia was independent from RZB (recital 123), Abalon DE was not an independent SME. Due to the above-mentioned substantial ties with the Raetia Group and with RZB, a financial institution of significance in the market, the Commission considers that Abalon DE did not in reality suffer from handicaps that would be typical of an SME, such as problems of access to finance.
- (136) This is illustrated by the fact that RZB provided 50 % of the investment loan and overdraft facility of Abalon DE (see recital 20). The Commission also notes that Abalon DE's mother company Gafluna received indirectly quasi equity capital from RZB. Indeed, in the course of the investigation, RBI, the legal successor of RZB, indicated (recital 88) that, in 2003 and 2007, in order to raise capital, Gafluna issued EUR 4,99 million worth of non-voting shares that were purchased in full by Abies, an indirect 100 %-subsidiary of RZB. Abies received an indirect shareholder grant (*indirekter Gesellschafterzuschuss*) of RZB to finance this acquisition. This substantial injection of EUR 4,99 million quasi equity capital in Gafluna shows that Gafluna and the entities linked to it did not encounter the typical handicaps of SMEs with regard to access to capital.

4.1.3. Conclusion on SME status

- (137) In the light of the above, the Commission concludes that Abalon DE cannot be considered as an SME when the two guarantees were issued in 2006.

4.2. Existence of aid

- (138) According to Article 107(1) of the TFEU, '[s]ave as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'. The qualification of a measure as aid within the meaning of that Article therefore requires that the following cumulative conditions be met: (i) the measure must be imputable to the State and financed through State resources; (ii) it must confer an advantage on its recipient; (iii) that advantage must be selective; and (iv) the measure must distort or threaten to distort competition and affect trade between Member States.

4.2.1. Financing with State resources and imputability to the State

- (139) The two guarantees were issued by the Investitionsbank Hessen on behalf of the Hesse Ministry of Finance. They are thus directly imputable to the State.
- (140) They rely on the State budget and thus involve State resources (recital 18).

4.2.2. Undertaking

- (141) Abalon DE qualifies as an undertaking as it is engaged in an economic activity. It processes forestry products and sells the processed products on the relevant product markets against remuneration (recital 23).

⁽⁵⁶⁾ Judgment of the Court of Justice of 29 April 2014, *Italy v Commission*, C-91/01, ECLI:EU:C:2004:244, paragraph 50.

⁽⁵⁷⁾ Judgment of the Court of Justice of 29 April 2014, *Italy v Commission*, C-91/01, ECLI:EU:C:2004:244, paragraph 54.

4.2.3. *Advantage*

- (142) An advantage is any economic benefit, which an undertaking could not have obtained under normal market conditions, that is to say in the absence of State intervention. A borrower which subscribes to a loan guaranteed by the public authorities of a Member State normally obtains an advantage inasmuch as the financial cost that it bears is less than that which it would bear if it had to obtain that same financing and that same guarantee at market prices ⁽⁵⁸⁾.
- (143) As a matter of principle, the State aid element will be deemed to be the difference between the appropriate market price of the guarantee provided and the actual price paid for that measure ⁽⁵⁹⁾.

4.2.3.1. Principles for calculation of aid equivalent in guarantees

- (144) Aid in the form of State guarantees is granted at the moment when a guarantee is given, and not at the point in time at which the guarantee is invoked or the moment at which payments are made under the terms of the guarantee ⁽⁶⁰⁾. Therefore, the relevant point in time for the assessment of the measures is the moment the guarantees were granted in December 2006 (recital 18).
- (145) In order to determine whether the two guarantees at stake provide an advantage to Abalon DE, the Commission needs to rely on the methods and principles allowing to calculate as accurately as possible the real market value of the guarantees. They are currently laid down in the 2008 Guarantee Notice. Even though the 2000 Guarantee Notice was applicable at the date of granting, it was replaced by the 2008 Guarantee Notice which lays down a more refined policy to calculate the aid element of guarantees in order to reflect more adequately the reality of the market. As the notion of aid is an objective notion to be assessed as accurately as possible, the Commission thus uses the 2008 Guarantee Notice for its assessment of whether the two guarantees at issue provides an advantage to Abalon DE.
- (146) According to point 3.2(d) of the 2008 Guarantee Notice, 'in order to determine the corresponding market price, the characteristics of the guarantee and of the underlying loan should be taken into consideration. This includes: the amount and duration of the transaction; the security given by the borrower and other experience affecting the recovery rate evaluation; the probability of default of the borrower due to its financial position, its sector of activity and prospects; as well as other economic conditions. This analysis should notably allow the borrower to be classified by means of a risk rating. This classification may be provided by an internationally recognised rating agency or, where available, by the internal rating used by the bank providing the underlying loan. ... To assess whether the premium is in line with the market prices the Member State can carry out a comparison of prices paid by similarly rated undertakings on the market.'
- (147) Point 4.2, first paragraph, of the 2008 Guarantee Notice provides three different methodologies to identify the aid element in individual guarantees such as the ones at stake. The first method, which considers that the cash grant equivalent should be calculated as 'the difference between the market price of the guarantee and the price actually paid' ('the first method under the 2008 Guarantee Notice') is to be applied in principle.
- (148) During the formal investigation procedure, the Commission requested from Germany information related to the calculation of the gross grant equivalent of the aid contained in the guarantees at stake using the first method under the 2008 Guarantee Notice but the German authorities considered that this information was impossible to provide (recitals 16, 91 and 92). The Commission considers however that it is in a position to apply the first method under the 2008 Guarantee Notice because the market provides guarantees for the type of transaction concerned.

⁽⁵⁸⁾ Judgment of the Court of Justice of 3 April 2014, *France v Commission*, C-559/12 P, ECLI:EU:C:2014:217, paragraph 96; judgment of the General Court of 12 March 2020, *Valencia Club de Fútbol v Commission*, T-732/16, ECLI:EU:T:2020:98, paragraph 121.

⁽⁵⁹⁾ See point 4.1, first paragraph, of the 2008 Guarantee Notice.

⁽⁶⁰⁾ Point 2.1 of the 2008 Guarantee Notice.

- (149) In order to identify the market price and calculate the aid amount, the Commission compares the price actually paid with the price paid in comparable market transactions, either by Abalon DE itself or by comparable companies. Since there is no data available as regards Abalon DE, the Commission analyses below (i) which companies are comparable to Abalon DE (section 4.2.3.2.), (ii) the market price of the guarantees at stake (section 4.2.3.3) and (iii) the resulting aid amount (section 4.2.3.4).

4.2.3.2. Comparison with companies with a similar default rate and rating

- (150) The main element to determine which companies are comparable to Abalon DE is their respective probabilities of default. When banks issue a loan to a company, they attribute a default rate (probability of default) to the borrower, reflecting their individual risk assessment. The banks carry out a comprehensive risk assessment taking into account, in line with their internal rating system, specific criteria on the economic viability of the company and an assessment of the product market and sector of activity.
- (151) It is therefore necessary to assess Abalon DE's default rates and their credibility.
- (152) Three banks issued the underlying loans and attributed different default rates (probability of default) to Abalon DE, namely KSK (2 % default rate), Helaba (1,32 % default rate) and RZB (0,832 % default rate) (see recital 19).
- (153) In general, since the rates are based on an individual risks assessment, it seems appropriate to take into account the different rates granted to a company and average them in order to adequately capture market reality. However, if a rating is not credible, not comparable, or not objective, it should not be considered for averaging.
- (154) In the present case, the Commission considers that the different ratings provided by the three banks are all applicable to Abalon DE directly (they were calculated by the banks on the basis of company-specific information provided by Abalon DE and the three banks were involved in the underlying loans provided to Abalon DE). However, the Commission considers that the RZB rating is not sufficiently objective and credible to be relied upon because of the links between RZB and the rated enterprise Abalon DE.
- (155) Therefore, the Commission bases its assessment only on the average of the default rates identified by KSK and Helaba, i.e. 1,66 % (average of 2 % and 1,32 %) ⁽⁶¹⁾. On the basis of this average default rate, the credit quality (rating) of Abalon DE in 2006 is in the 'Ba2'/'Ba3' range on Moody's rating scale ⁽⁶²⁾, corresponding to the 'BB'/'BB-' range on S&P's rating scale ⁽⁶³⁾.

4.2.3.3. Market price of the guarantees

- (156) Guarantee premiums charged to companies with a rating similar to the one of Abalon are not available.
- (157) However, the Commission is able to establish the market price by relying on traded credit default swaps (CDS). The Commission considers that CDS are appropriate and relevant proxies, as they provide a market price of the default risk of a company ⁽⁶⁴⁾.

⁽⁶¹⁾ Keeping the average of the three default rates (including the 0,832 % provided by RZB) would not change the outcome. The average would be 1,38 %, which is included in the same 'Ba2'/'Ba3' range on Moody's rating scale.

⁽⁶²⁾ See the first column (1 year default probabilities) of Exhibit 26 of Moody's Special Comment 'Corporate Default and Recovery Rates, 1920-2006', February 2007 (Ba2: 0.856; Ba3: 1.929) (<https://www.moody.com/sites/products/DefaultResearch/2006400000429618.pdf>).

⁽⁶³⁾ https://www.researchgate.net/figure/Moodys-and-S-P-alphanumeric-ratings-conversion-into-numeric-values_tbl1_23722339.

⁽⁶⁴⁾ See Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (OJ C 262, 19.7.2016, p. 1, paragraph 111). CDS are financial instruments insuring the lender (or any third party which has bought the protection) against the default risk of a referenced entity (here the borrower), like guarantees on loans. The price paid for the risk protection is called 'guarantee premium' in the case of a loan guarantee and 'market credit spread' in the case of traded CDS. Both prices are mainly determined by the default risk of the referenced entity (borrower) and can thus be considered as proxies of prices for the same type of risks, i.e. default risk.

- (158) In view of Abalon DE's rating, the iTraxx Europe Crossover Credit Derivate Index ('the iTraxx crossover index') is an appropriate market benchmark: the iTraxx crossover index is indeed composed of up to 75 European companies with an average rating of 'BB' around the relevant date ⁽⁶⁵⁾ and a level of collateral corresponding to the one of Abalon DE ⁽⁶⁶⁾. The market credit spread (proxy of the market guarantee premium) ⁽⁶⁷⁾ of the iTraxx Crossover Index on 29 December 2006 is 2,19 % for the working capital loan (weighted average life of the guarantee close to 5 years) and 2,66 % for the investment loan (weighted average life of the guarantee between 5 years and 10 years as a consequence of the linear amortisation).

4.2.3.4. Resulting aid amounts

- (159) Based on the above, the Commission calculates the gross grant equivalent of the aid contained in the guarantees, using the first method under the 2008 Guarantee Notice. It takes into consideration the following conditions, deriving from the guarantee and loan documents:

(a) Investment loan (*Investitionskredit*):

- (i) Loan amount of EUR 19,5 million, 10 years duration;
- (ii) Loan repayment in half-yearly instalments as of 2010: in 2010 two half-yearly instalments of EUR 500 000, in 2011 and 2012 four half-yearly instalments of EUR 1,25 million, in 2013 two half-yearly instalments of EUR 1,5 million, in 2014, 2015 and 2016 six half-yearly instalments of EUR 1,75 million, including the last instalment of EUR 1,75 million that was due on 31.12.2016;
- (iii) 70 % loan amount covered by public guarantee i.e. EUR 13,65 million until 2010;
- (iv) Guarantee coverage reduced in half-yearly reductions as from 2010: In 2010 reductions by EUR 350 000, in 2011 and 2012 by EUR 875 000, in 2013 by EUR 1,05 million, as of 2014 by EUR 1,225 million.

(b) Working capital loan (*Betriebsmittelkredit*):

- (i) Loan amount of up to EUR 10 million, no fixed duration (termination by cancellation), loan repayment after termination;
- (ii) Up to 50 % of loan amount covered by public guarantee limited in time until 31.12.2012, i.e. EUR 5 million;
- (iii) Guarantee coverage reduced in steps over time. On 31.12.2009 reduction by EUR 500 000; on 31.12.2010 by EUR 1 million; on 31.12.2011 by EUR 1,5 million, and on 31.12.2012 by EUR 2 million.

(c) In both cases:

- (i) Abalon DE pays an annual guarantee premium of 1 % on the outstanding guaranteed amounts;
- (ii) For the calculation of the gross grant equivalent of the aid contained in the guarantees, the cash flows must be discounted to the granting date of December 2006. To that purpose, a 5,36 % rate is used on the basis of the reference rate applicable in Germany in December 2006 ⁽⁶⁸⁾, increased by 100 basis points according to the Communication from the Commission on the revision of the method for setting the reference and discount rates ('the reference rate Communication') ⁽⁶⁹⁾.

⁽⁶⁵⁾ See Chart 20 of the 2007 Q3's Quarterly Bulletin of the Bank of England (Volume 47 No. 3, <https://www.bankofengland.co.uk/-/media/boe/files/quarterly-bulletin/2007/quarterly-bulletin-2007-q3.pdf>).

⁽⁶⁶⁾ The securities given by Abalon DE (collateral provided, recourse to machinery and real estate) is standard in terms of maximum recoverable amounts. This is consistent with using the iTraxx crossover index which assumes a 40 % recovery rate (i.e. 60 % loss given default), which is in line with market observations for loans that have standard collateral.

⁽⁶⁷⁾ See footnote 64.

⁽⁶⁸⁾ See Reference/discount rates and recovery rates for the 25 EU Member States from 1.5.2004 to 31.12.2006: 4.36 for Germany from 1.12.2006 to 31.12.2006, https://competition-policy.ec.europa.eu/document/download/ff0d1fd3-2fda-42c1-9980-42501a62c026_en?filename=reference_rates_eu25_en.pdf.

⁽⁶⁹⁾ 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).

(160) As noted in recital 158, the market guarantee premium would have been 2,19 % for the working capital loan and 2,66 % for the investment loan. This is to be compared to the annual premium of 1 % on the outstanding guaranteed amounts (see recital 159(c)(i)) actually paid by Abalon DE.

(161) Based on that comparison and using the applicable discount rate (see recital 159(c)(ii)), the gross grant equivalent of the aid contained in the investment credit guarantee is EUR 1 380 705 and the gross grant equivalent of the aid contained in the working capital credit guarantee is EUR 129 134, thus an overall aid amount of EUR 1 509 839.

4.2.3.5. Possibility of applying other methods to determine the advantage

4.2.3.5.1. Using the safe-harbour approach under the 2008 Guarantee Notice

(162) Pollmeier commented that Abalon DE was a newly founded undertaking without a credit history for which the safe harbour approach (3,8 %) under point 3.3 of the 2008 Guarantee Notice applied (recital 43). Under that approach, if the borrower is an SME, the Commission can accept a simple evaluation of whether or not a loan guarantee involves aid.

(163) The Commission however notes that Abalon DE is not an SME so that this method is not applicable.

4.2.3.5.2. Using any other objectively justifiable and generally accepted method i.e. the third method under the 2000 Guarantee Notice

(164) Point 3.2, first paragraph, of the 2000 Guarantee Notice provides that the cash grant equivalent of a loan guarantee in a given year can be:

- (a) calculated in the same way as the grant equivalent of a soft loan, the interest subsidy representing the difference between the market rate and the rate obtained thanks to the State guarantee after any premiums paid have been deducted ('the first method under the 2000 Guarantee Notice');
- (b) taken to be the difference between (i) the outstanding sum guaranteed, multiplied by the risk factor (the probability of default) and (ii) any premium paid, i.e. (guaranteed sum × risk) – premium ('the second method under the 2000 Guarantee Notice');
- (c) calculated by any other objectively justifiable and generally accepted method ('the third method under the 2000 Guarantee Notice').

(165) Pursuant to point 3.2, second paragraph, of the 2000 Guarantee Notice, for individual guarantees the first method should in principle be the standard form of calculation while for guarantee schemes the second method should be used.

(166) Germany suggested in its comments on the Opening Decision that a 0,5 % flat-rate approach was still applicable (see recitals 58 to 60, as it could be justified under the third method under the 2000 Guarantee Notice.

(167) The Commission however considers that the 2000 Guarantee Notice cannot be applied in the present case as the 2008 Guarantee Notice constitutes a more appropriate and precise guidance to determine the advantage (recital 145).

- (168) In any event, taking into account point 3.2, second paragraph, of the 2000 Guarantee Notice, the Commission notes that the third method under the 2000 Guarantee Notice has the character of a catch-all provision (*Auffangtatbestand*) that would only apply if the other methods of calculation are not justified, feasible and appropriate in the specific case at hand. In this context, the Commission notes that, for the ad hoc guarantees at stake in this case, point 3.2, second paragraph, of the 2000 Guarantee Notice requires that the first method under that Notice is used. That first method, which directly relies on a comparison with market figures, is able to reflect more adequately the market reality than the mere flat-rate approach under the third method under the 2000 Guarantee Notice. It should be noted in that regard that the General Court, in its 2015 judgment ⁽⁷⁰⁾, also noted that the acceptance by the Commission of the practice of using the rate of 0,5 % was of a 'provisional nature' and that 'a review of the situation was planned' following in particular 'more precise definition of the intensity of aid on the basis of additional studies', which confirms that the latter method was, already at that time, regarded as insufficiently reflecting the reality of the market. Therefore, for that additional reason, the third method under the 2000 Guarantee Notice should not be applied in this case.

4.2.3.5.3. Using the first method under the 2000 Guarantee Notice

- (169) In the Opening Decision ⁽⁷¹⁾, the Commission considered the possibility of applying the first method under the 2000 Guarantee Notice. That would e.g. have required data to determine the market interest rate. In recital 32 of that Decision, the Commission invited Germany to provide the information required to apply that method. However, Germany did not submit this information, neither in the preliminary examination phase ⁽⁷²⁾, nor in the later formal investigation phase ⁽⁷³⁾ following the explicit invitation in the Opening Decision. During the formal investigation, the Commission also requested from Germany information related to the calculation of the gross grant equivalent of the guarantees at stake using the first method under the 2000 Guarantee Notice but the German authorities considered (in essence) that calculating that amount was impossible (recitals 16, 91 and 92).
- (170) The Commission however considers that, as a matter of principle, the first method under the 2008 Guarantee Notice should be used (recital 147). In addition, given the lack of the required information on benchmark market interest rates, the Commission notes that a direct application of the first method under the 2000 Guarantee Notice is not possible. An indirect way would be to establish market proxies of the loan interest rates, using the reference rate Communication. However, such an approach would be much less precise and less meaningful due to the application of the broad credit risk categories of the reference rate Communication. The first method under the 2008 Guarantee Notice is therefore economically more meaningful as direct market proxies can be used.

4.2.4. Selectivity

- (171) The two ad hoc guarantees are provided exclusively to Abalon DE and are thus selective. This was not contested by Germany. As the Court of Justice has stated, where individual aid is at issue, the identification of the economic advantage is, in principle, sufficient to support the presumption that a measure is selective ⁽⁷⁴⁾. This is so regardless of whether there are operators on the relevant markets that are in a comparable situation.

⁽⁷⁰⁾ 2015 judgment, paragraph 174.

⁽⁷¹⁾ Recital 32 of the Opening Decision.

⁽⁷²⁾ In its submission of 28 May 2015, as an alternative to its suggested 0,5 % flat rate-method, Germany explicitly refers to the second method of calculation under the 2000 Guarantee Notice and not to first method of calculation under that Notice.

⁽⁷³⁾ In its submission of 27 March 2017, Germany focusses its argumentation on the suggested 0,5 % flat rate-method, which could in Germany's view also be applied under the third method of calculation under the 2000 Guarantee Notice. Germany does not provide more information on a possible application of the first method of calculation under that Notice.

⁽⁷⁴⁾ See judgment of the Court of Justice of 4 June 2015, *Commission v MOL*, C-15/14 P, ECLI:EU:C:2015:362, paragraph 60.

4.2.5. *Distortion of competition*

- (172) The guarantees improve the competitive position of Abalon DE compared to its competitors which do not benefit from those guarantees. Abalon DE is active in a market where there is competition (as evidenced in particular by the complaint filed by Pollmeier). Thus, the guarantees distort or threaten to distort competition.

4.2.6. *Effect on trade between Member States*

- (173) The Commission rejects Germany's argument (see recital 41) that the two guarantees are of a purely local nature. Even if, as Germany suggests, the raw material is obtained mainly from local sources, Abalon DE uses the raw material to manufacture beechwood products that it sells and distributes worldwide (see recital 23). Thus, the processed forestry products manufactured by Abalon DE (and those from its competitor Pollmeier) are subject to trade between Member States, and the support for Abalon DE is therefore likely to affect trade between Member States.
- (174) As *de minimis* aid is deemed not to affect trade between Member States ⁽⁷⁵⁾, the Commission verified if and to what extent the guarantees could fall under the relevant *de minimis* provisions.
- (175) As the Commission found already in the Opening Decision (see recital 28), the guarantees under scrutiny do not qualify as *de minimis* aid pursuant to the provisions of the 2013 *de minimis* Regulation, as its transparency requirements are not met (see recitals 25 *et sequitur* of the Opening Decision).
- (176) The Commission therefore assessed, in line with the applicable transitional rules, whether the guarantees would have qualified as *de minimis* aid under the 2001 *de minimis* Regulation, which applied in 2006, and which lays down in its Article 2(2) a *de minimis* threshold of EUR 100 000 ⁽⁷⁶⁾. The aid amounts for the two guarantees (see recital 161) exceed, both individually and combined, this threshold, and hence do not qualify as *de minimis* aid.
- (177) The Commission thus concludes that the two guarantees are likely to affect trade between Member States.

4.2.7. *Conclusion on existence of aid*

- (178) In light of the elements presented in section 4.2, the Commission concludes that both the investment loan guarantee and the working capital guarantee constitute State aid within the meaning of Article 107(1) of the TFEU.

4.3. **Lawfulness of the two guarantees**

- (179) The two guarantees do not constitute existing aid as defined in Article 1, point (b), Procedural Regulation ⁽⁷⁷⁾. They were notified by Germany ⁽⁷⁸⁾ but implemented without *a priori* Commission approval. The Commission therefore needs to assess whether the two guarantees have to be treated as 'unlawful aid' put into effect in violation of Article 108(3) of the TFEU ⁽⁷⁹⁾, or whether they were exempted – possibly retroactively – from the notification requirement under any relevant block exemption (and thus also compatible).

⁽⁷⁵⁾ See recital 3 of the 2013 *de minimis* Regulation, see also recital 5 of the 2001 *de minimis* Regulation.

⁽⁷⁶⁾ Article 2(2) of the 2001 *de minimis* Regulation 2001 says: 'The total *de minimis* aid granted to any one enterprise shall not exceed EUR 100 000 over any period of three years. This ceiling shall apply irrespective of the form of the aid or the objective pursued.'

⁽⁷⁷⁾ Unlike the regional investment grant (which was part of the larger aid package, see recital 18, the two guarantees were not granted under an approved and therefore existing aid scheme, see recitals 44 *et sequitur* of the 2008 Decision.

⁽⁷⁸⁾ They did not exist prior to the entry into force of the TFEU and they are not deemed to be existing aid pursuant to Article 17 of the Procedural Regulation.

⁽⁷⁹⁾ See Article 1(f) of the Procedural Regulation.

4.3.1. *No retroactive exemption (and compatibility) under the 2014 GBER*

- (180) Pursuant to its Article 58(1), the 2014 GBER is to apply to individual aid granted before its entry into force if the aid fulfils all its relevant conditions under that regulation, with the exception of Article 9 (publication and information). Since the 2014 GBER entered into force on 1 July 2014, the two guarantees could in principle be exempted by this retroactive application of the 2014 GBER.
- (181) However, as already set out in the Opening Decision, the transparency requirement laid down in Article 5(1) of the 2014 GBER limits its application ‘only to aid in respect of which it is possible to calculate precisely the gross grant equivalent of the aid ex ante without any need to undertake a risk assessment (“transparent aid”)’. Article 5(2), point (c), of the 2014 GBER provides that aid comprised in guarantees is to be considered transparent where either the gross grant equivalent has been calculated on the basis of safe harbour premiums laid down in a Commission notice or, where, before implementation of the measure, a methodology to calculate the gross grant equivalent of the guarantee has been accepted by the Commission.
- (182) The first methodology to calculate the gross grant equivalent of the guarantees notified by Germany was accepted by the Commission in 2007 in Decision C(2007) 4287 final⁽⁸⁰⁾, i.e. after the two guarantees were issued on 28 December 2006. Their gross grant equivalent was not calculated based on safe harbour premiums as these exist only for SMEs under the 2008 Guarantee Notice, whereas the 2000 Guarantee Notice does not provide for a safe harbour approach.
- (183) Thus, neither the investment loan guarantee nor the working capital loan guarantee meet the transparency criterion. Furthermore, the working capital loan guarantee that qualifies as regional operating aid can only be exempted under the specific circumstances set out in Article 15 of the 2014 GBER⁽⁸¹⁾. These specific circumstances are not present in the case at hand.
- (184) The exception to the general transparency requirement for start-ups, which is laid down in Article 5(2), point (g), of the 2014 GBER, applies only if all the conditions laid down in Article 22 of the 2014 GBER are met. Article 22(3), point (b) allows granting to start-ups guarantees with premiums which are not conform with market conditions but Article 22(2) lays down that eligible undertakings are ‘unlisted small enterprise’, while Abalon DE does not qualify as an unlisted small enterprise (see section 4.1). As a consequence, none of the two guarantees can be considered exempted by retroactive application of Article 22 of the 2014 GBER.
- (185) The Commission thus concludes that none of the two guarantees can be retroactively exempted from the notification requirement under the 2014 GBER.
- (186) Pursuant to Article 58(2) of the 2014 GBER, any aid not exempted from the notification requirement by virtue of the 2014 GBER or other regulations adopted pursuant to Article 1 of Council Regulation (EC) No 994/98⁽⁸²⁾ previously in force is to be assessed by the Commission in accordance with the relevant frameworks, guidelines, communications and notices.

⁽⁸⁰⁾ Commission Decision C(2007) 4287 final of 25.9.2007 in State aid case SA.21945 N 197/2007 — Germany — Method to Calculate the Aid Element in Guarantees, (OJ C 248, 23.10.2007, p. 3).

The non-confidential version of the Decision is publicly available on the following Commission website: <https://competition-cases.ec.europa.eu/cases/SA.21945>.

⁽⁸¹⁾ Pursuant to Article 15 of the 2014 GBER, regional operating aid schemes in outermost regions, sparsely populated areas and very sparsely populated areas may be compatible with the internal market within the meaning of Article 107(3) of the TFEU under certain conditions. The two guarantees at stake are not schemes and do not concern outermost regions, sparsely populated areas and very sparsely populated areas.

⁽⁸²⁾ Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to certain categories of horizontal State aid (OJ L 142, 14.5.1998, p. 1, ELI: <http://data.europa.eu/eli/reg/1998/994/oj>).

4.3.2. No retroactive exemption (and compatibility) under Commission Regulation (EC) No 800/2008 ⁽⁸³⁾

- (187) Pursuant to Article 44(1) of Regulation (EC) No 800/2008 ('the 2008 GBER'), which entered into force on 29 August 2008) the 2008 GBER applies to individual aid granted before its entry into force, if the aid fulfils all its conditions (except those in Article 9 of the 2008 GBER on publication and information).
- (188) However, according to Article 5(1) of the 2008 GBER, only transparent aid can be exempted. 'Transparent aid' means aid in respect of which it is possible to calculate precisely the gross grant equivalent *ex ante* without need to undertake a risk assessment (see Article 2, point 6, of the 2008 GBER). Similar to the 2014 GBER, also Article 5(1), second subparagraph, point (c), of the 2008 GBER provides for transparency requirements, which are met 'where the methodology to calculate the gross grant equivalent has been accepted following notification of this methodology ... or where the beneficiary is a small or medium-sized enterprise and the gross grant equivalent has been calculated on the basis of the safe-harbour premiums ...'. As mentioned in recital 182, the first methodology to calculate the gross grant equivalent of the two guarantees notified by Germany was only accepted after the guarantees were issued on 28 December 2006. Their gross grant equivalent was not calculated based on safe harbour premiums, nor is Abalon DE a small or medium-sized enterprise (see section 4.1).
- (189) Thus, neither the investment loan guarantee nor the working capital loan guarantee meet the transparency criterion. Furthermore, the working capital guarantee that qualifies as regional operating aid cannot be exempted under the 2008 GBER.
- (190) Therefore, the Commission concludes that none of the guarantees is retroactively exempted under the 2008 GBER.

4.3.3. No retroactive exemption (and compatibility) under Commission Regulation (EC) No 1628/2006 ⁽⁸⁴⁾

- (191) Regulation (EC) No 1628/2006 ('the Regional aid BER'), is not applicable *ratione temporis* to ad hoc measures put into effect before it entered into force on 21 November 2006. Article 9 of the Regional aid BER about 'entry into force and validity' merely refers to schemes put into effect before the date of entry into force of that Regulation and aid granted under those schemes, not to *ad hoc* aid and not to aid awarded (nor schemes put into effect) after 31 December 2006.
- (192) In any event, Article 3(3) of the Regional aid BER lays down that ad hoc aid is to be compatible with the common market and exempt from notification provided in particular that it directly fulfils all the conditions of that Regulation. In that regard, Article 4(1), first subparagraph, point (a), of the Regional aid BER lays down that aid for initial investment is to be compatible with the common market and exempt from the notification requirement provided that the aid is granted in regions eligible for regional aid, as determined in the approved regional aid map for the Member State concerned for the period 2007 to 2013, which is not the case of the Schwalm-Eder-Kreis in the applicable regional aid map ⁽⁸⁵⁾.
- (193) In addition, the Commission recalls that the Regional aid BER only applies to regional investment aid and does not create a basis for exemption for regional operating aid, e.g. the working capital guarantee in the present case. Therefore, the Commission concludes that none of the guarantees is retroactively exempted under the Regional aid BER.

⁽⁸³⁾ Commission Regulation (EC) No 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, ELI: <http://data.europa.eu/eli/reg/2008/800/oj>).

⁽⁸⁴⁾ Commission Regulation (EC) No 1628/2006 of 24 October 2006 on the application of Articles 87 and 88 of the Treaty to national regional investment aid (OJ L 302, 1.11.2006, p. 29, ELI: <http://data.europa.eu/eli/reg/2006/1628/oj>).

⁽⁸⁵⁾ Commission Decision C(2006) 4958 final of 8 November 2006 in case State aid N 459/2006 – Germany – Regional aid map 2007-2013 (OJ C 295, 5.12.2006, p. 6).

4.3.4. *No retroactive exemption (and compatibility) under the SME block exemption Regulation*

- (194) The Commission notes that none of the guarantees can be block-exempted under the SME block exemption Regulation, since that Regulation only applies to SMEs (see Article 1(1) of that Regulation). As found in recital 137, Abalon DE did not constitute an SME in 2006.
- (195) As the two guarantees were not exempted, even retroactively, from the notification requirement under any block exemption, the two guarantees have to be treated as unlawful aid.

4.4. **Compatibility**

- (196) As none of the guarantees is retroactively exempted from notification, and thus compatible, under any exemption regulation, in accordance with Article 58(2) of the 2014 GBER (see recital 186), the Commission is to assess their compatibility in application of a relevant framework, guideline, communication or notice, and in direct application of the Treaty. Germany has claimed that the two guarantees were regional aid aiming at regional development (recital 62). In general, the Commission will consider a regional aid measure compatible with Article 107(3) of the TFEU only if the aid contributes to regional development and cohesion. The aim must be either to promote the economic development of a-areas or to facilitate the development of c-areas. The two guarantees in favour of Abalon DE aim at promoting and facilitating regional development of the disadvantaged region of Schwalm-Eder-Kreis as well as territorial cohesion (see recital 17).
- (197) Schwalm-Eder-Kreis was at the time of the granting of the two guarantees a c-area eligible for regional investment aid pursuant to the regional aid map for Germany 2004-2006. The two guarantees can thus be assessed under the applicable Regional Aid Guidelines. From paragraph 188 of the Guidelines on regional State aid for 2014-2020 ⁽⁸⁶⁾, it results that regional aid awarded unlawfully before 1 July 2014 will be assessed in accordance with the Guidelines on national regional aid for 2007-2013 ⁽⁸⁷⁾ ('the 2007 RAG'). In accordance with paragraph 105 of the 2007 RAG 'Regional aid awarded ... before 2007 will be assessed in accordance with the 1998 guidelines on national regional aid'. Since the two guarantees were issued in 2006, the relevant guidelines for their assessment are thus the 1998 RAG, read in combination with the (then applicable) regional aid map for Germany 2004-2006 ⁽⁸⁸⁾.

4.4.1. *Investment loan guarantee*

- (198) According to the regional aid map for Germany 2004-2006, the region concerned (Schwalm-Eder-Kreis) is eligible for regional aid pursuant to (now) Article 107(3), point (c), of the TFEU, with a maximum aid intensity of 18 % of the eligible costs for large undertakings.
- (199) In accordance with point 4.5 of the 1998 RAG, the maximum aid ceiling applies to eligible expenditure that includes land, buildings and plant/machinery (equipment). In the present case, the total investment amounted to EUR 26 million for modern sawing machines, buildings and the purchase of the land. Of this amount, EUR 21 million was invested in machinery and equipment at the sawmill, EUR 4 million in building works and EUR 1 million in purchasing the site. Applying an 18 % aid intensity, this leads to a maximum allowable aid amount of regional investment aid of EUR 4,68 million.

⁽⁸⁶⁾ Guidelines on regional State aid for 2014-2020 (OJ C 209, 23.7.2013, p. 1).

⁽⁸⁷⁾ Guidelines on national regional aid for 2007-2013 (OJ C 54, 4.3.2006, p. 13).

⁽⁸⁸⁾ See footnote 9.

- (200) Aid of EUR 4,5 million, with respect to building and equipment costs of EUR 25 million, was already granted based on the Joint Action Programme 'improvement of regional economic structures' (*Gemeinschaftsaufgabe "Verbesserung der regionalen Wirtschaftsstruktur"*), scheme N 642/2002 (see recital 12 of the 2008 Decision). This aid was considered existing aid following its notification in the 2008 Decision⁽⁸⁹⁾, and this part of the 2008 Decision was upheld by the General Court in its 2015 judgment (see recital 4), and thus constitutes existing aid. As the maximum allowable aid amount under the 1998 RAG and the regional aid map for Germany 2004-2006 was not fully used by the existing regional investment aid, by the present Decision, additional investment aid of up to EUR 180 000 can be declared compatible if all the applicable 1998 RAG criteria are met.
- (201) The Commission assessed whether the 1998 RAG criteria (which do not exclude guarantees as an eligible form of aid) are met. The Commission concludes, that, as already established for the other parts of the regional aid package⁽⁹⁰⁾, all the standard compatibility criteria required by the 1998 RAG for aid that is not subject to individual notification under the Multisectoral Framework 2002⁽⁹¹⁾ – which is not applicable as the relevant threshold is not exceeded – are fulfilled.
- (202) In particular, point 2, paragraph 3, of the 1998 RAG considers that an individual ad hoc aid is in principle not covered by the 1998 RAG⁽⁹²⁾, as such aid generally comes within the ambit of specific or sectoral industrial policies and is often not in keeping with the spirit of regional aid policy as such. Point 2, paragraph 4, of the 1998 RAG however provides that it can be shown otherwise. The Commission considers that this is so in the present case. First, the investment loan guarantee, together with the other parts of the aid package, was meant to foster employment in an assisted area (creation of 118 jobs), which evidences the contribution of the aid towards regional development. Second, the ad hoc aid was also granted within the framework of the 2006 Hesse Guidelines (recital 21) which are not restricted to a limited number of sectors or undertakings.
- (203) The aid concerns an initial investment project (points 4.1 and 4.4 of the 1998 RAG), and concerns neither a sector excluded from the benefit of regional investment aid (see point 2, first paragraph, of the 1998 RAG), nor a firm in difficulty. The required own contribution of the beneficiary exceeds 25 % of the total investment costs⁽⁹³⁾ (point 4.2, first paragraph, of the 1998 RAG) and the investment project will be maintained for a minimum of five years in the region concerned (point 4.10 of the 1998 RAG). Works on the investment started after the guarantees had been applied for, they thus have an incentive effect (point 4.2, third paragraph, of the 1998 RAG). The cumulation rules (point 4.18 of the 1998 RAG) are respected since, in combination with the earlier approved EUR 4,5 million grant (see recital 18), the additional aid amount of EUR 180 000 does not exceed the applicable cumulation ceiling of EUR 4,68 million.
- (204) Therefore, the Commission considers that an additional aid amount of EUR 180 000 (present value in 2006), i.e. a part of the total aid amount of EUR 1 380 705 (present value in 2006, see recital 161) embedded in the investment loan guarantee, is compatible in accordance with the 1998 RAG.

⁽⁸⁹⁾ See recitals 44 *et sequitur* of the 2008 Decision.

⁽⁹⁰⁾ The investment loan guarantee being part of a regional aid package (see recital 18 and footnote 10), it is 'in keeping with the spirit of regional aid policy as such' (within the meaning of point 2, third paragraph, of the 1998 RAG), so that the investment loan guarantee can be assessed under the 1998 RAG.

⁽⁹¹⁾ Communication from the Commission — Multisectoral framework on regional aid for large investment projects (notified under document No C(2002) 315) (OJ C 70, 19.3.2002, p. 8).

⁽⁹²⁾ 'An individual *ad hoc* aid payment made to a single firm, or aid confined to one area of activity, may have a major impact on competition in the relevant market, and its effects on regional development are likely to be too limited. Such aid generally comes within the ambit of specific or sectoral industrial policies and is often not in keeping with the spirit of regional aid policy as such ...'.

⁽⁹³⁾ In particular, the 25 % own contribution rule is respected given the equity contribution of EUR 3,5 million and the part of the EUR 19,5 million investment loan that is not covered by the 70 % guarantee (30 % of EUR 19,5 million = EUR 5,85 million).

- (205) Germany did not invoke that the investment loan guarantee should be assessed in direct application of the Treaty and did not present any arguments that could justify such an approach. The Commission is unable to identify in the given case any exceptional, well justified reasons that would allow it to deviate from the 1998 RAG. The Commission thus concludes that the aid embedded in the investment loan guarantee is partly in conformity with the 1998 RAG (EUR 180 000 out of the total aid amount mentioned in recital 161). For the remainder (EUR 1 200 705) it constitutes incompatible aid.

4.4.2. Working capital loan guarantee

- (206) The working capital loan guarantee constitutes regional operating aid (recital 183). Under the 1998 RAG, such operating aid can only be approved in areas eligible for regional aid pursuant to (now) Article 107(3), point (a), of the TFEU, i.e., in outermost regions and in regions of low population density (see population density test in point 3.10.4 of the 1998 RAG). The region of the Schwalm-Eder-Kreis falls under none of these categories. Therefore, the working capital loan guarantee is not in conformity with the 1998 RAG.
- (207) Germany did not invoke that the working capital loan guarantee should be assessed in direct application of the Treaty and did not present any arguments that could justify such an approach. The Commission is unable to identify in the given case any exceptional, well justified reasons that would allow it to deviate from the 1998 RAG. The Commission thus concludes that the operating aid embedded in the working capital loan guarantee of EUR 129 134 (see recital 161) is incompatible with the internal market.

5. RECOVERY

- (208) According to the Treaty on the Functioning of the European Union and the established case law of the Union Courts, the Commission is competent to decide that the Member State concerned shall alter or abolish aid when it has found that it is incompatible with the internal market ⁽⁹⁴⁾. The Union Courts have also consistently held that the obligation on a Member State to abolish aid regarded by the Commission as being incompatible with the internal market is designed to re-establish the previously existing situation ⁽⁹⁵⁾.
- (209) In this context, the Union Courts have established that this objective is attained once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage which it had enjoyed over its competitors on the market, and the situation prior to the payment of the aid is restored ⁽⁹⁶⁾.
- (210) Article 16(1) Procedural Regulation states that 'where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary ...'.
- (211) Thus, given that the two guarantees implemented in breach of Article 108(3) of the TFEU constitute unlawful, and partly incompatible aid, the incompatible aid needs to be recovered in order to re-establish the situation that existed on the internal market prior to their granting. Recovery shall cover the time from the date when the aid was put at the disposal of the beneficiary until effective recovery. The amount to be recovered shall bear interest until effective recovery. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ⁽⁹⁷⁾.

⁽⁹⁴⁾ Judgment of the Court of Justice of 12 July 1973, *Commission v Germany*, C-70/72, ECLI:EU:C:1973:87, paragraph 13.

⁽⁹⁵⁾ Judgment of the Court of Justice of 21 March 1990, *Belgium v Commission*, C-142/87, ECLI:EU:C:1990:125, paragraph 66.

⁽⁹⁶⁾ Judgment of the Court of Justice of 17 June 1999, *Belgium v Commission*, C-75/97, ECLI:EU:C:1999:311, paragraphs 64 and 65.

⁽⁹⁷⁾ Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140, 30.4.2004, p. 1, ELI: <http://data.europa.eu/eli/reg/2004/794/oj>).

6. CONCLUSION

- (212) The Commission finds that Germany has unlawfully implemented the two guarantees in breach of Article 108(3) of the TFEU:
- (a) the aid embedded in the investment loan guarantee is compatible with the internal market pursuant to Article 107(3), point (c), of the TFEU up to an amount of EUR 180 000;
 - (b) the exceeding aid amount of EUR 1 200 705 embedded in the investment loan guarantee is incompatible with the internal market;
 - (c) the aid amount of EUR 129 134 embedded in the working capital loan guarantee is incompatible with the internal market,

HAS ADOPTED THIS DECISION:

Article 1

1. The following measures constitute State aid unlawfully put into effect by Germany in breach of Article 108(3) of the Treaty on the Functioning of the European Union (TFEU):
 - (a) investment loan guarantee in favour of Abalon Hardwood Hessen GmbH, with an aid amount of EUR 1 380 705 (present value in 2006);
 - (b) working capital loan guarantee in favour of Abalon Hardwood Hessen GmbH, with an aid amount of EUR 129 134 (present value in 2006).
2. The investment loan guarantee in favour of Abalon Hardwood Hessen GmbH is compatible with the internal market up to an aid amount of EUR 180 000, and incompatible with the internal market for the remaining amount of EUR 1 200 705. The working capital loan guarantee in favour of Abalon Hardwood Hessen GmbH, with an aid amount of EUR 129 134, is incompatible with the internal market.

Article 2

1. Germany shall recover the incompatible aid referred to in Article 1 from the beneficiary.
2. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiary until their actual recovery.
3. The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004.
4. Germany shall cancel any outstanding payments and other obligations under the guarantees referred to in Article 1 with effect from the date of notification of this Decision.

Article 3

1. Recovery of the amounts of incompatible aid referred to in Article 1 shall be immediate and effective.
2. Germany shall ensure that this Decision is implemented within four months following the date of its notification.

Article 4

1. Within two months following notification of this Decision, Germany shall submit the following information to the Commission:
 - (a) a detailed description of the measures already taken and planned to comply with this Decision;
 - (b) documents demonstrating that the beneficiary has been ordered to repay the incompatible aid referred to in Article 1.

2. Germany shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the incompatible aid referred to in Article 1 has been completed. Upon a simple request by the Commission, Germany shall immediately submit information on the measures already taken and those planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and interest already recovered from the beneficiary.

Article 5

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 16 May 2025.

For the Commission
Teresa RIBERA
Executive Vice-President
