COOPERATION AGREEMENT
between the European Community and the Kingdom of Cambodia

THE COUNCIL OF THE EUROPEAN UNION,

of the one part, and

THE GOVERNMENT OF THE KINGDOM OF CAMBODIA,

of the other part,

hereinafter referred to as 'the Parties',

WELCOMING the increase in trade and cooperation which has taken place between the European Community, hereinafter referred to as 'the Community', and the Kingdom of Cambodia, hereinafter referred to as 'Cambodia';

RECOGNISING the excellent relations and ties of friendship and cooperation between the Community and Cambodia;

REAFFIRMING the importance of further strengthening ties between the Community and Cambodia;

RECOGNISING the importance the Parties attach to the principles of the United Nations Charter, to the Universal Declaration of Human Rights, to the 1993 Vienna Declaration and the plan of action of the World Conference on Human Rights, to the 1995 Copenhagen Declaration on Social Development and the associated plan of action, and to the 1995 Beijing Declaration and the plan of action of the Fourth World Conference on Women;

RECOGNISING the common will to consolidate, deepen and diversify the relations between the Parties in areas of mutual interest on a footing of equality, non-discrimination, mutual benefit and reciprocity;

RECOGNISING the desire of the Parties to create favourable conditions for the development of trade and investment between the Community and Cambodia, and the need to adhere to the principles of international trade, the purpose of which is to promote trade liberalisation in a stable, transparent and non-discriminatory manner;

CONSIDERING the need to support the current process of economic reform in order to guarantee transition to a market economy, with due regard for the importance of the social development which should go hand in hand with economic development and the common commitment to respecting social rights;

CONSIDERING the need to support the Cambodian Government's efforts to improve the living conditions of the poorest and most disadvantaged sections of the population, with a special emphasis on the status of women;

CONSIDERING the importance accorded by the Parties to the protection of the environment at all levels and to the sustainable management of natural resources, taking account of the links between the environment and development;

HAVE DECIDED TO CONCLUDE this Agreement and to this end have designated as their Plenipotentiaries:

COUNCIL OF THE EUROPEAN UNION:

Hans Van MIERLO
Deputy Prime Minister and Minister for Foreign Affairs of the Netherlands,
President-in-Office of the Council of the European Union,

Manuel MARÍN
Vice-President of the Commission of the European Communities,

THE ROYAL GOVERNMENT OF CAMBODIA:

KEAT CHHON
Ministre d'Etat,
Minister for Economic Affairs and Finance,

WHO, having exchanged their Full Powers, found in good and due form,

HAVE AGREED AS FOLLOWS:

Article 1

Basis

Respect for the democratic principles and fundamental human rights established by the Universal Declaration on Human Rights inspires the internal and international policies of the Community and of Cambodia and constitutes an essential element of this Agreement.

Article 2

Objectives

The main objective of this Agreement is to provide a framework for enhancing cooperation between the Parties, within their respective areas of jurisdiction, with the following aims:

(a) to accord each other most-favoured-nation treatment on trade in goods in all areas specifically covered by the Agreement, save as regards advantages accorded by either Party within the context of customs unions or free trade areas, trade arrangements with neighbouring countries or specific obligations under international commodity agreements;

(b) to promote and intensify trade between the Parties, and to encourage the steady expansion of sustainable economic cooperation, in accordance with the principles of equality and mutual advantage;

(c) to strengthen cooperation in fields closely related to economic progress and benefiting both Parties;

(d) to contribute to Cambodia's efforts to improve the quality of life and standards of living of the poorest sections of its population, together with measures for the country's reconstruction;

(e) to encourage job creation in both the Community and Cambodia, with priority being accorded to programmes and operations which could have a favourable effect in this respect. The Parties shall also exchange views and information on their respective initiatives in this field, step up and diversify their economic links and establish conditions conducive to job creation;

(f) to take the requisite measures to protect the environment and manage natural resources sustainably.

Article 3

Development cooperation

The Community recognises Cambodia's need for development assistance and is prepared to step up its cooperation in order to contribute to that country's own efforts to achieve sustainable economic development and the social progress of its people through concrete projects and programmes in accordance with the priorities set out in Council Regulation (EEC) No 443/92 of 25 February 1992 on financial and technical assistance to, and economic cooperation with, the developing countries in Asia and Latin America.

In accordance with the abovementioned Regulation, assistance will be targeted mainly on the rehabilitation and reconstruction of the country and on the poorest sections of the population. In cooperation, priority will be given to schemes aimed at alleviating poverty, and in particular those likely to create jobs, foster development at grassroots level and promote the role of women in development. The Parties will also encourage the adoption of appropriate measures to prevent and combat AIDS and take steps to increase grassroots development and education on AIDS and the operational capacity of the health services.

Cooperation between the Parties will also address the problem of drugs to encourage and enhance training, education, health care and the rehabilitation of addicts.

The Parties acknowledge the importance of human resources development, social development, the improvement of living and working conditions, the development of skills and the protection of the most vulnerable sections of the population. Human resources and social development must be an integral part of economic and development cooperation. Appropriate consideration shall therefore be given to training objectives addressing institutional needs and specific vocational training activities aimed at enhancing the skills of the local workforce.

In view of its major contribution to mine-clearance programmes in Cambodia, the Community will, in its future commitments, continue to concentrate on mutually agreed priorities to ensure that assistance is effective and lasting.

Community cooperation in all its areas will be concentrated on mutually agreed priorities to ensure that assistance is effective and lasting. Development cooperation activities shall be compatible with the development strategies pursued under the auspices of the institutions of the Bretton Woods Agreement.

Article 4

Trade cooperation

1. The Parties confirm their determination:

(a) to take all appropriate measures to create favourable conditions for trade between them;

(b) to do their utmost to improve the structure of their trade in order to diversify it further;

(c) to work towards the elimination of barriers to trade, and towards measures to improve transparency, in particular through the removal at an appropriate time of non-tariff barriers, in accordance with work undertaken in this connection by other international bodies while ensuring that personal data are suitably protected.

2. In their trade relations, the Parties shall accord each other most-favoured-nation treatment in all matters regarding:

(a) customs duties and charges of all kinds, including the procedures for their collection;

(b) the regulations, procedures and formalities governing customs clearance, transit, warehousing and transhipment;

(c) taxes and other internal charges levied directly or indirectly on imports or exports;

(d) administrative formalities for the issue of import or export licences.

3. Within the areas of their respective areas of jurisdiction, the Parties shall undertake:

(a) to seek ways of establishing cooperation in the field of maritime transport leading to market access on a commercial and non-discriminatory basis, taking into account the work done in this connection by other international bodies;

(b) to improve customs cooperation between their respective authorities, especially with regard to vocational training, the simplification and harmonisation of customs procedures and administrative assistance in the matter of customs fraud;

(c) to exchange information on mutually advantageous opportunities, in particular in the field of tourism and cooperation on statistical matters.

4. Paragraphs 2 and 3(a) shall not apply to:

(a) advantages accorded by either Party to States which are fellow members of a customs union or free trade area;

(b) advantages accorded by either Party to neighbouring countries with a view to facilitating border trade;

(c) measures which either Party may take in order to meet its obligations under international commodity agreements.

5. Cambodia shall improve conditions for the adequate and effective protection and enforcement of intellectual, industrial and commercial property rights in conformity with the highest international standards. To this end, Cambodia shall accede to the relevant international conventions on intellectual, industrial and commercial property [1] to which it is not yet a party. In order to enable Cambodia to fulfil the abovementioned obligations, technical assistance could be envisaged.

6. Within their respective areas of jurisdiction and insofar as their rules and regulations permit, the Parties shall agree to consult each other on all questions, problems or disputes which may arise in connection with trade.

Article 5

Environmental cooperation

The Parties recognise that the way to improve environmental protection is to introduce appropriate environmental legislation, implement it effectively and integrate it into other policy areas.

The main objective of environmental cooperation is to enhance the prospects of sustainable economic growth and social development by placing a high priority on respect for the natural environment including:

(a) the drafting of an effective environment protection policy involving appropriate legislative measures and the resources needed to implement it. Proper implementation of these measures will be essential in helping put an end to illegal logging activities. Such a policy will also encompass training, capacity building and the transfer of appropriate environmental technology;

(b) cooperation in the development of sustainable and non-polluting energy sources, as well as solutions to urban and industrial pollution problems;

(c) refraining from activities harmful to the environment, especially in regions with fragile ecosystems, while developing tourism as a sustainable source of revenue;

(d) environmental impact assessment, which is a vital element in the preparation and implementation of any reconstruction or development project;

(e) close cooperation to achieve the objectives of environmental agreements to which both Parties are signatories;

(f) particular priority and initiatives for the conservation of existing primary forests and for the sustainable development of new forest resources.

Article 6

Economic cooperation

Within the limits of their respective areas of jurisdiction and the financial resources available, the Parties undertake to foster economic cooperation to their mutual advantage.

This cooperation will be aimed at:

(a) developing the economic environment in Cambodia by facilitating access to Community know-how and technology;

(b) facilitating contacts between economic operators and taking other measures to promote trade;

(c) encouraging, in accordance with their legislation, rules and policies, public- and private-sector investment programmes in order to strengthen economic cooperation, including cooperation between enterprises, technology transfers, licences and subcontracting;

(d) facilitating the exchange of information and the adoption of initiatives, fostering cooperation on enterprise policy, particularly with regard to improving the business environment and encouraging closer contacts;

[1] See Annex II.

(e) reinforcing mutual understanding of the Parties' respective economic environments as a basis for effective cooperation.

In the above fields the principal objectives shall be:

— to assist Cambodia in its efforts to restructure its economy by creating the conditions for a suitable economic environment and business climate;

— to encourage synergies between the Parties' respective economic sectors, and in particular their private sectors;

— within the Parties' respective areas of jurisdiction, and in accordance with their legislation, rules and policies, to establish a climate conducive to private investment by improving conditions for the transfer of capital and, where appropriate, by supporting the conclusion of agreements between the Member States of the Community and Cambodia on the promotion and protection of investment.

The Parties will together determine, to their mutual advantage, the areas and priorities for economic cooperation programmes and activities.

Article 7

Agriculture

The Parties undertake, in a spirit of understanding, to cooperate in the agricultural sector and examine:

(a) the scope for developing trade in agricultural products;

(b) sanitary, phytosanitary and environmental measures, and the results thereof, along with assistance to avoid obstacles to trade, taking into account the Parties' legislation;

(c) the possibility of assisting the Government of Cambodia in its efforts to diversify agricultural exports.

Article 8

Energy

The Parties recognise the vital importance of the energy sector for economic and social development and are prepared to step up cooperation by means of dialogue in the field of energy policy. This dialogue will take due account of the main objective, namely to ensure the sustainable development of Cambodia's energy resources.

Article 9

Regional cooperation

Cooperation between the Parties may extend to activities under cooperation or integration agreements with other countries of the same region, provided the said activities are compatible with those agreements.

Without excluding any area, special consideration may be given to the following activities:

(a) technical assistance (services of outside consultants, training of technical staff in certain practical aspects of integration);

(b) promotion of intraregional trade;

(c) support for regional institutions, projects and initiatives for which regional organisations bear responsibility;

(d) studies concerning regional links, transport and communications.

Article 10

Science and technology

The Parties, according to their respective policies, their mutual interest and within their respective areas of jurisdiction, may promote scientific and technological cooperation.

Cooperation will involve:

— the exchange of information and experience at regional (Europe-South-East Asia) level, especially on the implementation of policies and programmes,

— the promotion of lasting ties between the Parties' scientific communities,

— the stepping-up of activities aimed at promoting innovation in industry, including technology transfers.

Cooperation may involve:

— the joint implementation of regional (Europe-South-East Asia) research projects in areas of mutual interest, facilitating, where appropriate, the active involvement of enterprises,

— the exchange of scientists to promote the preparation of research projects and high-level training,

— joint scientific meetings to foster exchanges of information and interaction and to identify areas for joint research,

— the dissemination of results and the development of links between the public and private sectors;

— evaluation of the activities concerned.

The Parties' higher education institutions, research centres and industries will play an appropriate part in this cooperation.

Article 11

Chemical drug precursors and money laundering

Within their respective areas of jurisdiction and the legislation applicable, and taking into account work done by the relevant international bodies, the Parties will agree to cooperate in order to prevent the diversion of chemical drug precursors and will agree on the need to do all in their power to prevent money laundering.

The Parties will also consider special measures against the cultivation, production and trafficking of drugs, narcotics and psychotropic substances, and measures to prevent and reduce drug abuse.

This cooperation may include:

— measures to promote other forms of economic development;

— the exchange of relevant information, subject to personal data being duly protected.

Article 12

Physical infrastructure

The Parties recognise that the present state of Cambodia's physical infrastructure constitutes a serious constraint to private investment and to economic development in general. The Parties therefore agree to encourage specific programmes for the rehabilitation, reconstruction and development of Cambodia's infrastructure, including transport.

Article 13

Information, communication and culture

The Parties, within their respective areas of jurisdiction, and in the light of their policies and mutual interests, will cooperate in the fields of information, communication and culture to improve mutual understanding and strengthen existing ties between them. In view of the importance of the ancient Khmer civilization and its heritage, appropriate support may also be provided for the promotion of new initiatives in the following areas:

(a) preparatory studies and technical assistance for the conservation of the cultural heritage, notably for the purposes of tourism;

(b) cooperation in the field of the media and audio-visual documentation;

(c) the organisation of events and exchanges to improve cultural understanding.

The Parties recognise the importance of cooperation in the fields of telecommunications, the information society and multimedia. Such cooperation may include the exchange of information on the Parties' respective regulations and policies for telecommunication, mobile communications, including the promotion of Global Navigation Satellite Systems (GNSS), the information society, multimedia telecommunications technologies, networks and telematic applications (e.g. transport, health, education and environment).

Article 14

Institutional aspects

1. The Parties agree to establish a Joint Committee, whose tasks are:

(a) to guarantee the smooth working and proper implementation of this Agreement and of the dialogue between the Parties;

(b) to make suitable recommendations for promoting the objectives of this Agreement;

(c) to establish priorities for potential operations in pursuit of this Agreement's objectives.

2. The Joint Committee shall be composed of representatives of sufficient seniority of both Parties. It shall normally meet every other year, alternately in Phnom Penh and in Brussels, on a date fixed by mutual agreement. Extraordinary meetings may also be convened by agreement between the Parties.

3. The Joint Committee may set up specialised sub-groups to assist it in the performance of its tasks and to coordinate the formulation and implementation of projects and programmes under this Agreement.

4. The agenda for meetings of the Joint Committee shall be determined by agreement between the Parties.

5. The Parties agree that it shall also be the task of the Joint Committee to ensure the proper functioning of any sectoral agreements concluded, or which may be concluded, between the Community and Cambodia.

6. The organisational structures and the rules of procedure of the Joint Committee shall be determined by the Parties.

Article 15

Future developments

1. The Parties may, by mutual consent and within their respective areas of jurisdiction, extend this Agreement to expand cooperation and add to it by means of agreements on specific sectors or activities.

2. Within the framework of this Agreement, either Party may put forward suggestions for expanding the scope of the cooperation, taking into account the experience gained in its application.

Article 16

Other agreements

Without prejudice to the relevant provisions of the Treaties establishing the European Communities, neither this Agreement nor any action taken thereunder shall in any way affect the powers of the Member States of the European Union to undertake bilateral activities with Cambodia in the framework of economic cooperation or to conclude, where appropriate, new economic cooperation agreements with Cambodia.

Article 17

Facilities

To facilitate cooperation under this Agreement, the Cambodian authorities will grant to Community officials and experts the guarantees and facilities necessary for the performance of their duties. The detailed provisions will be set out in a separate exchange of letters.

Article 18

Territorial application

This Agreement shall apply, on the one hand, to the territories in which the Treaty establishing the European Community is applied and under the conditions laid down in that Treaty and, on the other hand, to the territory of Cambodia.

Article 19

Non-execution of the Agreement

If either Party considers that the other Party has failed to fulfil an obligation under this Agreement, it may take appropriate measures. Before so doing, except in cases of special urgency, it shall supply the Joint Committee with all relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the Parties.

In the selection of measures, priority must be given to those which least disturb the functioning of this Agreement. These measures shall be notified immediately to the Joint Committee and shall be the subject of consultations within the Joint Committee if the other Party so requests.

Article 20

Annexes

Annexes I and II to this Agreement shall form an integral part thereof.

Article 21

Entry into force and renewal

1. This Agreement shall enter into force on the first day of the month following the date on which the Parties notify each other of the completion of the procedures necessary for this purpose.

2. This Agreement is concluded for a period of five years. It shall be renewed automatically from year to year unless one of the Parties denounces it six months before its expiry date.

Article 22

Authentic texts

This Agreement is drawn up in duplicate in the Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish and Khmer languages, each text being equally authentic.

Done at Luxembourg, 29 April 1997.

For the European Community

For the Kingdom of Cambodia

ANNEX I

Joint Declaration on Article 19 — Non-execution of the Agreement

(a) The Parties agree, for the purposes of the interpretation and practical application of this Agreement, that the term 'cases of special urgency' in Article 19 of the Agreement means a case of the material breach of the Agreement by one of the Parties. A material breach of the Agreement consists in:

— repudiation of the Agreement not sanctioned by the general rules of international law,

— violation of essential elements of the Agreement set out in Article 1.

(b) The Parties agree that the 'appropriate measures' referred to in Article 19 are measures taken in accordance with international law. If a Party takes a measure in a case of special urgency as provided for under Article 19, the other Party may avail itself of the procedure relating to settlement of disputes.

ANNEX II

Joint Declaration on Intellectual, Industrial and Commercial Property

The Parties agree for the purposes of the Agreement that 'intellectual, industrial and commercial property' includes in particular protection of copyright and related rights, patents, industrial designs, software, brands and trademarks, topographies of integrated circuits, geographical indications, as well as protection against unfair competition and the protection of undisclosed information.

Joint Declaration on the readmission of citizens

The European Community recalls the importance that its Member States attach to the establishment of effective cooperation with third countries in order to facilitate the readmission by the latter of its nationals unlawfully residing on the territory of a Member State.

The Kingdom of Cambodia undertakes to finalise readmission agreements with those Member States of the European Union which request it.

EXCHANGE OF LETTERS
on maritime transport

A. *Letter from the Community*

Luxembourg, 29 April 1997

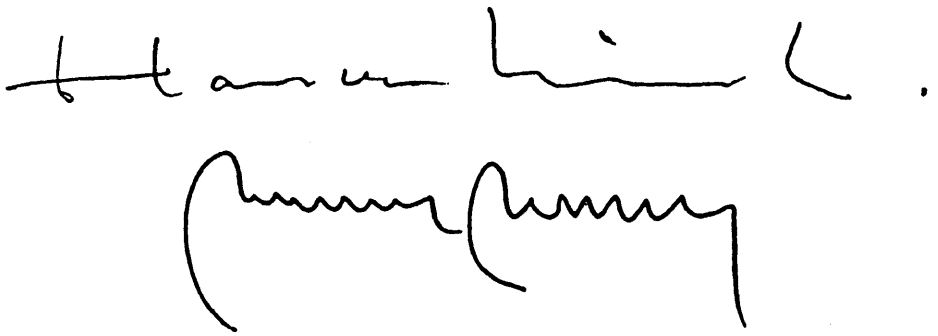
Sir,

With regard to the barriers to trade which may arise for the European Community and its Member States or the Kingdom of Cambodia as a result of the operation of shipping, it has been agreed that mutually satisfactory solutions should be sought with due regard for the principle of free and fair competition on a commercial and non-discriminatory basis.

I should be obliged if you would confirm that your Government is in agreement with the foregoing.

Please accept, Sir, the assurance of my highest consideration.

On behalf of the Council of the European Union



B. *Letter from Cambodia*

Luxembourg, 29 April 1997

Sir,

I have the honour to acknowledge receipt of your letter of today's date, which reads as follows:

'With regard to the barriers to trade which may arise for the European Community and its Member States or the Kingdom of Cambodia as a result of the operation of shipping, it has been agreed that mutually satisfactory solutions should be sought with due regard for the principle of free and fair competition on a commercial and non-discriminatory basis.

I should be obliged if you would confirm that your Government is in agreement with the foregoing.'

I am able to confirm that my Government is in agreement with the contents of your letter.

Please accept, Sir, the assurance of my highest consideration.

For the Kingdom of Cambodia

Information on the entry into force of the Cooperation Agreement between the European Community and the Kingdom of Cambodia

The Cooperation Agreement concluded between the European Community and the Kingdom of Cambodia [1] will enter into force on 1 November 1999, notification of completion of the procedures provided for in the first paragraph of Article 21 of the Agreement having been given by the Kingdom of Cambodia on 13 July 1999 and by the European Community on 4 October 1999.

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[1] See page 17 of this Official Journal.

COMMISSION

COMMISSION DECISION
of 3 March 1999
concerning aid granted by Italy to firms affected by the bankruptcy of Sirap SpA

(notified under document number C(1999) 584)

(Only the Italian text is authentic)

(Text with EEA relevance)

(1999/678/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 93(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(2)(a) thereof,

Having, in accordance with the abovementioned provisions, given interested parties notice to submit their comments,

Whereas:

I

By letter dated 9 March 1995, the Italian authorities, in accordance with Article 93(3) of the EC Treaty, notified measures to assist firms affected by the winding-up of Sirap SpA, a publicly-owned company responsible for the economic development of the Region.

The notification was incomplete inasmuch as the Italian authorities announced that the list describing the aid measures planned for the firms would be communicated to the Commission as soon as possible. When it acknowledged receipt of the letter, the Commission informed the Italian authorities that the two-month period within which it had to reach a decision on the aid would start to run when the promised information was received.

Despite several reminders, the Italian authorities did not supply the information requested. The most recent reminder was sent on 20 November 1995, when the Commission stated that, failing a reply from the Italian authorities within ten working days, the aid would be removed from the register of notified aid and entered in the register of unnotified aid in view of the fact that draft Law No 835 of the Region of Sicily provided for a first aid tranche for 1995. As no reply was received, the aid was entered in the register of unnotified aid under NN 196/95.

By letters dated 15 May and 3 June 1996, the Italian authorities indicated that the draft Law had been enacted on 24 March 1996 and provided some of the information requested.

By decision of 3 July 1996, the Commission initiated Article 93(2) proceedings in respect of the aid. The Italian authorities were informed of the commencement decision by letter dated 17 July 1996. Following publication of the letter in the *Official Journal of the European Communities* [1], comments were received from a third party, a lawyer representing one of the shareholders of Sirap SpA. The comments were forwarded to the Italian authorities on 14 March 1997. Despite several reminders, the Italian authorities gave the Commission their views on the comments only on 5 May and 22 September 1997.

Finally, on 8 October 1997, the Italian authorities notified a new aid scheme to the Commission relating to the regeneration and setting-up of craft centres, which were to have been carried out by Sirap SpA. The scheme is being examined separately by the Commission. As the new measure also provides for financial assistance for companies and/or persons having carried out work on behalf of Sirap SpA, the Commission questioned the Italian authorities about the connection between the new measure and the measures concerned by these proceedings. The reply from the Italian authorities was received on 15 January 1998.

II

The reasons why the Commission initiated the proceedings may be summarised as follows.

[1] OJ C 359, 28.11.1996, p. 3.

The scheme allows suppliers and creditors of Sirap SpA or firms having carried out work on its behalf to apply to credit institutions for loans of up to ITL 700 million, subject to a ceiling which must not exceed their claims on Sirap SpA.

The loans are granted over a period of five years, with a one-year grace period. The interest rate is 4 %, the difference as compared with the reference rate applied in the relevant market sector being covered by the Region. The loans are guaranteed by the transfer to the banks of any claims the firms may have against Sirap SpA and by an additional guarantee from the Region.

The guarantee from the Region should be regarded as aid to the firms as they would probably not have obtained the loans without it. Given that Sirap SpA is bankrupt, it is unlikely that the claims will be met in full and, therefore, recovered by the banks.

The Commission took the view that the aid element in the guarantee should therefore be regarded as corresponding to the amount guaranteed. It was, however, unable to calculate the aid element in the loans as it did not know the reference rates applied in the various sectors concerned. However, taking as a basis the reference rate applied to calculated regional aid, the Commission estimated an aid intensity of 20 % gross.

The Italian authorities were asked to send further details as it was not possible, on the basis of the data available, to exempt the aid measures under Article 92(3) of the Treaty and Article 61(1) of the EEA Agreement.

III

The Italian authorities' response was simply to send the Commission a list of the amounts owed to firms that had carried out work on Sirap SpA's behalf.

The Italian authorities also pointed out that the total amounts in question considerably exceed the maximum amount provided for in the regional law. They also stated that the regional guarantee is intended for firms with claims on Sirap SpA and not for Sirap SpA. This fact is sufficient, they claim, to rebut the Commission's statement that the regional guarantee has a net grant equivalent equal to the amount of guaranteed credit granted in connection with the bankruptcy of Sirap SpA.

In their most recent letter, received on 15 January 1998, the regional authorities explained that the measures in question constitute direct aid to the creditors of firms that carried out work on behalf of Sirap SpA. As those firms had been unable to obtain payment of their claims owing to the bankruptcy of Sirap SpA, they in turn had been unable to pay their own creditors.

In view of the delay in the application of the measures in question, most of the firms that carried out work for Sirap SpA have filed for bankruptcy on account of insolvency resulting from the suspension of payments by Sirap SpA. As a result, the creditors of those firms will have to wait for the liquidation of their debtors' assets in order to recover the amounts owed to them.

Lastly, no comments were made by the Italian authorities concerning the only response received by the Commission from a third party in this case.

IV

As part of the procedure, the Commission received comments from the legal representative of Finanziaria Meridionale SpA (hereinafter referred to as 'FIME'), one of the shareholders of Sirap SpA.

FIME wished to draw the Commission's attention to the financial prejudice it had suffered as a result of a negative decision taken by the Commission in 1994 concerning various aid measures promised by the Region of Sicily to a number of regional holding companies (aid No C 12/92, ref. SG(94)D/4720). One of the measures which the Commission declared incompatible with the Treaty was aid of ITL 4 billion to Ente Siciliano per la Promozione Industriale SpA (hereinafter 'ESPI') intended to cover the losses of its subsidiary Sirap SpA. The Commission accordingly prohibited the Italian Government from granting the aid.

FIME considers that the Commission based its decision on the wrong assumptions and without seeking clarification from the Region. It alleges that the Commission wrongly believed that Sirap SpA was engaged in the engineering industry, whereas FIME regards it as a firm aiming to achieve 'the industrial development of the territory of Sicily through the creation and development of enterprises'.

More specifically, Sirap SpA's activities were limited to planning, carrying out and managing the creation of the infrastructure and other facilities which would encourage productive investments. It also provided specialised services for the production, organisation and management of small and medium-sized firms.

Sirap SpA was set up with capital subscribed equally by FIME and ESPI. The capital was fully guaranteed by the Region, which undertook to cover the expenditure incurred by the firm in the course of its activities.

FIME considers that, although Sirap SpA was technically a public limited company, it did not constitute a normal business structure since it acted on behalf of the Region.

The decision of the Sicilian Regional Government in 1991 and 1992 no longer to cover the entire capital, and the negative Commission decision of 1994 resulted, it is claimed, in the demise of Sirap SpA. As a result, FIME's shareholding no longer has any financial value. FIME therefore asks the Commission to review where possible its position on the matter or, alternatively, to take steps to allow the Region to fulfil its obligations for 1991 and 1992 to guarantee the entire capital of Sirap SpA.

V

The notified measures constitute aid to the suppliers and creditors of Sirap SpA or firms which carried out work on its behalf since they attempt to limit the damage caused by the bankruptcy of Sirap SpA to such persons and/or firms. In practice, they constitute a temporary measure aimed at preventing recipients from having to suspend payments owing to the delay or the impossibility of recovering the sums owed by Sirap SpA or by the firms that carried out work on its behalf.

The aid in question is therefore aimed at cushioning the normal impact of the liquidation of Sirap SpA, where creditors and suppliers would await the final winding-up in order to recover all or part of their claims. Pending the outcome, those firms are unable in their turn to pay their creditors, and this is liable to trigger a chain of bankruptcies. According to the Italian authorities, because of the delay in applying the measures, most of the firms that worked on behalf of Sirap SpA are themselves being wound up, having become insolvent as a result of the suspension of payments by Sirap SpA.

On the basis of the information received, it must be concluded that the measures constitute operating aid aimed at ensuring the survival of the recipient firms by enabling them to bear the financial charges resulting from their normal business activities. Furthermore, the Italian authorities have never claimed that the measure in question constitutes regional investment aid or rescue or restructuring aid for firms in difficulty.

It is worth noting in this respect that, although a number of aid recipients have in turn filed for bankruptcy, the Italian authorities have not at any stage in these proceedings invoked the application of the Community Guidelines on State aid for rescuing and restructuring firms in difficulty [1]. Furthermore, they have not provided any information indicating compliance with the Guidelines, for example by submitting restructuring plans aimed at restoring the long-term viability of the recipient firms.

The direct recipients of the aid are engaged in a wide range of activities, as evidenced by the measure forming the subject of these proceedings, the interest subsidy being granted on the basis of the reference rates applied in the different sectors of the economy. The Commission has no information on the specific sector of each recipient. However, it concludes from the information submitted by the Italian authorities that, as Sirap SpA's creditors are firms which carried out work on its behalf, they are firms in the building and public works sector.

In addition, according to information received by the Commission in connection with State aid No N 693/97 concerning the redevelopment of areas equipped for craft activities which was to have been carried out by Sirap SpA, the latter's creditors include professional firms, architects and engineers to design and oversee the work.

The aid to Sirap SpA's creditors is therefore sectoral, as it is limited to one or more sectors. However, no information is available on the suppliers and creditors of firms which carried out work on behalf of Sirap SpA.

VI

State aid must be examined to determine whether it affects intra-Community trade or distorts or threatens to distort competition.

According to the Panorama of EU Industry for 1997 [2], building is inherently a local or regional activity, with most firms not usually moving far from their local area. Consequently, transnational activities do not usually result in exports of goods as such, but rather take the form of exports of capital or services through international mergers, acquisitions and joint ventures.

Nonetheless, whereas small firms tend not to move far from their region of origin, larger ones do so.

In the present case, distance does not appear to have acted as an inhibiting factor. The local nature of the activity is thus somewhat mitigated by the fact that the firms which carried out work for Sirap SpA include Italian firms located some distance from Sicily, notably Bologna and Udine. They took part in the work through consortia which also included firms located in Sicily. According to those firms, the value of such work was the fact that it was supported and funded by the State, as well as the absence of any risk to the solvency of Sirap SpA.

The fact that several recipient firms came from a long way away because of the absence of risk does not rule out the possibility that foreign firms might have been interested in taking part in the work and that there was trade between the Member States on the market in question. The Italian authorities have not, indeed, provided any evidence that no such trade took place.

As regards the planning of the work, the Panorama of EU Industry for 1997 points out that, whilst the architectural profession does not as yet have a sufficient number of economic observations to allow a satisfactory assessment of the wide and varied range of its numerous activities, architects do supply services in other Member States. Furthermore, as regards 'engineering' services in the Community, the Panorama states that, with the exception of Italy and the United Kingdom, which both have higher percentages, an average of 25 % of annual turnover in that sector is derived from contracts performed in other countries.

[1] OJ C 368, 23.12.1994, p. 12.

[2] Published by the Office for Official Publications of the European Communities.

It cannot therefore be concluded (nor have the Italian authorities, during the proceedings, made any claim to the contrary) that aid to such recipients does not distort trade between Member States.

The measure in question allows the recipients partially to avoid the consequences of the bankruptcy of the promoter. The firms are thus artificially placed in a more favourable position than similar firms in Italy and other Member States that are unable to rely on State aid in similar circumstances. It must therefore be concluded that the aid distorts or is liable to distort competition.

Accordingly, as the measure satisfies the tests of Article 92(1) of the Treaty, it constitutes State aid within the meaning of that Article. The next step is to determine whether the aid is lawful and compatible with the Treaty.

VII

As to whether the aid is lawful, it is necessary to consider the timing of the various legislative documents. The Italian authorities informed the Commission that the notified draft Law had been approved by the Region of Sicily on 24 March 1996 but had been the subject of a legal action brought by the *Commissario dello Stato* (Government representative). The Law was adopted on 22 March 1997 (Law No 8/97) and published in the Official Journal of the Region of Sicily of 29 March 1997. The difference between the second version of the Law and the first is the removal of one of the articles concerning the employment by the Region of Italter staff — a matter not covered by these proceedings (in the second version, the article in question was removed by Order No 60 of the Constitutional Court, sitting on 26 February to 4 March 1997).

For the reasons given above, the Commission entered the notified aid in the register of unnotified aid. Although the Italian authorities subsequently informed the Commission that the law had been approved and adopted one year later, they did not challenge the classification of the measure as unnotified aid.

Furthermore, although they were specifically requested to do so when these proceedings were initiated, the Italian authorities did not confirm that the implementation of the measures had been suspended pending the outcome of the Commission's assessment. The most that can be concluded from the recent correspondence concerning aid N 693/97 is that the delay in implementing Regional Law No 8/97 frustrated the intentions of the legislator.

This, however, is not enough to rule out completely the possibility that the measures concerned by these proceedings were implemented before the Commission took a decision and that they are, therefore, illegal.

VIII

With regard to the compatibility of the aid, it should be noted that the whole of Sicily is eligible for aid to promote regional development under Article 92(3)(a) of the Treaty.

The aid in question cannot be regarded as investment aid, as it is not intended to promote productive investment. It must therefore be regarded as operating aid.

In its communication on the method for the application of Article 92(3)(a) and (c) to regional aid [1], the Commission provided for the possibility of operating aid being granted under certain conditions, namely:

1. The aid is limited in time and designed to overcome the structural handicaps of enterprises located in Article 92(3)(a) regions.

2. The aid is designed to promote a durable and balanced development of economic activity and does not give rise to a sectoral overcapacity at the Community level such that the resulting Community sectoral problem produced is more serious than the original regional problem.

3. Such aid must not be granted in violation of the specific rules on aid granted to companies in difficulty.

4. An annual report on the application of the aid must be sent to the Commission, indicating total expenditure by type of aid and the sectors concerned.

5. Aid designed to promote exports to other Member States must be excluded.

As regards the first condition, it is worth noting that, although the aid is limited in time, it is not intended to overcome the structural handicaps of enterprises located in Sicily. First, at least two of the firms having participated in the temporary associations of undertakings responsible for the work are located outside the region. To grant aid to such enterprises would be tantamount to removing the distinction between assisted and non-assisted areas as regards regional development.

Furthermore, the aid is not intended to overcome the structural handicaps of the economic situation in Sicily, since it is aimed at helping the victims of the bankruptcy to stay afloat until the liquidation procedure has been completed. Such situations can occur throughout the Community, and no evidence has been adduced by the Italian authorities to show that the structural situation is worse because it is in Sicily.

As for the second condition, neither the object nor the effect of the aid can be regarded as promoting a durable and balanced development of economic activity. The aid is not intended to assist marketing or to cover the extra transport or communication costs which might be justified by the physical distance preventing firms from participating in the Community internal market.

As regards the third condition, it is unlikely that the suppliers and creditors of Sirap SpA or of firms carrying out work on its behalf could, when Sirap SpA went into liquidation, have been regarded as 'firms in difficulty'. It is, however, clear that the aid was intended to prevent the recipients, especially

[1] OJ C 212, 12.8.1988, p. 2.

the firms carrying out work on behalf of Sirap SpA, from having to suspend payments. This is confirmed by the Italian authorities, which acknowledged that, because of delays in granting the aid, most of the firms which had carried out work for Sirap SpA filed for bankruptcy owing to the latter's cessation of payments.

The aid is thus tantamount to rescue or restructuring aid for firms in difficulty. However, as was stated above, the Italian authorities have not invoked the application of the Community Guidelines on State aid for rescuing and restructuring firms in difficulty.

Yet, even had they done so, the aid does not qualify as a rescue measure since the loans were not granted at market rates, the Region having borne part of the interest, and were granted for more than the six months which the Commission regards as the period normally necessary for them to be defined as a recovery measure. Similarly, the aid does not qualify as restructuring aid since, among other things, the Commission did not receive any restructuring plan guaranteeing the long-term viability of the firm.

Although the last two conditions do not appear to be applicable in the present case, the failure to comply with the other conditions is already sufficient to rule out the possibility of exemption under Article 92(3)(a).

Exemption under Article 92(3)(b) is not possible as the aid is not intended to promote the execution of an important project of common European interest or to remedy a serious disturbance in the Italian economy.

The exemption provided for in Article 92(3)(c) is not applicable either because, in the context of that provision, the Commission does not authorise operating aid.

Lastly, the exemption provided for in Article 92(3)(d) is not applicable as the aid is not intended to promote culture and heritage conservation.

IX

In its letter initiating the proceedings, the Commission stated that, without the guarantee provided by the Region of Sicily, the recipients would probably not have obtained a bank loan. The only security the firms were required to provide to the banks issuing the loans were their claims on Sirap SpA, which was already bankrupt and in the process of being wound up. It therefore follows that Sirap SpA's creditors had very little chance of recovering a significant part of the claims in question. The Commission accordingly took the view that the aid element in the guarantee should be regarded as corresponding to the amount guaranteed.

The Italian authorities' rejection of that assessment is not supported by any evidence allowing the Commission to reverse its assessment. As already stated above, the purpose of the State aid is to ward off the normal effects of the liquidation of Sirap SpA by preventing a chain reaction of bankruptcies among its creditors owing to their failure to pay their own creditors.

In order to secure a loan from a bank, Sirap SpA's creditors are required to transfer their claims to that bank as a primary guarantee. Given that Sirap SpA is in liquidation, it is doubtful whether the claims have any significant value. According to information received as part of the proceedings, Sirap SpA simply acted as intermediary in the execution of development projects for the Region. It is therefore doubtful that the firm possessed any solid assets which could be sold in order to pay creditors. Even if this were to be the case, which is unlikely in view of Sirap SpA's activities, the Italian authorities have not invoked this as an argument. This is why the Region provides an additional guarantee.

It is, of course, possible that recipient firms in sound financial health could have obtained a loan on the capital market in the normal way. However, the Italian authorities have not provided any evidence that Sirap SpA's creditors could have obtained financing solely on the basis of the primary guarantee or their own financial position, i.e. without the additional guarantee provided by the Region.

It would seem, in fact, according to statements by the legal representatives of FIME which have not been denied by the Italian authorities, that the solvency of Sirap SpA was closely tied to capital injected by the Region in order to maintain the capital integrity of the firm. Indeed, the latter's difficulties began when the Region refused to contribute capital in 1991 and 1992, leading to the suspension of payments by Sirap SpA to the firms and the cessation of work.

Furthermore, FIME claims that its holding in Sirap SpA, formerly worth ITL 2 billion, should now be regarded as worthless.

In view of the foregoing, it must be concluded that the Italian authorities have not furnished any evidence that the claims on Sirap SpA, which were transferred as security in exchange for loans, had any significant financial value. As a result, apart from the healthy firms which could have obtained a loan on the market under normal conditions (the Italian authorities have not provided any evidence that such a situation constitutes the rule), the Commission has no option but to maintain its position, namely that the aid element in the guarantee must be regarded as equal to the amount guaranteed.

X

As was stated above, in the course of these proceedings the Commission received comments from a former Sirap SpA shareholder. The comments call for the following observations:

1. The information on the characteristics and activities of Sirap SpA was communicated to the Commission by the Italian authorities under proceedings initiated in respect of various aid measures promised by the Region of Sicily to several regional holding companies (aid C 12/92). In their letter of 21 July 1992, the authorities stated that Sirap SpA was a company established under Article 53 of Regional Law No 105 of 5 August 1982 in order to provide technical design services for public works and/or services on behalf of public bodies (regions, municipalities, etc.) and, accordingly, was not involved in products that could be assessed on the market.

   In its final decision on the case (ref. SG 94 D/4720), the Commission took the view that, according to the description of its activities provided by the Italian authorities, Sirap SpA operated in the engineering sector. This is also in line with the definition of engineering given in the Panorama of EU Industry for 1997, i.e. intellectual services aimed at optimising investment projects in industry, construction and infrastructure as well as at all the stages of a project, from its initial conception to its completion.

   The Commission had concluded that the amount of aid was such that, in view of the generally small size of engineering firms, it could prevent private-sector competitors of Sirap SpA from gaining access to the market or force them out of the market, both in Italy and in other Member States, as they would not benefit from State aid to cover any losses.

2. The comments made by the legal representatives of FIME to the Commission as part of the proceedings confirm that at least some of Sirap SpA's activities comprised the activities described above, as defined by the Commission in its 1994 decision.

3. It should be noted that neither Sirap SpA, nor its shareholders or their legal representatives nor the Italian authorities challenged the Commission decision of 1994 within the specified period. The decision is therefore final.

4. With regard to the preceding point, the Commission notes that the Italian authorities have not responded to the comments received as part of the proceedings, despite having been invited to do so. This constitutes further confirmation of the statements in the preceding point.

XI

In view of the foregoing, the measures to assist the firms affected by the liquidation of Sirap SpA, which are provided for in the regional law approved on 24 March 1996 (DDL 1182-1210) and adopted as Regional Law No 8 of 22 March 1997 and which take the form of guarantees and interest subsidies, constitute aid within the meaning of Article 92(1) of the Treaty.

As the budgetary resources were approved for five years from 1996, the aid is unlawful as regards the portion not covered by the rules in the Commission notice on *de minimis* aid [1], which sets a threshold of EUR 100 000 over three years, given that the Italian authorities have not confirmed that the measures were not implemented before the Commission took a decision.

The aid not covered by the *de minimis* rule is also incompatible with the common market, as it is not covered by the exemptions provided for in the Treaty for the reasons already given (see Section VIII).

Where aid is incompatible with the common market, the Commission is required, pursuant to Article 93(2) of the EC Treaty and the case-law of the Court of Justice, in particular its judgments in Cases 70/72 [2], 310/85 [3] and C 5/89 [4], to ask the Member State to recover the illegal aid from the recipients. Consequently, with regard to the portion not covered by the *de minimis* rule, the aid must be abolished and, in so far as it has already been granted, recovered by the Italian authorities.

This case concerns a guarantee where the aid element can amount to the full loan guaranteed, whilst the loan itself comprises an aid element in the form of an interest subsidy with an estimated intensity of 20 %, as was stated when they were initiated. As the Italian authorities have not communicated the sectoral interest rates applied to calculate the interest subsidies, the Commission is unable to determine the extent to which the rates correspond to those applied to calculate regional aid.

Where the financial position of the aid recipients would have enabled them to obtain the financing in question on the capital market, without the State guarantee, the aid element consists solely in the interest subsidy. Otherwise, the aid consists in the amount of the guaranteed loan and the interest subsidy.

Accordingly, in order to comply with the ceiling provided for in the *de minimis* notice, the guarantee may cover only a maximum amount of EUR 83 333, by adding the aid element contained in the interest subsidy, a total of EUR 100 000 over a three-year period is obtained,

HAS ADOPTED THIS DECISION:

Article 1

The measures to assist firms affected by the bankruptcy of Sirap SpA, which are provided for in the law of the Region of Sicily approved on 24 March 1996 and subsequently adopted as Regional Law No 8 of 22 March 1997 and which take the form of guarantees and interest subsidies, constitute aid within the meaning of Article 92(1) of the Treaty.

[1] OJ C 68, 6.3.1996, p. 9.
[2] [1973] ECR 813.
[3] [1987] ECR 901.
[4] [1990] ECR I-3437.

The portion of that aid which exceeds the ceiling of EUR 100 000 over three years provided for in the *de minimis* notice is illegal inasmuch as it was granted before a decision was taken by the Commission under Article 93(3) of the Treaty.

Article 2

The aid not covered by the *de minimis* rule referred to in Article 1 is also incompatible with the common market as it does not qualify for exemption under Article 92(2) and (3) of the Treaty.

Article 3

Italy shall abolish the part of the aid scheme in question that is not covered by the *de minimis* rule and shall take the necessary steps to recover the aid granted illegally and described in Article 1 of this Decision.

Where the financial position of a firm receiving aid referred to in Article 1 of this Decision would have afforded it normal access to the capital market without the State guarantee, recovery shall apply only to the interest subsidy.

Where a recipient would not have been able to obtain the loan in question without the State guarantee, the full amount of aid shall be recovered.

Article 4

The aid shall be recovered in accordance with the procedures and provisions of Italian law, together with interest starting to run from the date on which the aid was granted to the date on which it was repaid. The rate shall be the reference rate, applicable on the date the aid was granted, used to calculate the net grant equivalent of regional aid in Italy.

Article 5

The Italian Government shall inform the Commission, within two months of the date of notification of this Decision, of the measures taken to comply herewith.

Article 6

This Decision is addressed to the Italian Republic.

Done at Brussels, 3 March 1999.

For the Commission

Karel VAN MIERT

Member of the Commission

COMMISSION DECISION

of 26 May 1999

on State aid granted by Germany to Dow/Buna SOW Leuna Olefinverbund GmbH (BSL)

(notified under document number C(1999) 1469)

(Only the German text is authentic)

(Text with EEA relevance)

(1999/679/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

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

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

Whereas:

I. PROCEDURE

(1) By Decision 96/545/EC of 29 May 1996 concerning aid proposed by Germany to Buna GmbH, Sächsische Olefinwerke GmbH, Leuna-Werke GmbH, Leuna-Polyolefine GmbH and BSL Polyolefinverbund GmbH [2], the Commission approved aid totalling DEM 9,5 billion for the privatisation of Dow/Buna SOW Leuna Olefinverbund GmbH (BSL).

(2) By letter dated 8 September 1997, Germany submitted two new contractual agreements (Third and Fourth Amendment Agreements) amending the privatisation agreement.

(3) By letter dated 3 February 1998, the Commission informed Germany that it had decided to reopen the Article 88(2) proceedings in respect of the aid which it had approved by Decision 96/545/EC. Germany replied by letter dated 3 March 1998. By letter dated 1 April 1998, the Commission requested additional information, receiving replies by letters dated 9 and 19 June 1998.

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

(5) On 17 June 1998, a meeting took place between the Commission and the German authorities to enable the Commission to examine the contracts concluded between BSL and Hoechst.

(6) The third-party comments were forwarded to Germany by letter dated 29 June 1998. Germany's comments in response to these were received by letter dated 4 August 1998.

(7) By letter dated 4 September 1998, the Commission put further questions, to which it received a reply on 29 September 1998.

(8) On 3 November 1998, a meeting was held with the German authorities.

(9) On 2 December 1998, the Commission asked further questions and sent a study by an outside expert concerning the energy contracts to Germany for comments.

(10) By letters dated 6 January and 15 March 1999, Germany sent its reply and also informed the Commission of a number of amendments.

II. DETAILED DESCRIPTION OF THE AID

(11) On 10 December 1997, the Commission decided to reopen Article 88(2) proceedings in respect of the DEM 9,5 billion in aid for BSL which it had approved in its final Decision of 29 May 1996. The aid was to be paid for the privatisation of BSL, which is the successor to three of the largest chemical industry complexes in the former German Democratic Republic.

(12) The authorisation given by the Commission on 29 May 1996 was subject to the fulfilment of a number of conditions, including the requirement that Germany must notify the Commission, pursuant to Article 93(3) (now, Article 88(3)) of the EC Treaty, of any deviations from the privatisation agreement.

(13) At the beginning of September 1997, Germany submitted to the Commission two new contractual agreements (Third and Fourth Amendment Agreements) between Dow and the 'Bundesanstalt für vereinigungsbedingte Sonderaufgaben' (BvS) amending the privatisation agreement. The amendment agreements related to changes in the plants that were to be built or upgraded. Although the overall amount of aid remained unchanged at DEM 9,5 billion, both amendments resulted in far-reaching changes in capacity and aid payments that

[1] OJ C 128, 25.4.1998, p. 13.
[2] OJ L 239, 19.9.1996, p. 1.
[3] See footnote 1.

altered the balance between capacities and amounts of aid which the Commission had approved in its Decision of 29 May 1996 for the various investments to be carried out by BLS.

(14) In addition, the Commission learnt that the new energy supply agreement concluded between BSL and VKR (VEBA) in compliance with the condition contained in the Commission Decision of 29 May 1996 provided for a much higher price during the restructuring period (in which the BvS is to offset negative cash flow) than in subsequent years.

(15) In its decision of 10 December 1997 to reopen the case, the Commission was aware that the total aid amount of DEM 9,5 billion was not affected by the amendment agreements.

(16) Nevertheless, it had serious doubts as to whether the *changes in production capacity* within BSL's restructuring contained in the Third and Fourth Amendment Agreements could still be regarded as being covered by the Commission Decision of 29 May 1996. The possibility could thus not be excluded that the increases in capacity could adversely affect competition and trade between Member States.

(17) The relevant changes contained in the amendment agreements concern the following plants:

(18) Regarding the *upgrading of the cracker*, the capacity for the production of chemical grade ethylene, which is needed for the production of ethyl benzene and, further downstream, of styrene, was to be increased to 60 kt/y.

(19) In this context, the Commission wanted to know whether the investment to be carried out in the cracker was still consistent with the information provided by Germany before Decision 96/545/EC was adopted. It was in particular necessary to know whether the increase in chemical grade ethylene production would affect the total capacity of the cracker or whether the increase would simply be within such overall capacity.

(20) It had been decided to increase the capacity of the *benzene plant* to 320 kt/y. The capacity originally planned was 120 kt/y, but during the Commission's first Article 88(2) proceedings the planned capacity had already been increased to 200 kt/y. The Commission had based its Decision 96/545/EC on this capacity. The capacity increase provided for in the Fourth Amendment Agreement resulted in additional costs of DEM 50 million.

(21) In reopening the Article 88(2) proceedings, the Commission saw no reason why these additional investment costs should be financed under the approved aid. Even though benzene itself is not traded, but is used in BSL's aniline plant, aniline would certainly be traded. Furthermore, several aniline manufacturers had repeatedly indicated their concern to the Commission about the aniline plant. The compatibility of additional aid for investment costs amounting to some DEM 50 million therefore appeared doubtful.

(22) An increase in the capacity of the *butadiene plant* from 45 kt/y to 120 kt/y was added to the restructuring plan instead of the DEM 45 million propane storage tank approved in Decision 96/545/EC, the storage tank being no longer required in the amended restructuring plan. The butadiene was to be used in-house in the new solution process elastomers plant. DEM 90 million were earmarked for the financing of the butadiene plant.

(23) Here too, the Commission had serious doubts as to whether any financing by the BvS of the DEM 90 million cost of the butadiene plant expansion was still in line with the absolute minimum restructuring aid requirement authorised in Decision 96/545/EC.

(24) The expansion of the *ethylbenzene/styrene unit* was added to the restructuring plan in place of the 'structural deficiency' payments which the Commission could not accept. The capacity of this unit was now to be expanded from 200 kt/y to 280 kt/y. Both products are used in-house. The Fourth Amendment Agreement stipulated that investment costs amounting to DEM 33 million would not be financed by the BvS. The overall costs would be DEM 75 million more than originally planned.

(25) The Commission had serious doubts on the aid for this investment for the following reasons: first, the original capacity of 200 kt/y seemed to be higher than that reported to the Commission under the initial Article 88(2) proceedings and, secondly, it was doubtful whether the DEM 33 million really represented the cost of the increase in capacity, given that the plant would cost DEM 75 million more than originally planned.

(26) The capacity of the *LDPE plant at Leuna* was now described as being 160 kt/y instead of 145 kt/y. Here, the Commission wanted to know the reason for this change and, in particular, whether there were also changes in the investment.

(27) Under the Third Amendment Agreement, the *Mitteldeutsche Erdölraffinerie MIDER (previously Leuna 2000) was to contribute* DEM *10,5 million* to construction of the pipeline to Rostock. The contribution of the BvS would be reduced by this sum; however, the total aid ceiling was to remain unchanged.

(28) This DEM 10,5 million contribution by MIDER to the Rostock pipeline clearly led to an increase in the aid budget available for other investment. The Commission felt that the overall amount of aid should be reduced by DEM 10,5 million, particularly as MIDER itself was receiving large amounts of aid and its contribution was therefore equivalent to the granting of aid under other schemes.

(29) The *acrylic acid and acrylic esters plants* to be built by Hoechst for BSL were to have a lower capacity than originally planned, but were to cost considerably more than anticipated. The Fourth Amendment Agreement laid down a ceiling of DEM 390 million for the BvS's contribution to this investment. The Fourth Amendment Agreement stipulated that the agreements between BSL and Hoechst, which were made available to the Commission only on 10 December 1997, covered the operation as well as the construction of the plants and that Hoechst was to receive an incentive payment.

(30) The Commission was afraid here that Hoechst could become a beneficiary of the aid approved for BSL.

(31) In respect of the *EDC plant*, there were inconsistencies in the figures. Annex 7 to the original privatisation agreement provided for a capacity of 276 kt/y, whereas the Fourth Amendment Agreement showed a capacity of 532 kt/y. In this context, the Commission wanted to know whether the investment carried out in the cracker still tallied with the information provided by Germany before Decision 96/545/EC was adopted.

(32) As regards the approved DEM 327 million in aid for investment in phthalic acid, solvent and dispersion plants which were not an integral part of BSL or for *investment in replacement plants*, the Fourth Amendment Agreement specified which units were to be shut down and which to be maintained. The investment in the plants to be maintained amounted to only DEM 28 million. For the remaining DEM 299 million, the Agreement provided for the following replacement plants costing a total of DEM 432 million: a 15 kt/y hydrocarbon resin plant, a 36 kt/y syndiotactive polystyrene plant, a 60 kt/y solution process elastomers plant and a 23 kt/y polycyclohexylethelene (PCHE) plant.

(33) Although the Commission approved the aid, it could not agree to such potential introduction of replacement investment of which nothing was known, and it therefore approved aid only for the phthalic acid, solvents and dispersion plants.

(34) The Commission was less negative in its attitude towards this replacement investment, since the possibility of such investment had been expressly provided for in the privatisation agreement and a considerable proportion of the costs would not be financed by the BvS. However, it could not rule out the possibility that this replacement investment might create sectoral difficulties and affect trade between Member States to an extent contrary to the common interest. It therefore considered it appropriate to include this point in the new Article 88(2) proceedings and to invite interested parties to comment on any adverse effect the replacement projects might have on the market.

(35) Lastly, the Commission felt that the *energy supply contracts* concluded between VKR and BSL after Decision 96/545/EC had been adopted might contain aid elements. Decision 96/545/EC had expressly excluded any aid for energy supply, since the Commission considered such support to be operating aid, which could in no way be accepted. In addition, Article 5 of the Decision of 29 May 1996 stipulated that Germany must refrain from granting any further aid for the restructuring of BSL beyond what was approved in the Decision.

(36) The new energy supply contracts were concluded for a period of 19 years (until 31 December 2014). For the remaining restructuring period (until 31 May 2000), during which, under the privatisation agreement, losses would be covered by the BvS, the supply contracts provided for prices which far exceeded the average prices for the supply of electricity and heat. For the period after restructuring, when Dow itself would have to finance any losses in BSL, the contracts provided for energy prices which were initially well below the average price. These prices would then increase gradually each year until they reached the level of average prices by the year 2014.

(37) The Commission's doubts concerned the substantial differences in the prices which BSL would have to pay during and after the restructuring period. This price differential seemed to be artificial, and the possibility could not be ruled out that the very high energy price during the restructuring period, when losses would be covered by the BvS, could subsidise the much lower energy prices in the period thereafter.

(38) The Commission also doubted that aid for the supply of energy was really excluded, since, with the takeover of part of the financing of VKR's powerplant by BSL, for which the BvS would provide [...] in compensation, the energy prices could be influenced in such a way that VKR would be relieved of expenditure which it would otherwise have to bear itself.

III. COMMENTS FROM INTERESTED PARTIES

(39) Three sets of comments were received from interested parties, namely one from the United Kingdom, another from a Portuguese aniline producer and the third from BSL itself. They may be summarised as follows:

(40) The United Kingdom shared the Commission's doubts as to the effects which the changes laid down in the Amendment Agreements could have on trade and competition in the common market, and it expressed particular concern regarding the effects on the European petrochemicals market, which was, in its opinion, in a position of oversupply.

(41) The Portuguese aniline producer stated that it expressly shared the Commission's doubts on all points and trusted that the Commission would take the right decision at the end of the Article 88(2) proceedings.

(42) BSL's comments focused on explaining why it believed that neither the changes in the restructuring programme nor the energy supply contracts contained any aid elements. In addition it pointed out that the overall aid amount had not risen. Lastly, it referred to the negative impact which the new Article 88(2) proceedings would have on new investment at BSL's industrial site and requested the Commission to terminate its investigation as quickly as possible.

IV. COMMENTS FROM GERMANY

(43) In response to the Commission's decision to initiate Article 88(2) proceedings, Germany provided the following relevant information on the key points at issue:

A. The changes in production capacity

(44) As regards the *upgrading of the cracker*, Germany pointed out that the production of chemical grade ethylene was a Dow technology. Chemical grade ethylene could be used only for the production of ethylene benzene and not for any other purpose. More specifically, it cannot be used for the production of polyolefins.

(45) According to Germany, it is current industrial practice to define the capacity of a cracker in terms of its capacity to produce ethylene. The production of chemical grade ethylene in this cracker has no influence on the overall capacity of the cracker, which remains at 450 kt/y, as authorised by the Commission in Decision 96/545/EC.

(46) Turning to the *increase in the capacity of the benzene plant* from 200 kt/y to 320 kt/y, regarding which the Commission saw no reason why additional investment costs of DEM 50 million should be financed by the BvS, Germany stressed in particular that the additional costs amounted to only DEM 30,5 million. The plant now planned with a capacity of 320 kt/y cost DEM 180,5 million, whereas a plant with a capacity of 200 kt/y would have cost DEM 150 million. As evidence of this, Germany submitted a study by an independent consultant which, on the basis of a comparison of the cost of a plant with a capacity of 320 kt/y and one with a capacity of 200 kt/y, confirmed its figures.

(47) As regards the additional aid to be paid by the BvS for the DEM 30,5 million cost of the capacity increase, Germany undertook to ensure that the privatisation agreement concluded between the BvS and BSL would be amended to exclude any contribution from the BvS to the financing of this capacity increase.

(48) As regards the *increase in the capacity of the butadiene plant* from 45 kt/y to 120 kt/y, Germany stressed that this capacity increase was not caused by an extension of the existing plant, but by the construction of a *completely new butadiene plant* to replace the existing one. Germany also pointed out that the propane storage tank for which the Commission had authorised aid in Decision 96/545/EC in order to allow BSL to overcome structural deficiencies would not be built.

(49) At a later stage in the proceedings, Germany undertook to ensure that the privatisation agreement would be amended in such a way as to remove the financing of the butadiene work completely from the restructuring programme, i.e. the financing of the construction of this plant by the BvS would be ruled out.

(50) This amendment would not detract from the justification for the aid authorised by the Commission in Decision 96/545/EC for overcoming structural deficiencies. In this context, Germany described two additional infrastructure projects which would, on the one hand, help to overcome the structural weaknesses of the firm's plants spread over three different industrial sites, e.g. non-building of the propane storage tank, and, on the other, would not lead to any increase in production capacities and would thus not have any impact on the market.

(51) The relevant infrastructure projects were as follows:

(52) The *construction of a pipeline* between the cracker in Böhlen and the one in Litvinov in the Czech Republic [1] for the transport of various products and for the storage of such products in the salt tunnel at Teutschenthal. The pipeline would allow greater flexibility in the production and consumption of hydrocarbon monomers and would, in addition, save costs and be environmentally friendly, since transport of the relevant products by rail or road could be avoided. Use of the pipeline is available to producers other than BSL and can, according to the German authorities, contribute to the development of the chemical triangle at the Böhlen/Schkopau industrial site. The overall cost of the pipeline would amount to DEM 90 million.

[1] This cracker does not belong to Dow, but to Unipetrol, which is owned by the Czech State and is about to be privatised.

(53) The *construction of a connection road* between the plants in Schkopau and the A38 motorway, including parking areas, which will be carried out on BSL's site, enabling heavy goods vehicles to have direct access to the motorway without having to pass through the cities of Halle and Merseburg. The German authorities state that use of the road and of the parking areas would be open to everybody. This measure would relieve local traffic and could also cut the time required for transporting products. The cost of this measure would be DEM 8 million.

(54) Germany pointed out that these additional infrastructure measures would continue to justify the payment for overcoming structural deficiencies which the Commission had approved in Decision 96/545/EC [1]. At the same time, the BvS contribution would be limited to the same amount as had been allocated to replacement of the propane storage tank and the upgrading of the old butadiene plant, for which aid had also been authorised in Decision 96/545/EC. Consequently, the maximum aid ceilings (DEM 386 million) agreed between the BvS and BSL for projects intended to overcome structural deficiencies which had been approved by the Commission and for which BSL had already received advance payments would be fully complied with.

(55) As regards the Commission's doubts that the original capacity of the *ethylbenzene/styrene unit*, at 200 kt/y, was higher than that notified under the initial Article 88(2) proceedings, Germany admitted that this capacity had at the time not been explicitly specified to the Commission. The building costs of DEM 175 million had, however, been notified to the Commission. This price corresponded exactly to the cost of a plant with a capacity of 200 kt/y. Furthermore, the capacity fitted into the structure of the overall complex, as approved by the Commission. Consequently, no additional capacity was involved.

(56) As regards the Commission's doubts on the question of whether the cost of increasing the capacity of this unit from 200 kt/y to 280 kt/y, as provided for in the Fourth Amendment Agreement, would really amount to only DEM 33 million, given that the plant as a whole appeared to cost DEM 75 million more than originally planned, Germany submitted a study carried out by an independent consultant. The study confirmed that the additional cost was limited to DEM 33 million. Germany also emphasised that the BvS would not participate in the financing of this additional investment cost.

(57) As regards the capacity of the *LDPE plant at Leuna*, which was described as being 160 kt/y instead of 145 kt/y, Germany explained that there were no changes to this project. The capacity increase, which was less than 10 %, was due solely to more efficient use of the plant.

(58) As far as the *DEM 10,5 million contribution by MIDER* is concerned, Germany emphasised that it would only cover the costs of additional investment which was necessary in order to enable MIDER to make use of the pipeline and to transport oil. The additional investment costs related to cleaning-, measuring- and analysis-stations, adaptation of the pipeline to crude oil and the valve and pump stations. This additional investment would be financed exclusively by MIDER.

(59) It was not necessary to reduce the BvS's contribution to the overall restructuring programme, since the scope of the original pipeline project had not changed in any way.

(60) Regarding the *acrylic acid and acrylic esters plants* which were to be built by Hoechst on behalf of BSL and on which the Commission, due to insufficient information on the agreements concluded between BSL and Hoechst, had serious doubts that Hoechst might become a beneficiary of the aid approved by the Commission for BSL, Germany made the agreements available for detailed examination.

(61) As regards the *EDC plant*, where there were inconsistencies in the figures, Germany indicated that no additional capacity would be created. The overall capacity which would be created during both phases was specified in Annex 13.1 of the original privatisation contract approved by the Commission, where, in point 3.3.1, an overall capacity of 531 kt/y was indicated. The new Annex 7 to the Fourth Amendment Agreement, which indicated a capacity of 532 kt/y, merely provided clarification.

(62) With regard to the approved aid for *replacement investment amounting to DEM 327 million* in plants which were not an integral part of BSL (e.g. phthalic acid, solvents, dispersion plants), Germany emphasised that this replacement investment would not cause any sectoral problems. This was confirmed by the fact that no particular comments were received from third parties on this issue. Furthermore, Germany pointed out that the overall investment for these projects had been increased to DEM 460 million, whereas the BvS's contribution remained the same at DEM 276,3 million, thus increasing significantly BSL's own share in the financing of these projects.

[1] See Section IV, point 9.

B. **The energy supply contracts**

(63) Regarding the [...] grant paid by BSL for the construction of the power plant ('Baukostenzuschuss'), the German authorities stressed that, in Germany, it was common practice for a large client like BSL to contribute to the costs of a plant which was ultimately being built largely for it. Such a contribution was indeed required under the German Energy Act.

(64) On the question of whether, in view of the enormous difference between prices in the period up to the year 2000 and the period agreed thereafter, the new energy supply contracts contained aid elements, the German authorities stated that the prices were realistic and not artificially inflated. In support of this statement, they submitted a study drawn up by a consultant confirming their view.

(65) Germany nevertheless agreed that the Commission would have a study drawn up by an independent consultant in order to examine the energy contracts and associated questions in greater detail.

(66) The study arrived at the following conclusions:

(67) Regarding the [...] grant, the study established that it was being treated as part of the negative cashflow for which BSL will receive compensation during the restructuring period and that it was not included in the calculation of energy prices during that period. The study concluded that it was legitimate to regard this payment as restructuring costs, as such costs arose from the reduction in BSL's steam demand, which had changed from the original estimate since the construction of the powerplant in 1993, requiring modifications to be made to the steam and electricity facilities at the VKR and BSL site. It was customary in Germany for large electricity consumers to make a financial contribution of their own, and this was indeed provided for in Section 6 of the German Energy Act and therefore normal practice in Germany in the case of new energy consumers.

(68) As far as the energy supply prices were concerned, the study concluded for the period from 1 April 1996 to 31 May 2000, during which BSL has to pay a relatively high price per kWh, that the prices were higher than the maximum total costs (fuel costs + operating and maintenance costs + investment costs) for a coal-fired plant, that liberalisation effects were not, however, as yet detectable on the electricity market, i.e. there were neither alternative suppliers nor was BSL in a position to operate its own plant, and VKR could use its position as monopoly supplier to BSL during the restructuring period to recover substantially more of its sunk costs during than after the restructuring period and that these prices were not out of line with expected prices for very large industrial customers in eastern Germany over that period.

(69) For the period after restructuring, i.e. from 1 June 2000 to 31 December 2014, in which BSL will have to pay a much lower price for energy supplies, the study concludes that, on the basis both of the notion of a liberalised energy market in which the price of electricity is determined by the market and not by VKR, and of BSL's option of setting up its own facility for the generation of electricity and steam, the price payable by BSL is in line with the prices which it would have to pay if it pursued the other two options.

(70) The study concludes by looking at the question of whether a contract such as that entered into between VKR and BSL was based on a normal commercial arrangement that did not depend on the potential impact of State aid on one of the companies concerned.

(71) Its first conclusion was that VKR could have no interest in spreading the recovery of its stranded costs over a longer period than it did. To do so would have exposed VKR to two risks: in the first place, BSL might not survive as a business for the entire period of the contract and, secondly, BSL might decide, probably with the support of the German regulatory authority, to renege on the contract when the market became more competitive. Both risks gave VKR a powerful incentive to shift additional cost charges into a period in which it still enjoyed a *de facto* monopoly.

(72) Taking account of the above assumptions, it was, according to the study, not necessary to hypothesise that BSL would endeavour to exploit State aid provisions in order to explain the dual-period structure of the contract. Furthermore, the date of the changeover was consistent with both interpretations of how far the parties could at the time have anticipated when VKR would lose its monopoly position, both in relation to forecasts of the advent of market liberalisation and as regards the time when a new plant would be built. Lastly, BSL would not have been in a position to attack VKR's monopoly position with the German regulatory authority, since it would not have been able to demonstrate discrimination by reference to comparable prices to other industrial consumers and with the prospect of market liberalisation.

(73) Thus, the study arrives at the conclusion that the energy supply contracts do not contain any aid elements.

(74) As regards the comments of other interested parties, Germany stated the following:

(75) In reply to the United Kingdom's comments, Germany rejected the view that there was oversupply on the petrochemicals market. It argued that the United Kingdom's opinion might be influenced by the fact that BP had shut down some of its plants in the United Kingdom. The decision to shut down these plants had been taken a long time ago and was not influenced by the market situation. This view was confirmed by the fact that BP itself had not submitted any third-party comments as part of the proceedings.

(76) As regards the comments made by the Portuguese aniline producer, Germany believed that there was no need for a specific reply, since the comments did not contain any points that went beyond the Commission's comments.

(77) No specific remark was made on BSL's comments.

V. ASSESSMENT OF THE AID

(78) In assessing the points at issue in this case, it should be borne in mind that the Commission decided to reopen the Article 88(2) proceedings in respect of aid paid in connection with BSL's privatisation because it doubted whether the changes in the Third and Fourth Amendment Agreements were still in line with the Commission's findings in Decision 96/545/EC. Thus, the point of the Commission's examination is not to establish whether the changes constitute aid within the meaning of Article 87(1) of the EC Treaty that might be exempted under Article 87(2) and (3) of the EC Treaty. Rather, the Commission must base itself on Decision 96/545/EC, especially since the overall aid amount of DEM 9,5 billion approved by the Commission has not in any way altered.

(79) Moreover, it must be borne in mind that the Commission's concern in examining the capacity increases is that the BvS should not pay any aid for capacity increases beyond the amounts which the Commission approved in Decision 96/545/EC, and not whether the capacity increases as such are compatible with the aid rules. The aid authorised for the restructuring of BSL was intended solely to assist in the creation of a minimum industrial basis which was to help attract further investment and, consequently, further increases in capacity. This is confirmed both in Decision 96/545/EC and in the decision of 10 December 1997. In point 13.4 of Section IV of Decision 96/545/EC, the Commission specifically makes the point that 'Dow and BSL contemplate making investments of DM 1 250 million in addition to the investments under the reconstruction programme until the year 2010, in order to secure the long-term competitiveness, growth and economic viability of the petrochemical complex'. In point 9.1 of the decision of 10 December 1997, the Commission expressly stated that 'any new changes which increase production capacities... should... be financed by the company itself'. The Commission thus expressly accepted further investment and increases in capacity, provided that such investment was financed by BSL itself. Consequently, it was the Commission's task in this investigation to make sure that BSL's capacity increases are not financed by the BvS.

(80) In the two areas that had to be examined (changes in production capacities and energy supply contracts), the Article 88(2) proceedings demonstrated the following:

A. Changes in production capacities

(81) As regards the *upgrading of the cracker*, the proceedings showed that the production of chemical grade ethylene in the BSL cracker does not affect the overall capacity of the cracker, which is defined by its capacity to produce ethylene and which remains at 450 kt/y, as approved by the Commission in its Decision 96/545/EC [1]. There is therefore no infringement of the Decision in this respect.

(82) As regards the *increase in capacity of the benzene plant* from 200 kt/y to 320 kt/y, where the Commission saw no reason why additional investment of DEM 50 million should be financed under the approved aid, but felt that such additional costs should be borne by the investor itself, Germany provided evidence that such costs amounted to only DEM 30,5 million. In addition, Germany undertook to ensure that the privatisation agreement between the BvS and BSL would be amended by a further Amendment Agreement specifying that the BvS would not contribute to the additional costs of the capacity increase.

(83) Consequently, BSL will not receive more aid for this project than authorised in Decision 96/545/EC.

(84) As regards the *increase in the capacity of the butadiene plant* from 45 kt/y to 120 kt/y as a result of the construction of a completely new butadiene plant to replace the old one, no aid will be paid by the BvS. This is ensured by Germany's undertaking that the privatisation agreement will be supplemented by a clause removing any BvS contribution to the financing of this project. Consequently, there is no infringement of Decision 96/545/EC in this respect.

(85) With regard to the *ethylbenzene/styrene unit*, Germany provided evidence in both cases that the original capacity notified to the Commission under the initial Article 88(2) proceedings amounted to 200 kt/y and that the cost of increasing the capacity of this unit from 200 kt/y to 280 kt/y was limited to only DEM 33 million. Since it is stipulated in the Fourth Amendment Agreement that the BvS will not contribute to these additional costs, the capacity increase will be financed only by BSL. Consequently, only the aid authorised in Decision 96/545/EC will be paid for this project.

[1] See Section III point 3 of Decision 96/545/EC.

(86) As regards the capacity of the LDPE plant at Leuna, which is now given as 160 kt/y instead of 145 kt/y, the information provided demonstrates that there is no change to this project and that the capacity increase of less than 10 % is the result of more efficient use of the plant. Consequently, there is no 'real' increase in capacity and, hence, no divergence from Decision 96/545/EC.

(87) The *DEM 10,5 million contribution by MIDER to the pipeline to Rostock* will cover only the costs of the additional investment needed to enable MIDER to make use of the pipeline and to transport oil. The additional investment relates to cleaning-, measuring- and analysis-stations, the adaptation of the pipeline to crude oil and the valve and pump stations. The additional investment will be financed by MIDER alone. There will therefore not be any change in the scope of the original pipeline project. Consequently, the project remains in line with Decision 96/545/EC [1].

(88) As regards the agreements concluded between BSL and Hoechst for the construction of *acrylic acid and acrylic esters plants*, it is clear that there is an increase in the overall investment costs of DEM 365 million provided for in the original contract approved by the Commission. It should be borne in mind, however, that the Commission's purpose in initiating proceedings was to clarify whether Hoechst might become a beneficiary of the aid to be paid for this project. This should be ruled out. An incentive system agreed between BSL and Hoechst should ensure that the price Hoechst obtains corresponds to its expenses. Since Hoechst will be rewarded if it keeps below a specified ceiling, it is in its interests to keep the costs low. This arrangement should also result in only minor changes in the overall investment cost. It should also be borne in mind that the overall capacity will be lower than in the original plans, that it is always difficult to predict with 100 % accuracy the real costs of a new project and that the overall contribution of the BvS to the investment will differ only marginally. Similar variations are also evident in other BSL investment projects. In addition, the agreements between BSL and Hoechst contain clauses providing for an audit to be carried out at the request of the BvS. Consequently, the change can be accepted within the framework of Decision 96/545/EC.

(89) As regards the *EDC plant*, Germany made it clear that no additional capacity will be created. The overall capacity which will be created during both phases of the restructuring programme is indicated in Annex 13.1 to the original privatisation agreement approved by the Commission. Point 3.3.1 of that Annex gives the overall capacity as 531 kt/y. The new Annex 7 to the Fourth Amendment Agreement, which indicates a capacity of 532 kt/y, merely clarifies the situation. There is therefore no infringement of Decision 96/545/EC.

(90) As regards the approved aid for *replacement investment amounting to DEM 327 million* [2], the Article 88(2) proceedings showed, as the Commission had already assumed when the proceedings were initiated, that this investment is unlikely to cause any sectoral problems. No comments on this investment were received from third parties, for whose sake alone the Commission had included the investment in its investigation. It should also be borne in mind that the overall investment for these projects has risen to DEM 460 million, while the BvS's contribution remains the same at DEM 276,3 million. Dow's own share in the financing of these new investment projects will therefore increase.

B. **Energy supply contracts**

(91) The study which the Commission asked an independent consultant to carry out and which examined in detail the justification for the price differences in energy supplies comes to the conclusion that the energy supply contracts between VKR and BSL will not necessarily have any spillover effect and do not provide any grounds for assuming that State aid granted for other purposes has been misused. Furthermore, the study notes that BSL's contribution to the construction of the power plant is common practice in Germany and is indeed provided for in the German Energy Act.

(92) Consequently, no aid is involved in the energy supply contracts.

C. **The two additional infrastructure projects**

(93) In the light of the above, the Commission concludes that, assuming the changes announced by Germany to the Third and Fourth Amendment Agreements are enshrined in a Fifth Amendment Agreement, none of the points at issue in respect of which the Article 88(2) proceedings were reopened involves an infringement of Decision 96/545/EC. There is, however, one point which is not explicitly dealt with in Decision 96/545/EC and where the Commission must therefore examine whether it is nevertheless covered by that Decision. This is the BvS's financing of the two infrastructure projects in place of its contributions to the butadiene plant and the cancelled construction of the propane storage tank, which were authorised by the Commission in its Decision 96/545/EC as part of a number of different projects intended to enable BSL to overcome structural deficiencies. It must therefore be examined whether these two projects are consistent with the reasons accepted as justifying such various projects, for which the Commission authorised aid totalling DEM 384 million and for which advance payments have been made by the BvS to BSL.

[1] See Section IV point 6.9 of Decision 96/545/EC.

[2] See point 9.1 of the decision of 10 December 1997. This investment is specified in point 8.1.2 of the privatisation agreement approved by the Commission.

(94) The main beneficiary of both infrastructure projects will certainly be BSL. On the other hand, there will also be significant benefit to other firms. BSL is not the only producer within the new chemical triangle at Schkopau. A pipeline which is also available to other producers in this region may contribute to the development of the industrial site as a whole. The same is true of a direct motorway access link. Both projects may therefore help to overcome structural difficulties which undoubtedly exist at the relevant sites. Account must also be taken of the fact that the two infrastructure projects replace another infrastructure project, i.e. the propane storage tank which was not built, but which was approved by the Commission in Decision 96/545/EC. The two infrastructure projects will certainly not have any more adverse impact on the market than the tank approved by the Commission. The BvS contribution of DEM 384 million approved by the Commission for this part of the restructuring programme will not increase, but remain the same. Consequently, the Commission would not be authorising any new, additional public funding, but merely a change in the use made of funds already approved and made available to BSL in the form of advance payments immediately after Commission Decision 96/545/EC.

VI. CONCLUSION

(95) The Article 88(2) proceedings have demonstrated that no additional aid for BSL is involved and that the aid to be paid corresponds to the amount and is limited to the capacities which were authorised by the Commission on 29 May 1996. In addition, no aid element was found in the energy supply contracts. The Commission therefore concludes that the minor divergences from the original privatisation agreement are compatible with the principles laid down in Decision 96/545/EC,

HAS ADOPTED THIS DECISION:

Article 1

The Third and Fourth Amending Agreements concluded between Dow/Buna SOW Leuna Olefinverbund GmbH (BSL) and the 'Bundesanstalt fur vereinigungsbedingte Sonderaufgaben' (BvS) comply with Decision 96/545/EC approving aid for the privatisation of BSL, subject to the conditions and obligations set out in Article 2.

Article 2

1. Germany shall submit an Amendment Agreement stipulating that:

(a) the BvS will not contribute to the financing of the DEM 30,5 million costs of increasing the capacity of the benzene plant, and that

(b) the financing of the butadiene plant will be completely removed from the restructuring programme, i.e. the BvS will no longer finance the construction of this plant.

2. A copy of the Fifth Amendment Agreement shall be submitted to the Commission within one month of its conclusion.

Article 3

The provisions and conditions laid down in Decision 96/545/EC shall remain applicable. This applies in particular to the requirement that Germany submit to the Commission half yearly reports on the progress of restructuring and the amount of aid paid by the BvS.

Article 4

Germany shall inform the Commission, within two months of the date of notification of this Decision, of the measures taken to comply therewith.

Article 5

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 26 May 1999.

For the Commission

Karel VAN MIERT

Member of the Commission