

COMMISSION DECISION**of 20 July 1999****on State aid to be granted by Germany to CBW Chemie GmbH, Bitterfeld-Wolfen***(notified under document number C(1999) 3272)***(Only the German text is authentic)****(Text with EEA relevance)**

(2000/393/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

- | | |
|-------------------|---|
| 21 March 1997 | Germany informed the Commission, in accordance with Article 88(3) of the EC Treaty, of the privatisation of the firm CBW Chemie GmbH Bitterfeld-Wolfen (CBW). The case was registered on 25 March 1997 as State aid N 238/97. |
| 18 April 1997 | The Commission asked Germany to supply additional information (reference D/51861). |
| 23 May 1997 | Germany supplied additional information (letter registered as received on 27 May 1997 under reference A/34120). |
| 18 August 1997 | The Commission informed Germany by letter SG(97) D/7102 of its decision to initiate formal proceedings in the case. The decision was also published in the <i>Official Journal of the European Communities</i> ⁽¹⁾ . |
| 2 September 1997 | Germany replied (letter registered as received on 2 September 1997 under reference A/37005). |
| 12 September 1997 | The Commission sent a further letter to Germany (reference D/54167). |
| 29 September 1997 | Germany replied (letter registered as received on 30 September 1997 under reference A/37729). |
| 5 January 1998 | Comments were submitted by interested party Fischer & Limberger (registered as received on 12 January 1998 under reference A/30208). |
| 16 January 1998 | Comments were submitted by interested party Fischer & Limberger, represented by Schön, Nolte, Finkelnburg & Clemm (registered as received on 16 January 1998 under reference A/30379). |

⁽¹⁾ OJ C 383, 17.12.1997, p. 4.

| | |
|------------------|---|
| 11 February 1998 | The Commission forwarded the comments received to Germany (reference D/50622). |
| 23 February 1998 | A letter was sent by Fischer & Limberger to the Commission (registered as received on 23 February 1998 under reference A/31489). |
| 11 March 1998 | A letter was sent by CBW to the Commission (registered as received on 11 March 1998 under reference A/32032). |
| 24 April 1998 | A letter was sent by Fischer & Limberger to the Commission (registered as received on 27 April 1998 under reference A/33271). |
| 5 June 1998 | A letter was sent by Fischer & Limberger to the Commission (registered as received on 8 June 1998 under reference A/34297). |
| 11 June 1998 | A letter was sent by Fischer & Limberger to the Commission (registered as received on 11 June 1998 under reference A/34439). |
| 15 June 1998 | The Commission asked Germany a number of questions (reference D/52467). |
| 27 July 1998 | Germany replied (letter registered as received on 28 July 1998 under reference A/35874). |
| 12 November 1998 | Talks were held between representatives of the Commission and Germany in Berlin. |
| 8 December 1998 | Germany supplied additional information (registered as received on 4 January 1999 under reference A/30043). |
| 2 February 1999 | A letter was sent by Mr Thieme to Mr Van Miert, Member of the Commission (registered as received on 8 February 1999 under reference A/000542), to which Mr Van Miert replied by letter of 24 February 1999 (reference D/508350386). |

II. GENERAL DESCRIPTION

1. Reasons for initiating formal proceedings

After examining the notification and the additional information supplied by Germany, the Commission decided to initiate formal proceedings under Article 88(3) of the EC Treaty for the following reasons:

- (a) doubts as to the firm's viability: the data contained in the notification gave rise to doubts concerning the firm's ability to remain in business since a positive result was not expected before 2005;
- (b) insufficient contribution by the investor: the originally proposed share of 3,5 % of the costs of restructuring was insufficient;
- (c) distortion of competition: the incomplete nature of the information supplied by the German authorities gave rise to doubts concerning possible overcapacity on the relevant market.

2. The recipient of aid

In 1990, the former Chemiekombinat Bitterfeld-Wolfen, situated at Bitterfeld (Saxony-Anhalt), was transformed into Chemie AG. When the attempts by the Treuhandanstalt (THA) to privatise the entire firm failed owing to a lack of interested buyers, Chemie AG was split up into a number of divisions. This resulted in the creation of Chemie GmbH Bitterfeld-Wolfen (formerly CBW), a firm active in the manufacture of various primary chemical products for the dye and pharmaceutical industry.

Under a contract of 13 March 1997, six divisions of CBW, subsequently known as CBW Chemie GmbH, Bitterfeld-Wolfen (CBW), were taken over by Mr Bräutigam and Mr Riemann (B & R) for a total of DEM 1 million. On top of this was a variable price component that was determined on the basis of the annual cash-flow trend. With 246 employees and a turnover of DEM 74 million in 1997, CBW meets the definition of a small and medium-sized enterprise (SME).

3. Financial measures

Under the privatisation contract, the costs break/down among the individual providers of funds as follows:

BvS

(in million DEM)

| Aid measure | Amount |
|---|--------|
| Investment aid | 46,100 |
| Various grants (disposal of chemical residues, infrastructure measures) | 11,240 |
| Payment of the costs of disposing of chemical residues from the period before 1 July 1990 | 1,280 |
| Payment to offset negative cash flow | 9,000 |
| Total | 67,620 |

Land of Saxony-Anhalt

(in million DEM)

| Aid measure | Amount |
|--|--------|
| Investment aid under the joint Federal Government/Länder scheme ⁽¹⁾ | 28,800 |
| Total | 28,800 |

⁽¹⁾ The measures provided for under the joint Federal Government/Länder scheme for improving regional economic structures constitute regional investment aid within the meaning of Article 87(1) of the EC Treaty and were approved under Article 87(3)(a) (25th framework plan, cf. aid case C 37/96 (ex N 186/96), (OJ) C 35, 4.2.1997).

Investors

(in million DEM)

| Aid measure | Amount |
|--------------------------------|--------|
| Purchase price | 1,000 |
| Taking-over of the liabilities | 8,857 |
| Capital increase | 1,000 |
| Guarantee | 2,000 |
| Operating loan | 2,000 |
| Investment loan | 8,000 |
| Total | 22,857 |

Under a contract dated 13 March 1997, the shares of the former CBW were sold to B & R for an immediate price of DEM 1 million. The additional variable component of the purchase price is to be

calculated on the basis of the expected cash flow in the period 2000 to 2004 (up to 50 % of annual cash flow, payable each September of the year following the year in question). Since the initiation of proceedings, Germany has informed the Commission that the value of this price component is now as much as DEM 20 million given the firm's significantly improved position⁽²⁾. In addition, the investor has taken over CBW's liabilities of DEM 8,857 million, an amount which falls due for payment on 30 June 2005.

Under the purchase contract, the investor is also required to increase CBW's capital by DEM 1 million; it is also assuming liability for dormant equity holdings of DEM 2 million.

Private credit institutions, including [...] (*), granted the firm two loans guaranteed by the investor and totalling DEM 10 million. A DEM 2 million operating loan on 30 June 1998 and carrying interest at 8,25 % per annum and a DEM 8 million investment loan over two years at an interest rate of 5,75 %. The original intention was to cover these loans by 80 % guarantees from the *Land* of Saxony-Anhalt but, as the Commission learned from Germany in the course of the proceedings, the banks have since waived the need for public guarantees because of the firm's improved position.

III. COMMENTS FROM INTERESTED PARTIES

After initiation of the formal proceedings, a group which was also interested in buying CBW, Fisher & Limberger (F & L), expressed doubts as to whether B & R had in fact submitted the best aid.

IV. COMMENTS FROM GERMANY

The Commission passed these remarks on to Germany and gave the German authorities the opportunity to comment on them. Germany responded by letter of 23 March 1998, supplying further details on the choice of investor, the tender procedure and the current position of the firm.

V. ASSESSMENT OF THE AID

1. Existence of aid within the meaning of Article 87(1) of the EC Treaty

(a) *Aid in connection with the privatisation of firms*

Privatisation measures do not contain any element of State aid if the following conditions are met⁽³⁾:

- a competitive tender must be held that is open to all comers, transparent and not conditional on the performance of other acts,
- the company must be sold to the highest bidder, and
- bidders must be given enough time and information to carry out a proper valuation of the assets as the basis for their bid.

If these conditions are not met, the measures in question must be notified so that any payments made in connection with the privatisation can be assessed in the light of the prohibition of aid laid down in Article 87(1) of the EC Treaty.

In its letter of 5 January 1998, the group F & L alleged that it had been discriminated against in the tender procedure. The Commission therefore has doubts as to whether the tender procedure was correctly implemented.

(*) Business secret.

⁽²⁾ This information was supplied by the BvS at a meeting on 12 November 1998.

⁽³⁾ See 23rd report on competition policy (1993), point 402 et seq.

(i) Sequence of events in the privatisation process

In mid-1995 the firm KPMG carried out an international call for tenders for the purchase of nine operating divisions of the former CBW. Of the firms and persons which notified their interest, there were, alongside six tenders for the privatisation of individual divisions, three potential groups of investors:

- Mr Bräutigam and Mr Riemann (B & R),
- the group Fischer & Limberger (F & L),
- a consortium⁽⁴⁾.

According to the assessment made by KPMG and the management committee⁽⁵⁾ (*Leitungsausschuß*) at a meeting held on 22 August 1995, only B & R and F & L had submitted realistic tenders for all of the divisions to be sold off. The consortium's tender was rejected because of the exorbitant amount of public money it would require. A series of tenders for the separate privatisation of individual divisions were also deemed too costly.

The total costs associated with the original tenders for the takeover of the nine divisions compare as follows:

| (in million DEM) | |
|---------------------------|----------------|
| Total costs | |
| B & R | 140,6 |
| F & L | 212,0 |
| Individual privatisations | Total of 178,7 |

At the end of 1995 the BvS decided to reduce the number of divisions to be privatised from nine to six because the examination of tenders had revealed that the privatisation of three of the divisions would not be profitable. From March 1996 onwards, discussions on the takeover were held only with B & R and F & L.

In April 1996 F & L complained for the first time to the BvS that B & R had a competitive advantage because Mr Bräutigam had previously worked as a consultant in the chemicals department of the THA. He had therefore been able, in drawing up the 1996 management buy-out plan, to make use of expert reports financed using THA/BvS funds. These allegations had been examined at a meeting of the management committee in July 1996 but could not be substantiated. The management committee rejected any accusation of improper conduct on the part of the BvS because KPMG had made all relevant reports available to F & L and had answered all of the latter's requests for additional information. Moreover, the BvS had submitted to the Commission the report of the public prosecutor's office in Halle on the basis of which an investigation had been launched, following allegations of fraud under Section 263 of the Criminal Code, in respect of members of the BvS Chemicals Working Group and of the management committee. This investigation was closed on 18 September 1998 owing to lack of evidence.

In the view of the management committee, as expressed at its meeting of 18 August 1996, B & R and F & L had submitted two comparable tenders. B & R's tender envisaged a slightly higher (by amount DEM 4 million) public contribution. It seemed more interesting from the point of view of its approach but also involved higher risks up to 2000.

On 17 September 1996 the board of directors of the BvS decided, after examining both plans on the basis of the data in the table below, to continue negotiations first with B & R and then, if these did not lead to a satisfactory outcome, with F & L. Before concluding a privatisation contract with B & R, the board of directors also requested some additional information.

⁽⁴⁾ This was made up of four partners; Buch Umwelttechnik GmbH, Manifattura Chemica Italiana, Mr H. Schmidt and a fourth unknown firm.

⁽⁵⁾ An independent body set up by the competent ministry to evaluate the plans submitted. The BvS is not bound by the Committee's decisions but will normally follow them.

| | B & R plan (1997) | B & R plan (August 1996) | F & L plan (August 1996) |
|---|-----------------------------|-----------------------------|-----------------------------|
| Total cost 1997 to 2000 (in million DEM) | 309,9 | 309,9 | 361,5 |
| Number of employees, | 254 | 254 | 203 |
| of which subject to penalties | 190 | 190 | 184 |
| Total investment, | 84,9 | 95,2 | 99,9 |
| of which subject to penalties (in million DEM) | 84,9 | 84,2 | 99,9 |
| BvS contribution (in million DEM) | 55,1 | 56,4 | 39,1 |
| Land contribution (joint Federal Government/Länder scheme; in million DEM) | 28,8 | 28,8 | 42,3 |
| Public contribution (BvS and Land in million DEM) | 83,9 | 85,2 | 81,4 |
| Contribution by investor | 3,0 | 0,3 | 20,0 |
| (excluding purchase price; in million DEM) | 8,857 (2005) | (proposal) | (proposal) |
| Purchase price (in million DEM) | 1,0 + variable component | | n.a. |

According to the information supplied during the formal proceedings, the BvS decided in favour of the B & R plan for the following reasons:

- It had serious doubts concerning the financial plan and, in particular, the solvency of F & L. In spite of repeated requests, most recently by letter of 19 July 1996, it had still not received any details from the group concerning its financial contribution. Given that the group's combined nominal capital was DEM 16,8 million, it did not seem realistic that it could put up finance of DEM 20 million [...]. Despite its requests for information, the group had consistently refused to provide a consolidated financial statement. Although the group had, on several occasions, declared its readiness to provide data on the business activities of the individual firms within it, the BvS did not at any time receive such information.
- As far as the public contribution was concerned, the BvS doubted whether F & L would receive funds from the Land of Saxony-Anhalt covering 42 % of its investment costs. According to the information supplied by the Land authorities, this calculation seemed unrealistic because of uncertainty concerning the group's SME status⁽⁶⁾ F & L did not manage to dispel these doubts. By contrast, the plan of B & R, whose SME status was not in doubt and which envisaged aid equivalent to 33 % of the investment costs, seemed plausible.
- A further reason for the BvS's decision was the strategic approach of the B & R plan, which involved introducing made-to-order production and the concentration on 'toll-processing' as a means of securing the firm's long-term viability. This seemed more intelligent and forward-looking to the BvS than the F & L plan, which envisaged merely an increase in turnover on the basis of existing products, most of which were at the end of their useful life. The analysis of the relevant market also showed that large chemical companies such as BASF and Hoechst were increasingly farming out their production activities and obtaining chemical products which they no longer produced themselves

⁽⁶⁾ Classification as an SME is important because it is associated with a certain ceiling below which investment costs can be granted in the form of regional aid under the joint Federal Government/Länder scheme for improving regional economic structures.

from other producers. B & R's plan took account of this trend in that CBW would be transformed into a firm producing chemical products to order for these large companies. The products in question would be top of the range so that a net value added could be achieved⁽⁷⁾. Central to F & L's plans, by contrast, was cooperation with partners such as [...]. Enquiries had revealed, however, that these companies were interested in maintaining only certain areas of activity (e.g. in the case of [...], camposan) or production units (e.g. in the case of [...], the pilot plant).

(ii) Assessment

The doubts concerning the tender procedure and the choice of investor were not confirmed as the proceedings progressed. KPMG was responsible for arranging the call for tenders. The BvS selected the investor on the basis of quantitative and qualitative criteria.

B & R's plan required a slightly higher public contribution than that of F & L. As is clear from the above table, the BvS and the *Land* would have to put up a total of DEM 81,3 million under F & L's 1996 plan, while B & R required public funds of DEM 85,2 million initially and, in fact, of only DEM 83,9 million when the contract was concluded.

Nevertheless, the BvS decided in favour of B & R's plan because it appeared more viable in view of the investor's solvency. F & L did not manage to dispel the BvS's doubts about its financial strength and DEM status. Since the BvS wishes at all costs to avoid a situation in which a privatised firm requires further aid and 'contract management' is necessary after privatisation, the criterion of the solvency of the investor has always played an important role in the selection of buyers. In view of the minor difference between the public contributions envisaged by B & R and F & L, the Commission is able to support the BvS's arguments. In addition, in selecting B & R, the BvS opted for the more modern plan, under which CBW would introduce made-to-order production (toll-processing). The Commission therefore accepts that, following an open and transparent tender procedure which was not conditional on the performance of other acts, the firm was sold to the highest bidder and that privatisation therefore took place in accordance with the relevant rules⁽⁸⁾.

It must nevertheless be examined whether liquidation might not have been less costly than the sale of the firm. When the THA was still in operation, the Commission took the view that the liquidation of a given firm should be considered as an economic alternative to privatisation⁽⁹⁾. If the costs of liquidation are lower than the costs arising on the sale of a firm, the process of privatisation is deemed to include elements of State aid. In the case in hand, the costs of liquidation would be in the region of DEM 54 million; the net cash value is DEM 46,303 million.

The Commission has been unable to verify the costs of liquidation estimated by Germany. The estimated value might, in view of the State's social responsibility (continuation of contractual obligations), be higher than the corresponding cost of winding up a private firm. A private provider of capital would not need to bear this burden because it would prefer insolvency to liquidation. This is reason enough for deeming privatisation to constitute a process which includes elements of State aid.

Germany has complied with its obligation under Article 88(3) of the EC Treaty to inform the Commission of the financial measures being taken in favour of CBW.

(b) *Individual aid measures*

It cannot be ruled out that the measures taken in support of the firm active on the relevant market distort trade between the Member States.

⁽⁷⁾ A significant growth factor is the global success of firms which manufacture generic products for the pharmaceutical industry and agriculture, two sectors in which the main producers are increasingly buying their active substances from outside.

⁽⁸⁾ See footnote 3.

⁽⁹⁾ Commission decisions on the activities of the THA in Cases NN 108/91 (letter of 26 September 1991, SG(91) D/17825), E 15/92 (letter of 8 December 1992, SG(92) D/17613) and N 768/94 (letter of 1 November 1995, SG(95) D/1062)..

The measure taken by the *Land* of Saxony-Anhalt under the joint Federal Government/*Länder* scheme for improving regional economic structures constitutes State aid within the meaning of Article 87(1) of the EC Treaty. However, it has been implemented under and in accordance with an aid scheme notified to and approved by the Commission.

The measure taken by the BvS, which is to be deemed to constitute State aid within the meaning of Article 87(1) of the EC Treaty and the value of which can be put at DEM 66,34 million, must be assessed in the light of the possible application of Article 87(3)(c) of the EC Treaty and of the Community guidelines on State aid for rescuing and restructuring firms in difficulty⁽¹⁰⁾. The amount of DEM 1,28 million allocated for the disposal of chemical residues from the period before 1 July 1990 (a 'burden' inherited from the days of German Democratic Republic) does not constitute State aid. Under the 1991 Treuhand arrangements⁽¹¹⁾, the Commission already took the view that funds provided to cover the cost of disposing of such burdens could not be classified as State aid because neither the firm nor the investor could be made responsible for them since they fell solely within the responsibility of the former political regime.

2. Derogation under Article 87(3) of the EC Treaty

The Commission must examine whether the aid in question may be deemed compatible with the common market in accordance with Article 87(3).

Article 87(2) cannot be applied in this case because of the nature of the measures involved. Moreover, Germany has not claimed that the conditions for such a derogation are met.

The Commission must therefore consider whether a derogation under Article 87(3)(c) might be applicable. Under that provision, aid to facilitate the development of certain economic activities or of certain economic areas may be considered compatible with the common market where such aid does not adversely affect trading conditions to an extent contrary to the common interest. Moreover, CBW is situated in an area in which there is serious underemployment and the standard of living is abnormally low.

However, the main purpose of the aid in this case is not to promote regional development but rather to rescue a firm. It must therefore be regarded as ad hoc aid designed to help a firm in difficulty operating in an ailing economic sector to restore its viability. Such aid may be deemed compatible with the common market if it meets the conditions of the Community guidelines on State aid for rescuing and restructuring firms in difficulty.

(a) Restoration of viability

(i) Assumption of the worst-case scenario

When drawing up their restructuring plan, the investors worked on the basis of extremely cautious estimates.

The worst-case scenario covers two aspects: B & R estimated certain cost elements at a very high level. For example, its plan provides for very high depreciation over a period of not more than 10 years. However, the periods of depreciation usually applied in business are based on the actual useful life of plant, which, in the case of the chemical industry, is 15 years. Staff costs were also estimated at a high level by both investors. Even if the number of employees increases as planned, the estimated increase in staff costs seems excessive.

Furthermore, the restructuring plan does not contain certain aspects relating to the firm's strategic approach which were envisaged in B & R's original plan. The central component of that plan was the merger of the six divisions into one economic entity, with the resultant synergistic effects allowing costs to be drastically cut. At the same time, introducing made-to-order production and the concentration on toll-processing technology within CBW would lead to better utilisation of production capacities and

⁽¹⁰⁾ OJ C 368, 23.12.1994, p. 12.

⁽¹¹⁾ See aid NN 108/91 (letter of 26 September 1991, SG(91) D/17825).

improved productivity. However, B & R's business plan does not allow for the synergistic effects resulting from the merger or for the introduction of made-to-order production (toll-processing) because the investor was unable, in 1996, to predict when the restructuring measures would produce their effect.

(ii) Plausibility of the worst-case scenario

The plan was nevertheless deemed plausible by KPMG and the management committee. On the basis of the information received in the course of the proceedings, the Commission is able to support the BvS's arguments.

- In order to be able to assess the plausibility of the restructuring plan, it must first be stated that the assumptions made are based on the annual cash flow. In order for the firm to be deemed viable under the terms of the guidelines, the cash flow must normally be enough to cover not only current activities but also maintenance and reinvestment measures.

However, in order for CBW to be classified as viable, its cash flow need not cover such maintenance and reinvestment measures precisely because its maintenance costs are already included in the firm's planning at an amount of DEM 4 million per annum. Moreover, in view of the considerable investment carried out between 1997 and 1999 for the firm's extensive reorganisation, reinvestment will not be necessary until CBW has further stabilised.

Consequently, cash flow is not required to cover maintenance and reinvestment measures in this case. CBW's cash flow should be positive from 1999 onwards⁽¹²⁾. This means that operating costs would be covered and that the firm will be in a position to finance itself.

- In the restructuring plan presented by the investor, a series of cost items have been set at a very high level. Take, for example, depreciation, which is particularly high because of the depreciation period of not more than 10 years. However, for the purpose of establishing whether the plan is viable, a depreciation period must be applied which corresponds to the actual useful life of plant. Assuming, that, from 1997 to 1999, a total of DEM 83,3 million was invested in plant and that no replacement investment will be necessary until 2005 or later, the depreciation costs are in fact lower (60 %) than set out in the plan. On that basis, the firm would show a positive result from as early as 2001.
- A number of elements of B & R's original plan are not adequately taken into account in the restructuring plan itself. Nevertheless, the BvS did take account, in assessing the plan's viability, of the synergistic effects and of the introduction of made-to-order production and toll-processing, which should lead to lower costs and higher productivity.

(iii) The firm's current position

In the course of the proceedings, Germany has submitted updated data which suggest that a positive operating result can be expected from 2000:

(in million DEM)

| Data submitted with the notification | | | | | | |
|--------------------------------------|-------|-------|-------|-------|-------|-------|
| | 1997 | 1998 | 1999 | 2000 | 2001 | 2002 |
| Turnover | [...] | [...] | [...] | [...] | [...] | [...] |
| Operating result | [...] | [...] | [...] | [...] | [...] | [...] |
| Gross cash flow | [...] | [...] | [...] | [...] | [...] | [...] |

⁽¹²⁾ The original plan forecast negative cash flow for 1997 and 1998 that was to be offset by the abovementioned DEM 9 million payment.

(in million DEM)

| Data received by the Commission in the course of the proceedings | | | | | | |
|--|-------|-------|-------|-------|-------|-------|
| | 1997 | 1998 | 1999 | 2000 | 2001 | 2002 |
| Turnover | [...] | [...] | [...] | [...] | [...] | [...] |
| Variable costs | [...] | [...] | [...] | [...] | [...] | [...] |
| Fixed costs | [...] | [...] | [...] | [...] | [...] | [...] |
| Depreciation | [...] | [...] | [...] | [...] | [...] | [...] |
| Staff costs | [...] | [...] | [...] | [...] | [...] | [...] |
| Operating result | [...] | [...] | [...] | [...] | [...] | [...] |
| Gross cash flow | [...] | [...] | [...] | [...] | [...] | [...] |

As the table shows, CBW's financial position has improved considerably. Its turnover in 1997 was much higher than forecast, namely a 30 % increase in relation to the worst-case scenario on which the notification was based.

The data supplied in the course of the proceedings are realistic for the following reasons:

- the improved position is attributable to the initial restructuring measures undertaken in 1997 and 1998 and involving the firm's marketing strategy, the merger of the research units into one analysis centre, the introduction of the ISO 9001 standard and the use of IT systems,
- according to the German authorities, CBW has gained a good reputation among the chemical industry's main players (strategic customers are [...]). Solely on the basis of this newly acquired reputation, the firm is obtaining firm and potential orders for the next three years and more. The merger of six divisions into one entity and the introduction of made-to-order production have been highly successful,
- the progress made in the wake of restructuring has, without doubt, been bolstered in 1997 by favourable trends on the world market.

All of these factors throw a positive light on the restoration of the firm's viability and on the arguments of BvS, which when proceedings were initiated in 1997, were greeted with scepticism. The situation in which CBW finds itself today confirms the BvS's earlier assessment concerning the restoration of the firm's viability.

(b) *Avoidance of undue distortions of competition*

The doubts expressed when the proceedings were initiated concerning overcapacity on the relevant market have not been confirmed by third parties. The Commission does not have any information on the capacity situation on the market for any of CBW's products, with the exception of anilin 310. It would appear that there are some problems with regard to this product⁽¹³⁾. However, in view of the fact that CBW is an SME situated in a region eligible for assistance under Article 87(3)(a) of the EC Treaty, the Commission is not so strict in demanding capacity reductions. That apart, the trend on the chemicals market is very positive, particularly as far as products for the pharmaceutical industry are concerned. For the rest, anilin accounts for only 10 % of total production. The Commission therefore takes the view that no reduction of capacities is necessary in this case.

⁽¹³⁾ CBW is made up of six divisions: Anilin, Azo-Ost, Camposan, nitro-chloro-benzole distillation, pharmaceuticals and the pilot plant.

(c) *Proportionality of the aid*

Even if account is taken of the fact that this case involves a management buy-out, the financial contribution originally envisaged by the investor (some 3,5 %) was inadequate. However, Germany has informed the Commission in the course of the proceedings that, in view of the firm's progress, the (private) credit institutions have waived the need for State guarantees on *Land* loans of more than DEM 10 million in total. This waiver means that the investor's contribution has increased to DEM 22,857 million⁽¹⁴⁾. This constitutes some 19 % of the overall finance and is deemed appropriate given that this case involves a management buy-out. To this should be added a variable purchase-price component estimated, on the basis of the firm's much improved situation, at some DEM 20 million⁽¹⁵⁾.

Against the background of the firm's improved position, it has been incumbent on the Commission to examine whether the aid intensity has been limited to the strict minimum needed to enable restructuring to be undertaken. The aid granted by the BvS includes a payment to offset the negative cash flow originally forecast for 1997 and 1998 (DEM 9 million). However, Germany informed the Commission in the course of the proceedings that the cash flow for 1997 was in fact [...], with a similar figure being estimated for 1998⁽¹⁶⁾. Given this much improved cash-flow situation, the proposed cash-flow offset does, in the Commission's view, indeed exceed the minimum needed to enable restructuring to be undertaken. For this reason, it has to be deemed incompatible with the common market.

VI. CONCLUSION

The amount of DEM 28,8 million made available by the *Land* of Saxony-Anhalt under the joint Federal Government/*Länder* scheme for improving regional economic structures constitutes State aid within the meaning of Article 87(1) of the EC Treaty. It was, however, granted in its entirety under and in accordance with aid schemes notified to and approved by the Commission.

The measures by the BvS which are to be deemed to constitute State aid within the meaning of Article 87(1) of the EC Treaty and amount of DEM 66,34 million have been examined in the light of the Community guidelines on State aid for rescuing and restructuring firms in difficulty in order to determine whether Article 87(3)(c) is applicable. The amount of DEM 1,28 million granted for the disposal of chemical residues from the period before 1 July 1990 does not constitute State aid⁽¹⁷⁾.

Doubts concerning the choice of investor have not been confirmed in the course of the proceedings. The firm KPMG was responsible for the call for tenders. The rescue plan submitted by B & R provided for a slightly higher public contribution than that of F & L, but the BvS chose the B & R plan because it considered it to be more viable in view of the investor's solvency. The group F & L did not succeed in dispelling the BvS's doubts concerning its planned financial arrangements. The solvency criterion was always a key factor for the BvS when it came to selecting a particular buyer. In view of the insignificant difference between the respective amounts of aid envisaged by B & R and F & L, the Commission accepts the reasons put forward by the BvS for its decision. Moreover, in choosing B & R, the BvS opted for the more modern plan because it involves introducing made-to-order production (toll-processing).

The serious doubts expressed when the proceedings were initiated as to whether the firm's viability could be restored were dispelled by the information supplied in the course of the proceedings. The fundamentals of the restructuring plan were deemed viable by the BvS despite its extremely cautious assumptions. The

⁽¹⁴⁾ This is made up of the purchase price of DEM 1 million, the taking-over of the hive-off vehicle's liabilities of DEM 8,857 million, a DEM 3 million capital increase and the granting of an investment and operating loan totalling DEM 10 million. The loans are included in the investor's contribution because they are no longer guaranteed by the *Land*.

⁽¹⁵⁾ According to information supplied by the BvS at talks on 12 November 1998.

⁽¹⁶⁾ It should be pointed out that the privatisation contract provides for the reimbursement of the cash-flow offset up to an amount of DEM 6,4 million if there is no negative cash flow.

⁽¹⁷⁾ Commission decision on the activities of the Treuhandanstalt in Case NN 108/91 (letter of 26 September 1991, SG(91) D/17825).

Commission supports this assessment. Since positive cash-flow results were anticipated as from 1999, with the firm's operating costs thus being covered, the firm should, in principle, be able to finance itself. The BvS's expectations concerning the restoration of CBW's viability are borne out by the firm's current position following the positive cash flow in 1997.

The investor's share of the total costs of restructuring is estimated by the Commission at 19,1 %. To this should be added a variable purchase-price component. Consequently, since this case involved a management buy-out, the investor's contribution is deemed adequate.

The firm's current position is much better than expected in the original plan. In view of the positive gross cash flow for 1997 [...] and the similarly positive result for 1998, the Commission takes the view that the DEM 9 million payment to offset negative cash flow exceed the minimum needed for the firm's restructuring and is therefore incompatible with the common market,

HAS ADOPTED THIS DECISION:

Article 1

1. The measures amounting to DEM 1,28 million which Germany intends to take in order to dispose of the burdens of the firm Chemie GmbH Bitterfeld-Wolfen (CBW) inherited from before 1 July 1990 do not constitute State aid within the meaning of Article 87(1) of the EC Treaty.
2. The State aid totalling DEM 57,34 million which Germany intends to grant to CBW in the form of an investment grant of DEM 46,1 million and the payment of the costs of demolition works and infrastructure totalling DEM 11,24 million is compatible with the common market.
3. The State aid of DEM 9 million which Germany intends to grant to CBW in the form of a payment to offset negative cash flow is incompatible with the common market. This aid may therefore not be granted.

Article 2

Germany shall inform the Commission within two months of the notification of this decision of the measures it has taken to comply with it.

Article 3

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 20 July 1999.

For the Commission

Mario MONTI

Member of the Commission
