II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 22 July 1998

on the misuse of restructuring aid for MTW-Schiffswerft and Volkswerft Stralsund, two companies formerly belonging to Bremer Vulkan Verbund, and the unauthorised provision of an investment loan of DEM 112,4 million to MTW-Schiffswerft

(notified under document number C(1998) 2405)

(Only the German text is authentic)

(Text with EEA relevance)

(1999/274/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

Having given notice in accordance with the above Article 93 to the parties to submit their comments,

Whereas:

I. PROCEDURE

By letter dated 20 March 1996 the Commission informed Germany of its decision to initiate proceedings under Article 93(2) of the Treaty. The reasons given for the decision were the suspected spillover of authorised restructuring aid for MTW-Schiffswerft GmbH, Wismar (MTW), Volkswerft GmbH, Stralsund (Volkswerft) and other companies belonging to Bremer Vulkan Verbund AG (BVV), and the unauthorised provision of an investment loan to MTW.

The Commission's decision to initiate proceedings was published in the *Official Journal of the European Communities* [1]; the other Member States and interested parties were asked to submit their comments.

Germany commented on the Commission's decision by letter dated 3 September 1996. It made available to the Commission a report by the Bundesanstalt für vereinigungsbedingte Sonderaufgaben (BvS) on the loss of DEM 854 million in the context of the insolvency of BVV, and sent under cover of a letter dated 22 July 1996 an auditor's report by the firm of accountants Susat & Partner (Susat) on the contributions made by the 'eastern yards' (i.e. MTW and Volkswerft) to BVV's central cash concentration system. A revised final auditor's report was drawn up on 5 September 1996.

The comments submitted by two Member States in response to the initiation of proceedings by the Commission were forwarded to Germany by letter dated 19 July 1996. Germany commented thereon in its abovementioned letter of 3 September 1996.

The comments and reports which the Commission received after the main investigation proceedings were initiated afforded a much better insight into the extent of the misuse of funds and the operation of the cash concentration system. But little was still known in particular

[1] OJ C 150, 24.5.1996, p. 2.

about the uses to which the funds had been put in the various BVV companies. In order that it might take an informed decision on the recovery of the aid after first giving all interested third parties and above all the companies concerned an opportunity to state their views, the Commission decided to extend the scope of the Article 93(2) proceedings. In its decision to this effect the Commission set forth the facts as they were apparent from the documents then available and made a preliminary assessment of the findings of its investigation.

By letter dated 22 November 1996 the Commission informed Germany of its decision to extend the proceedings. The decision was published in the Official Journal ([2]).

Two Member States, two industry associations and seven companies, in which BVV either had or still has an interest, submitted comments on the decision to extend the proceedings. The Commission forwarded the comments to Germany by letter dated 17 April 1997.

Germany replied by letter dated 17 July 1997, stating that it was unable to adopt a position on the comments owing to the ongoing nature of the inquiry by the investigating authorities and the proceedings pending before the courts. The letter contains among other things a description of how the cash concentration system had developed during the four months prior to the initiation of the BVV insolvency proceedings.

II. FACTS

The facts as set out in the abovementioned letters and in the Commission decisions of 20 December 1992 ([3]), 21 December 1993 ([4]), 11 May 1994 ([5]), 21 June ([6]), 20 September ([7]) and 14 November 1995 ([8]) are as follows.

1. The exceptional arrangements for shipyards in the former German Democratic Republic

On 20 July 1992 the Council adopted Directive 92/68/EEC ([9]) amending Directive 90/684/EEC ([10]) (Seventh Directive on aid to shipbuilding) to enable yards in the new German *Länder* to carry out the comprehensive restructuring that was urgently needed if they were to become competitive.

When the exceptional arrangements were adopted the Commission gave an undertaking that it would make use of its monitoring and investigatory powers in order to ensure that the yards in the new *Länder* received only such aid as was needed to enable them to restructure. To that end, the aid was to be released in instalments. According to Directive 92/68/EEC, however, the operating aid had to be paid by 31 December 1993, that is to say before most of the operating losses had had an effect on liquidity.

2. Disbursement of the aid

MTW was privatised in 1992 and sold on 11 August of that year to the BVV-owned company Hanse-Holding. On 2 October 1992 Germany notified the aid that was to accompany the privatisation. Since it was clear to the German authorities (from the discussions held in the spring of 1992 in connection with Directive 92/68/EEC) that the Commission would authorise the release of the planned aid in instalments only, the Treuhandanstalt concluded a collateral agreement on 1 October 1992. This had the effect of circumventing the clause in the privatisation agreement whereby the Commission reserved the right to withhold its approval, in particular as regards the disbursement of the aid. A lump-sum cash subsidy of approximately DEM 686,5 million was accordingly paid to MTW on 6 October 1992 (343,8 million), 6 January 1993 (275,1 million) and 1 December 1993 (67,6 million). The payment took the form of a loan, on which interest was not to be payable until after the aid proceedings were terminated. If and when the Commission gave its consent, the obligation to pay interest was to cease to apply retroactively as of the day on which the principal was paid. This collateral agreement was not notified to the Commission, and was made available by Germany only on 18 November 1996 in response to repeated queries about the Susat report.

The Commission authorised the release of a first instalment of DEM 223,3 million of restructuring aid by letter dated 6 January 1993. With an eye to the deadline for the disbursement of operating aid laid down in Directive 92/68/EEC, at the Commission's request the DEM 463,2 million which had not yet been released was placed at the end of 1993 in a blocked account (held, not by the Treuhandanstalt as expected, but by the company). Payments from this blocked account were then made only following authorisation for release from the Commission on 18 May 1994 (DEM 220,8 million), 5 October 1995 (DEM 194,0 million) and 3 April 1996 (DEM 48,4 million) ([11]).

In the privatisation agreement, provision was made not only for payment of the lump-sum cash subsidy, but also for the granting to MTW of a loan of DEM 112,4

([2]) OJ C 65, 1.3.1997, p. 17.
([3]) Case N 692/B/91 (MTW).
([4]) Case N 692/F/91 (VWS).
([5]) Case N 692/I/91 (MTW).
([6]) Case N 84/95 (VWS).
([7]) Case N 572/95 (MTW).
([8]) Case N 801/95 (VWS).
([9]) OJ L 219, 4.8.1992, p. 54.
([10]) OJ L 380, 31.12.1990, p. 27.

([11]) Case N 207/96. This payment of the balance took place at the end of the reflection period following the hiving-off of MTW from BVV.

million to finance investments. The loan was to be free of interest for four years, after which it was to bear interest at a rate 1,5 % above the discount rate. It was notified as part of the overall aid package on 2 October 1992. It was common ground between the Commission and Germany that, because of the favourable rate at which it was granted, the loan constituted State aid, the grant equivalent of which was put at DEM 45 million. The Commission never authorised the release of the loan as up until the end of the reflection period it was not needed to finance any investment. By letter dated 15 March 1996, Germany announced that the loan had been granted on 22 March 1993. The funds were never used to finance investment at MTW.

Volkswerft was sold on 18 February 1993 to a consortium led by BVV. Germany transmitted the privatisation agreement on 17 March 1993, and the actual notification of the aid dates from 7 May 1993. A collateral agreement similar to the one in the MTW case was concluded on 9 March 1993. A lump-sum cash subsidy of DEM 585 million was paid in three instalments on 25 March 1993, 2 August 1993 and 6 January 1994. Contrary to the Commission's expectations no blocked account was created in the Volkswerft case. The Commission was sent a copy of the payment agreement on 18 November 1996.

The reason given by Germany for the premature disbursement of the funds was that the buyers would not otherwise have been prepared to take over the urgently needed day-to-day running of the company. The funds bore a normal commercial interest rate and had therefore been granted in accordance with the rules applicable to State aid. A blocked account had not been created for the Volkswerft funds because, according to Germany, the Treuhandanstalt did not consider it necessary, essentially since the Commission had authorised the release of all operating aid in December 1993.

3. **Monitoring of the uses to which the aid was put**

The aid to MTW and Volkswerft consisted of operating aid, investment aid and closure aid to finance the redundancies accompanying the restructuring. Whereas the release of the operating aid was authorised by the Commission under Directive 92/68/EEC in a lump sum to cover the expected operating losses and strengthen the equity capital base, the release of the instalments of the investment aid and closure aid was authorised on the basis of amounts actually or soon to be paid out. But because the Commission had no knowledge of the disbursements made without its authorisation, the actual flow of funds differed markedly from the money outflow that should have resulted from the Commission's decisions on the release of aid. In fact, only the MTW funds placed, as indicated above, in a blocked account at the end of 1993 were disbursed in accordance with the relevant Commission decisions.

The funds not yet needed for restructuring were placed by the two yards at the disposal of BVV AG under separate arrangements in the form of interest-bearing loans. Since October 1993 BVV had operated a cash concentration system ([12]). MTW and Volkswerft joined the system at the end of 1994 on instructions from the group's top management. Initial demands by the BvS that the two eastern yards' contributions be covered by bank guarantees were dropped in view of BVV's persistent refusal.

Under Directive 92/68/EEC, Germany had to provide evidence in the form of annual reports by an independent accountant that the aid was benefiting only yards in the former GDR. Further to this measure, the Commission and Germany agreed that quarterly reports (so-called spillover reports) should be provided. These reports, which were mostly very late in forthcoming, were produced by the same firm of accountants as audited BVV's annual accounts.

The reports confirm that the funds whose release was authorised by the Commission benefited only MTW and Volkswerft, that (in 1994) MTW and Volkswerft were run as separate profit centres, and that no spillover effects had occurred in transactions between MTW and Volkswerft and other BVV-owned companies. With regard to the yards' investments in BVV, it is confirmed that, as required by the Commission, these had been undertaken on normal market terms. The Susat report draws the conclusion that the authors of the spillover reports did not perform their mandate properly. Being aware of the expectations of the BvS and the Commission, they should at least have appended to their confirmatory certificates a reservation to the effect that they had not examined the placement of funds in BVV, especially in the cash concentration system.

For 1994 BVV reported a profit of DEM 56,5 million and in the spring of 1995 contemplated paying a dividend once more. Susat concludes that 'the management (of BVV) portrayed the group's profitability in 1994 and at the beginning of the 1995 financial year in too favourable a light. Although the group's annual accounts as at 31 December 1994 (...) comply with the statutory balance sheet and valuation requirements as currently worded and with one interpretation of the principles of proper accounting, the margin for manoeuvre (...) was exploited to the utmost.'

([12]) See Section II(5) for an explanation of how the system worked.

On the whole, therefore, the reports submitted by BVV and the then auditors described the financial transactions in an incomplete manner and painted too positive a picture of BVV's financial position.

4. Investigations into the extent to which funds were misused

The first signs of liquidity problems began to emerge at BVV in September 1995, but the company gave the impression that the difficulties had been overcome within a few days. However, the crisis erupted again in late October/early November 1995. The Commission accordingly sent an initial letter on 10 November 1995 asking whether the terms and conditions of the funds transferred by MTW to BVV were still in line with the spillover ban. Further questions concerning Volkswerft followed on 27 November. Several reminders and high-level talks followed in December and January. It is clear from the reports submitted by Germany that by late October 1995 the German authorities were aware of extremely high losses at BVV and that they knew, at the latest after talks between BVV and the BvS and various authorities on 29 November 1995, that a massive misuse of funds had taken place and that the resources of the eastern yards were 'no longer sufficient to meet their needs'. Nevertheless, the Commission received an initial report only on 2 February 1996, followed on 23 February 1996 by a further interim report by the firm of accountants KPMG, which had in the meantime been newly appointed as auditors by the BvS. The Commission's decision to initiate formal investigation proceedings under Article 93(2) was necessarily based on these two interim and incomplete reports.

The KPMG interim report contains an initial itemisation of the main uses and recipients of the funds taken from the cash concentration system. The basis for this itemisation was a letter dated 31 January 1996 from a senior employee of BVV to the BvS. The origin of the funds in the cash concentration system had at that time hardly been explored, as a result of which only a spread of potentially misused funds could be mentioned in the decision initiating proceedings.

It was then that Germany commissioned Susat to clarify matters further. In the first part of its comments of 3 September 1996, Germany reports on the findings of the investigations into the use made of the aid by BVV and confirms that a total of DEM 854,0 million had been placed by MTW and Volkswerft in BVV's cash concentration system by 31 December 1995 ([13]). Susat is of the opinion that it is impossible to determine unequivocally how much of this amount is accounted for by State aid. It is equally impossible to identify specific payments made under the cash concentration system as deriving from the aid or from the funds received from MTW and Volkswerft, since other subsidiaries of the BVV group such as Flender Werft and STN Atlas Elektronik were also net contributors to the system. Total deposits in the cash concentration system by the end of 1995 amounted to DEM 972,1 million, including the abovementioned amount of DEM 854,0 million originating from MTW and Volkswerft. ([14])

Over time the aid became so inextricably mixed up with the yards' other funds, such as advance payments received or own liquidity, that it is no longer possible to say what is aid and what is not. However, on the assumption that all aid which had not yet been used by 31 December 1995 was placed in the cash concentration system, the following amounts may be identified as aid:

(million DEM)

	MTW	Volkswerft
Operating aid	268,1	60,7
Investment aid	55,3	107,2
Closure aid	1,5	0,0
Subtotal (Lump-sum cash subsidy)	324,9	167,9
+ investment loan	112,4	0,0
+ accrued interest on aid (estimate) ([1])	85,0	54,4
+ transferable interim payments of regional aid	16,0	28,1
Grand total	538,3	250,4
Grand total both yards	788,7	

([1]) *Source:* Susat report of 5 September 1996, Annex 2a; by contrast to Germany's comments of 3 September 1996, this interest calculation is based on the actual dates on which the funds were disbursed. The figures do not include any interest on the investment loan as this was provided interest-free until March 1997.

([13]) According to the auditor's report, some further transactions took place up until 21 February 1996, so the balance in favour of the eastern yards on that date was DEM 846,1 million.

([14]) As a result of a series of transactions and interest accrued before BVV became insolvent, the total amount of claims by the two yards on BVV increased to DEM 868,9 million (including DEM 596,9 million for MTW and DEM 272,0 million for Volkswerft).

The interim payments of regional aid originate from aid received under the joint Federal Government/*Länder* programme for improving regional economic structures. Under the privatisation agreement, they were to be paid back by the yards to the BvS.

5. Investigations into the uses to which the misused funds were put

Finding answers to the question as to what the misused funds had actually been spent on proved to be extremely difficult. Although BVV had announced the opening of debt composition proceedings on 21 February 1996, the new chairman of the managing board was prepared only days before the liquidation began on 1 May 1996 to place documents at the disposal of Susat's employees and release the previous auditors from their obligation of secrecy. The requested documents were not made available until later, and then only partially. The BVV board members responsible for financial and auditing matters said they were not prepared to talk. It was therefore not possible to verify the BVV data set out in the letter of 31 January 1996 (see above). As indicated in the Commission decision extending the proceedings, Susat saw no reason to question the veracity of BVV's statements. Nevertheless the figures did not, it realised, reflect every movement of funds between 1993 and 1995, individual transactions having been singled out. Nor, it said, could any direct connection between the in-payments made by MTW and Volkswerft and specific uses be deduced from the data.

Lawyers acting on behalf of DSR-Senator Lines GmbH have proved, however, with the help of a letter sent by Germany on 19 December 1996, that BVV's data are to some extent manifestly wrong, something which was also conceded by Susat in a letter dated 5 February 1997 ([15]).

BVV's statements of 31 January 1996 therefore appear on the whole to be unusable as proof of the uses to which the funds were put. The Commission asked Germany on a number of occasions to take further steps to clarify the uses to which the aid had been put in BVV's various areas of activity between 1993 and 1995. Germany finally replied in a letter dated 17 July 1997 that: 'The Federal Government does not know for certain what use was made of the funds taken from the yards through the cash concentration system. Despite extensive inquiries in connection with the enforcement of the BvS's claims, which are being asserted also against members of BVV's managing board ([16]), a precise correlation with specific financial transactions within BVV cannot at present be established.' According to the information currently available, direct proof of the use of the aid intended for the eastern yards to cover specific expenditure by named companies elsewhere in the BVV group is therefore not on hand.

Since for the reasons given above it is not possible to obtain any direct evidence of the uses to which the misused funds were put, Susat concentrated its efforts on deducing the use made of the funds from the account balances of the group member companies in the cash concentration system. This proved possible, however, to only a limited extent.

— The cash concentration system was introduced in 1993/94 to cover the liquidity requirements of the various group activities and companies as far as possible from internal sources and thus to limit recourse to the more costly alternative of credit lines from banks. The various group member companies joined the system by concluding an agreement with BVV. In some cases, especially in that of MTW, enormous pressure was brought to bear by the group's top management. From the beginning of 1995 onwards, virtually every payment transaction involving the group member companies was carried out through the cash concentration system. The number of accounting operations is therefore extremely high and it is technically impossible to determine the proportion of aid in a given payment. The funds were reshuffled almost daily and the aid was mixed up inseparably with funds from other sources.

— The cash concentration system had a pyramid-like structure. Credit relationships were always established between a subsidiary and its immediate parent company. As a rule this was an intermediate holding company subordinate to the BVV holding company itself. The balances held by the intermediate holding companies were equalised using the target account of the BVV holding company, which decided on the granting of credit lines to the various group member companies. The intermediate holding company for MTW and Volkswerft was Vulkan Schiffbau Verbund GmbH (VSV), in which all the shipbuilding and shipping activities of the group were clustered ([17]). As a result of this pyramid-like structure, at no time was there any direct credit relationship between MTW/Volkswerft and the other operational units of BVV, such relationships existing solely *vis-a-vis* VSV. By virtue, however, of the applicable provisions of German law on liability in a *de facto* group, the claims of these shipyards are also enforceable against the umbrella holding company BVV.

([15]) Letter from Germany to the Commission dated 6 February 1997.

([16]) The judicial inquiries did not reveal anything new in this respect. It must be assumed at present that, within the group also, the eastern yards' funds were not kept separate; see judgment of the Bremen Regional Court of 8 October 1997, Case No 4-O-1073/96.

([17]) The shipping company DSR-Senator Lines did not belong to VSV and did not participate in the cash concentration system, being an 'associated company' within the shipbuilding division.

— The cash concentration system was brought to an end between December 1995 and February 1996. By then BVV's difficulties had reached the stage where business was being conducted normally in only a few areas of activity. When the system was closed down, the accounts were not equalised, but instead each company was either in the black or in the red. It cannot be concluded directly, however, from the fact that a group member company was in the black that that company had profited from the misuse of aid. Although most companies were either permanently in the black or permanently in the red ([18]), in a number of cases the position changed towards the end more or less by chance owing to in-payments which were in no way connected with State aid. Bremer Vulkan Werft GmbH had been in loss for many years and was accordingly a long-standing debtor towards the cash concentration system. However, since towards the end of 1995 the yard received a series of interim payments for ships under construction, it finished in the black. By contrast, Geeste Metallbau GmbH, a supplier to the yard, had for years been in profit. Only when Bremer Vulkan Werft wrung price concessions out of it with retroactive effect and refused to pay bills did it fall into the red. The transfer prices for internal group services were not actual market prices. Especially when one analyses the deliveries of ships by group member yards to shipping companies linked to the group, the services provided turn out to be overvalued. Lastly, account must be taken of the fact that in a number of cases the fact of being in the black was influenced by a remission of debt by the holding companies.

To conclude, it can therefore be said that the final accounting positions in the cash concentration system represent no more than a snapshot of the financial positions of the group member companies within the group. Owing to the system's pyramid-like structure, MTW and Volkswerft could not assert any claims against other operative companies belonging to the group. Overall it is quite clear that the substantial sums of money that were employed by BVV under the cash concentration system largely originated as aid for MTW and Volkswerft. There is also a strong likelihood that those companies that were persistently in the red benefited from the misuse of aid. But because of the constant mixing with other funds and for the other reasons given above, the proportion of the final liabilities of each subsidiary accounted for by aid can be determined only with the help of various assumptions. A clear causal link proving beyond a shadow of doubt that certain amounts held by a subsidiary started out as aid cannot as a rule be established. Germany accordingly endorses Susat's view that a direct connection between the amounts paid out of the cash concentration system and the amounts paid in by MTW and Volkswerft cannot be proved ([19]). In the case of Dörries Scharmann AG, which according to Germany's letter of 3 September 1996 withdrew DEM 304,5 million from the cash concentration system, it can, however, be said for certain that the company was the recipient of misused aid. The overall net payments from other sources would not otherwise have sufficed to cover the company's liquidity requirements.

([18]) The former category included, for example, STN Atlas Elektronik GmbH, Flender Werft AG and MTW-Schiffswerft GmbH, while the latter category included Dörries Scharmann AG, Dieselmotorenwerk Vulkan GmbH and Schichau-Seebeckwerft AG.

6. Steps taken by the German authorities to recover the misused funds

The misused aid forms part of the funds that accrued to BVV from MTW and Volkswerft through VSV in the form of loans under the cash concentration system. Both BVV and VSV have been insolvent since 1 May 1996. The repayment claims of MTW and Volkswerft were added to the schedule of debts in both sets of insolvency proceedings and confirmed down to the smallest amounts (of no relevance from an aid point of view) by the liquidator. The aid and the other funds in the cash concentration system can thus be retraced in so far as BVV and VSV still have any resources or saleable assets. The sale of assets as part of the liquidation also includes any shares in subsidiaries and any claims by BVV and VSV against subsidiaries.

The repayment claims of MTW and Volkswerft will be met once the liquidation proceedings are terminated up to the amount of the dividend for non-preferential creditors. BVV's liquidator stated back in 1996 that it will probably not be possible to pay any dividend for non-preferential claims.

When MTW and Volkswerft were taken over, all their repayment claims against BVV and VSV were assigned to the BvS, which is now following them up. At the same time, the BvS renounced all claims for recovery against the two yards. As stated in the Commission's proposal for a regulation on aid to certain shipyards under restructuring ([20]), this was necessary to allow the restructuring to go ahead.

([19]) Letter from Germany dated 17 July 1997.
([20]) OJ C 153, 22.5.1997, p. 3.

Besides following up the claims in the liquidation proceedings, the BvS has brought actions for damages against five BVV management board members before the Bremen Regional Court. On 8 October 1997 the court dismissed four of these actions, finding that the board members were not personally liable. The BvS has appealed against these decisions. The trial court has yet to deliver judgment in the fifth case.

III. COMMENTS FROM THIRD PARTIES ON THE EXTENSION OF THE PROCEEDINGS

Following the initiation of proceedings the governments of two Member States sent comments to the Commission. These were summarised in Part III of the notice concerning the extension of the proceedings ([21]).

The governments of two Member States, two national shipbuilding associations and seven companies stated their positions on the extension of the proceedings.

One Member State took the view that, first, the aid amounts that had not been authorised by the Council or the Commission should be recovered from the companies (i.e. MTW and Volkswerft) in accordance with normal practice. Second, any aid unlawfully received by other companies belonging to the BVV group should be recovered. The other Member State doubted whether MTW and Volkswerft needed any fresh restructuring aid. The sale of BVV's assets should have sufficed to cover both yards' new liquidity requirements.

It is not the purpose of these proceedings to assess any new restructuring aid for MTW and Volkswerft. The matter was discussed in the Council in connection with Council Regulation (EC) No 1013/97 of 2 June 1997 on aid to certain shipyards under restructuring ([22]). The Commission would point out, however, that the proceeds from the sale of BVV's assets benefited only preferential creditors. It was not possible to finance the further restructuring of MTW and Volkswerft out of these resources.

One shipbuilding association likewise objected strongly in its comments to the granting of any fresh aid to MTW and Volkswerft. In its view the yards were themselves responsible for transferring the funds to their parent company and they themselves ought therefore to see to their recovery. All aid should, it stated, be paid back to the State if it could not be proved that it had been used for the purpose for which it was intended. The argument to the effect that Germany had no influence over the misuse was not satisfactory. Germany ought, in accordance with the decisions of the Council and the Commission, to have made sure that it did exert sufficient influence and thus be in a position to ascertain that the aid was being used properly. The association called lastly for improved, uniform monitoring of the use of aid by the Commission. Until this was assured, no further aid decisions should be taken.

The other shipbuilding association took the view that MTW and Volkswerft had profited from the cash concentration system through their links with BVV. At all events BVV had, it claimed, gained a competitive advantage over the yards belonging to the association, and the conduct in question was partly responsible for the collapse in prices in the shipbuilding market. In 1996 four out of five east German yards had exceeded their capacity limits. All these points should, it argued, be taken into consideration in the decision on fresh aid to MTW and Volkswerft.

As indicated above, these proceedings are not concerned with the question of new aid. As regards any exceeding of capacity limits, as far as the Commission is aware this occurred only in the case of MTW. The Commission punished this infringement by reducing the aid in its decision of 30 July 1997 ([23]).

The seven companies, which were all previously connected with BVV either as subsidiaries or as associated companies, all state in their comments that they had no knowledge of the refinancing of the cash concentration system or of the misuse of the aid. They had assumed from statements by the group's top management that the banks had granted generous lines of credit and that there was a large amount of freely disposable liquid assets. Individual companies belonging to the group also refer to their limited independence when taking strategic decisions in the financial sphere, when acquiring new subsidiaries and when performing large contracts within the group. They were therefore not commercially responsible for the losses they had had to cover through obligations under the cash concentration system. According to Lloyd Werft Bremerhaven, Schichau Seebeckwerft AG and Volkswerft, this applied especially to the second half of 1995 when those companies had been compelled to contract loans on behalf of the group and had had to provide part of their assets as guarantees.

DSR-Senator Lines pointed out, lastly, that in its case misuse of aid through the cash concentration system was impossible. The relevant liquidity inflows had occurred at a time when the two yards did not yet have the resources, and DSR-Senator Lines had never been included in the cash concentration system.

([21]) See footnote 2.
([22]) OJ L 148, 6.6.1997, p. 1.
([23]) Case C 60/96, see OJ C 344, 14.11.1997, p. 2.

The German Government stressed in its reply that, despite extensive inquiries, it could draw no definite conclusions as to the uses to which the aid had been put. Owing to the large number of in-payments and out-payments by the companies participating in the cash concentration system, there was no concrete evidence on the allocation of specific aid resources. In the absence of proof to the contrary, it had to be assumed that the companies which benefited from the cash concentration system were not, and could not have been, aware of the outflow of aid from the yards. Especially when BVV was under a contractual obligation to finance companies ([24]), those companies' managers were entitled to rely on being able to receive funds under the cash concentration system for that purpose. Germany reserved the right, however, to take further steps if new evidence came to light and was therefore not in a position to comment on the observations made by individual companies.

IV. **ASSESSMENT**

The notifications of the restructuring programmes for MTW and Volkswerft were from the outset incomplete and, in part, factually incorrect inasmuch as Germany did not inform the Commission of the agreements it had reached with BVV on the payment of the lump-sum cash subsidy. The reasons given, namely that if other payment conditions had been imposed there was a risk that BVV might have refused to take over the yards, and that Germany assumed that authorisation would be forthcoming for payment of the entire aid amount in one instalment, cannot justify this behaviour. If only because of the agreement to the effect that the interest on the as yet unauthorised amounts would be waived with retroactive effect once the aid was authorised by the Commission, Germany's argument that the advance payments took the form of loans at normal commercial rates is incorrect. Member States are required pursuant to Article 11(2) of Directive 90/684/EEC to notify to the Commission in advance any new aid scheme covered by the Directive and they may not put it into effect without the Commission's authorisation. Germany has disregarded this provision. The infringement took place throughout the period from October 1992 until the time of BVV's collapse, as even when it applied for the release of further instalments Germany omitted to inform the Commission of the earlier payments.

It follows both from the provisions of Articles 6 and 7 of Directive 90/684/EEC and above all from the exception provided for by Article l0a as inserted by Directive 92/68/EEC that all restructuring aid payments had to be strictly limited to the activities of yards situated in the new *Länder*. When Directive 92/68/EEC was adopted, the Commission undertook to ensure that the yards in the new *Länder* received only such aid as was needed for restructuring. The Commission referred to these provisions in each of its decisions releasing instalments of the aid. The decisions also contained a statement of the reasons for the size of the relevant aid instalment. In assessing the scale of operating aid the Commission took into account both the need for the aid and the deadline referred to in Article l0a(2)(a). In assessing the instalments of investment and closure aid to be authorised pursuant to Articles 6 and 7, it was guided in conformity with those provisions by the need for funds in the light of the investment and redundancy plans submitted by Germany. In the course of the proceedings Germany did not furnish any information which might have objectively justified the advance payment of aid the release of which had not yet been authorised. On the contrary, the deadline referred to in Article 10a led in the case of operating aid to payments being authorised well before the need for funds actually arose. As a result of repeated delays in the implementation of the investment programme, the amount of investment aid authorised for release almost always exceeded the need for funds at that particular moment. The payment of aid without the Commission's prior authorisation and in excess of the amounts authorised was therefore not only expressly unlawful, but it was objectively unjustified and incompatible with the provisions of Articles 6 and 10a of Directive 90/684/EEC (as amended).

This holds true especially for the DEM 112,4 million 'investment loan' to MTW-Schiffswerft, which was granted on 22 March 1993 but never used for investment purposes, and for the DEM 70,5 million of investment aid for Volkswerft, which was paid in January 1994 despite the fact that up until the time of BVV's collapse there was no need for it.

The regional aid totalling DEM 44,1 million (DEM 16,0 million for MTW and DEM 28,1 million for Volkswerft) which found its way into the cash concentration system is likewise to be considered incompatible. These amounts can be traced back to the joint financing of the restructuring drive, being funds from the Treuhandanstalt and the joint Federal/*Länder* development programme. It was never intended by the providers of the aid that it should be retained by the recipient companies, being instead repayable under the privatisation agreements to the Treuhandanstalt/BvS. Ultimately, however, additional aid was channelled through the chosen handling mechanism to the companies and the needs-based amount authorised in each case by the Commission was exceeded.

([24]) Such obligations existed above all in respect of businesses in the new *Länder* which had been taken over by the Treuhandanstalt.

Lastly, the advance payments produced considerable benefits in terms of interest earned. According to the Susat report's calculations, this may be put at some DEM 100 million for the period between 1992 and the beginning of 1996. On the basis of the assumptions made in that report, which though simplistic are basically plausible, during that period a total of DEM 139,7 million accrued as interest, including approximately DEM 39 million attributable to authorised aid from the time of its authorisation.

Of the DEM 788,7 million of aid which according to the analyses submitted by Germany was to be found on 31 December 1995 in the cash concentration system, approximately DEM 327 million consisted of amounts whose disbursement had not been authorised by the Commission and which must be considered incompatible with the Treaty.

It has not been clearly ascertained so far, however, for what purposes the aid which, though disbursed, has not been used, was applied in each case. There are basically two reasons for this. Contrary to normal commercial practice, the Treuhandanstalt did not ensure that provision was made in the privatisation agreements for any earmarking of the lump-sum cash subsidy or for any suitable monitoring procedures. With the exception of the sums placed in a blocked account at the end of 1993, the aid became mixed up with the group's other funds. From 1995 at the latest this state of affairs became irreversible owing to the multitude of transactions in the cash concentration system. According to the available documents, in particular the expert's report of the auditors Susat, it is however very likely that at least the main debtors under the cash concentration systems received parts of the misused aid. In the case of Dörries Scharmann AG (which went into bankruptcy in the meantime) this is to be regarded as certain, even if the exact amount cannot be established until now. When the system was wound up, all the claims of MTW and Volkswerft were offset by liabilities of other parts of the BVV group. These claims, totalling DEM 854 million, included aid amounting to DEM 788,7 million. It is certain, therefore, that this aid has not, as required by Article 10a(2)(d) of Directive 92/68/EEC, benefited only yards in the former German Democratic Republic, and that the aid for MTW and Volkswerft has been misused within the meaning of Article 93(2) of the EC Treaty. According to that provision, misused aid must be abolished or altered. Alteration of the aid in the sense of restitution of the misused amounts to MTW and Volkswerft is out of the question as when they were hived off from BVV both yards assigned their claims to the BvS. All the misused aid, totalling DEM 788,7 million, must therefore be abolished and recovered. The German Government has informed the Commission that the BvS has taken the steps required by German law to recover the aid as part of the BVV and VSV insolvency proceedings,

HAS ADOPTED THIS DECISION:

Article 1

The aid which was granted to MTW-Schiffswerft GmbH, Wismar, and Volkswerft GmbH, Stralsund, for their restructuring was disbursed without being notified fully to the Commission in advance. It was therefore granted unlawfully in infringement of Article 11 of Directive 90/684/EEC and Article 93(3) of the EC Treaty. Including interest accruing up until the end of 1995, the two companies received approximately DEM 327 million more in the way of aid than had been authorised by the Commission. The granting of this additional amount of DEM 327 million infringes Articles 6 and 10a of Directive 90/684/EEC. This aid amount is accordingly incompatible with the common market.

Article 2

The aid referred to in Article 1 and part of the aid which was authorised by the Commission for the restructuring of the two yards was misused elsewhere in the Bremer Vulkan Verbund AG group. On the basis of the analyses submitted by Germany, the-total amount of funds thus misused may be put at DEM 788,7 million. This misuse constitutes a misuse of aid within the meaning of Article 93(2) of the EC Treaty.

Article 3

Germany shall recover the misused aid from Bremer Vulkan Verbund AG as part of the insolvency proceedings concerning that company and shall take all steps required by German law to recover any partial amounts from companies previously belonging to the Bremer Vulkan group should suitable opportunities arise in the course of subsequent inquiries. In the recovery of the aid according to the procedures and rules under German law, accrued interest is to be taken into account.

Article 4

The German Government shall inform the Commission within one month from the date of notification of this Decision of the measures taken to comply therewith and of their outcome.

Article 5

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 22 July 1998.

For the Commission
Franz FISCHLER
Member of the Commission