II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 25 November 1998

on measures by Germany to assist InfraLeuna Infrastruktur und Service GmbH

(notified under document number C(1998) 3840)

(only the German text is authentic)

(Text with EEA relevance)

(1999/646/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 given notice to the parties concerned to submit their comments, in accordance with that Article,

Whereas:

I. PROCEDURE

On 15 April 1997 the Commission wrote to the German Government, informing it that on 12 March it had decided to initiate proceedings under Article 93(2) of the EC Treaty. The proceedings related to DEM 765 million which InfraLeuna Infrastruktur und Service GmbH (hereinafter referred to as 'InfraLeuna') was to receive from the Bundesanstalt für Vereinigungsbedingte Sonderaufgaben (hereinafter 'the BvS'), and DEM 300 million which was to be provided by the *Land* of Saxony-Anhalt; the Commission was concerned that the money might constitute state aid and, if so, that it might not be compatible with the common market.

The Commission's decision to initiate proceedings was announced in the *Official Journal of the European Communities*; the notice called on Member States and interested parties to submit observations [1]. The German Government submitted its observations on the decision in a letter of 14 August 1997.

The Commission had received observations opening the proceedings, from one Member State, three trade associations and four companies; it passed these on to the German Government by letter of 28 August. The German Government replied by letter of 17 November.

In letters dated 14 May 1997, 1 December 1997 and 18 March 1998, the Commission put a number of questions to the German Government that had arisen in connection with the case. The German Government replied in its letter of 14 August 1997 and in further letters on 9 January and 10 July 1998. In order to clarify the case further, meetings between the German authorities and the Commission took place in Leuna on 7 and 8 July 1997 and in Brussels on 30 April and 28 July 1998.

II. FACTS

On the basis of the letters cited here and the information supplied by the German Government at the meetings just referred to, the facts of the matter can be stated as follows.

1. Background

The case concerns the privatisation of the infrastructure at the Leuna chemical complex in Saxony-Anhalt, a region which qualifies for assistance under Article 92(3)(a) of the EC Treaty [2].

[1] OJ C 196, 26.6.1997, p. 3.

[2] Commission decisions on state aid measures N 464/93, SG(94) D/5633 of 22 April 1994, and N 613/96, SG(97) D/488 of 23 January 1997, which apply until the end of 1999.

Chemicals was one of the main industries in the former German Democratic Republic, using a workforce of about 90 000. It was based in Saxony and Saxony-Anhalt, forming what is known as the 'chemical triangle'. Production was concentrated in a few very large state-owned enterprises, which were interlinked and dependent on one another for supplies of raw materials, intermediate products, energy and so on. The chemicals industry in Leuna was an important component in the chemical triangle, employing 26 000 people.

After the unification of Germany in 1990, the Treuhandanstalt privatisation agency (hereinafter: 'the Treuhand') sought to privatise the chemicals industry. The first step was to create economic units of a size that might interest a potential buyer. In 1990, the Treuhand set up Leuna Werke AG on the Leuna site, as the immediate successor to the old state enterprise ('Volkseigener Betrieb'). At the beginning of 1994, the form of the company was changed, with Leuna Werke AG becoming Leuna-Werke GmbH (hereinafter 'LWG'); and in June 1994 a new company was hived off under the name Leuna-Werke Standortservice GmbH (hereinafter 'LWS'), whose object was to provide, on site, the infrastructure and supply the services necessary for the manufacturing operations. These included roads, pipe bridges, fire-fighting services, waste dump, fresh water supply, waste-water collection, laboratory services, communications, and energy, gas and water supplies.

2. **The Treuhand's efforts at privatisation**

The Treuhand initially planned to sell the entire Leuna site with the existing infrastructure as a single enterprise, and in 1991 and 1992 Leuna Werke AG was offered for sale, in an international, open, transparent and unconditional tendering procedure. However, no investor was found who was prepared to take over a chemicals operation on this scale. In addition, the plant was in a dilapidated condition, so that a buyer would have had to undertake substantial investment and extensive anti-pollution measures.

The Treuhand then changed its approach, and decided to split up the product lines and privatise them separately. The separate units were offered for sale in open, transparent and unconditional procedures; by the end of 1994 there had been 97 privatisations. The various chemical product lines were sold to a range of investors including UCB, Rhone Poulenc and Dow. The biggest chemical investors on the site were Linde AG, which took over the production of industrial gases, and Caproleuna, a wholly-owned subsidiary of the Domo Group, […] (*), which took over the production of Caprolactam.

Most of the product lines were sold and the volume of production grew substantially; the site infrastructure, however, remained in the hands of the Treuhand, which in turn assigned it to its subsidiary, LWS.

For the continued operation of the infrastructure, there were roughly two alternatives: either it could be run by the public sector (in the shape of the *Land*, the local authority, or a public utility); or a private buyer could be found. In 1992, in order to evaluate the needs of the site and to identify the best solution, the Treuhand commissioned studies of the site from internationally recognised consultants. At the same time it made repeated attempts to persuade the *Land* of Saxony-Anhalt and the municipality of Leuna to take over the infrastructure. The negotiations were ultimately broken off when it became clear that neither the *Land* nor the municipality was prepared to take on the operation of the facilities.

Consequently, the only options left were for the infrastructure to be sold to a private investor or for the Treuhand itself to go on operating it. The Treuhand had to bear in mind that the earlier calls for tenders had shown that investors generally had no interest in taking over the infrastructure and that the number of enterprises qualified to run it was small, given the size of the site and the specialised manufacturing going on there. It was not clear, either, whether as regards the site it would make more sense to sell the entire infrastructure to a single investor or to separate the different parts and sell them off to different investors.

In 1992, therefore, the Treuhand began making direct approaches to companies that possessed the necessary technical know-how and specific knowledge of the chemicals industry. Companies that were important in the industry, and especially companies already operating there, were taken to visit the site; LWS allowed interested parties full freedom to inspect its books, under agreements known as 'due diligence' ([3]) agreements ([4]), and gave them copies of the consultants' studies. In this way, the Treuhand hoped to stimulate interest in the site among companies and to involve them in the search for a workable solution.

Between the end of 1992 and the end of 1994, the Treuhand negotiated with three serious candidates for the sale of the entire infrastructure: with a consortium consisting of Thyssen, VEW and Steag; with Mannesmann AG; and with the French Compagnie Générale des Eaux. But the negotiations came to nothing, and no acceptable offer was made. No one was prepared to take on the entire infrastructure, so that the facilities of little commercial interest, such as roads and pipe bridges, would have remained in the hands of the Treuhand.

(*) Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets and marked with an asterisk.

([3]) The English term is used in the German text.

([4]) Interested parties were given full access to all business papers so as to enable them to make offers, but had to undertake not to misuse the knowledge thereby acquired.

Nor would the potential buyers accept any safeguards to provide protection against what would be a de facto monopoly in such things as energy and water supplies, and they refused to bear the risks for site development and consumption if large customers preferred to make their own arrangements. It became clear that if any of the potential buyers were to take over the entire infrastructure the privatisation operation at the site would be a great deal more expensive and, indeed, that its success might be endangered.

At the beginning of 1994, alongside its efforts to privatise the infrastructure as a single package, the Treuhand opened negotiations with various investors regarding the sale of separate lots. However, these efforts too had to be broken off without success at the end of 1994: many of the potential buyers demanded impracticable guarantees of turnover; several lots proved unsaleable; it was not possible to coordinate the individual awards; and there was no discernible economic advantage either to the Treuhand or to the site.

Early in 1994, faced with the prospect that the negotiations under way at the time would fail, the Treuhand convened what was called a 'site conference', which was intended to carry the privatisation process forward and to sound out any impetus for new approaches. The companies on the site were asked to develop ideas and to discuss them. Other participants were Thyssen-Sonnenberg and Westdeutsche Instandhaltungsgesellschaft, who were interested in carrying out renovation and maintenance work. The conference produced a scheme for an integrated infrastructure corporation, in which the firms on the site would take holdings, and which would not merely manage and reorganise the infrastructure but would also be responsible for developing the site and privatising the remaining land and product lines. However, although the scheme was designed jointly, the firms were very reluctant to take shares in this site-management corporation. Ultimately, only Linde and Caproleuna proved willing to enter into negotiations. In October 1994 a statement of intent was agreed, and in November a preliminary contract was concluded for the purchase of 51 % of the shares in the infrastructure corporation, which had yet to be established. The corporation was set up legally on 15 February 1995, under the name InfraLeuna Infrastruktur und Service GmbH, and began operations on 1 January 1996. On 22 May 1996 the privatisation agreement with Linde and Caproleuna was signed, with retroactive effect from 1 January 1996. Caproleuna and Linde each took 25,5 % of the shares in InfraLeuna, while 49 % remained with the Treuhand's successor organisation, the BvS. The price paid was DEM 1,53 million, equal to 51 % of InfraLeuna's DEM 3 million capital. It is intended to persuade other investors on the site to take the shares held by the BvS so that, if possible, all of them will ultimately participate in InfraLeuna.

3. **The scheme**

The Treuhand organised the privatisation on the basis of the characteristics of the site as it found it, and Leuna has accordingly become a cluster of dissimilar and legally independent chemical production plants. Site servicing is a great deal more complex than what is needed on conventional industrial estates, because of the measure of mutual dependence which exists, the variety of infrastructure networks, especially pipelines and pipe bridges, and the links with such things as roads, railways, waste-water disposal systems and energy supplies. The manufacturers on the site are dependent on supplies of various raw materials, and need an efficient infrastructure to deliver them. Because of the lack of assured availability of power, gas, etc., the buyers of privatised firms frequently made it a condition that the Treuhand, or later the BvS, should guarantee the provision of particular services. As the privatisation process progressed, therefore, an extremely complex structure of contracts emerged under which the BvS was bound by extensive supply obligations to a variety of investors. But after 40 years of a planned economy the existing facilities were in a dilapidated condition and in need of thoroughgoing renovation and overhaul. Yet at the same time as renovation went ahead, privatisation and development had to continue and new firms had to be accommodated on the site.

It was in the interests of the firms already present that the infrastructure should be provided at an attractive price, and that the range of firms on the site should ensure them a supply of the particular intermediate products or raw materials they needed and provide outlets for their own products.

The scheme arrived at is the one most likely to meet the special needs of the site and to do justice to the interest of the BvS and of the investors. InfraLeuna is to manage the restructuring and undertake the investment needed to improve and modernise the site infrastructure. It is to continue development of the site and to seek new investors so that the remaining industrial sections of the site and product lines can be sold. Suitable buildings and land inside the site have been transferred to InfraLeuna for this purpose, amounting to a total of some 190 ha available for newcomers. It is also to provide the operational infrastructure and the necessary services at the site, allowing the exchange and transport of goods and ensuring supply to the firms. This phase of the restructuring is to be completed by 31 December 2000.

The investors are required to plan and organise their own infrastructure, in a mechanism approaching that of a cooperative society. Their involvement ensures that InfraLeuna has the necessary expertise and know-how. Thus they are in a position to judge which products will fit best into the overall pattern so that the structure of firms on the site can be expanded sensibly. Their closeness to the site ensures that the services offered can be tailored to real needs, superfluous facilities avoided, and costs kept down. Their membership of

the company makes them suppliers as well as consumers; they have an interest in keeping prices low, while nevertheless covering the costs of the facilities and services offered. They also have a greater interest in the additional integration effects which can be secured if fresh arrivals contribute to successful and balanced development of the site, improving sales of their own products and ensuring inexpensive supplies of the materials they need for their own business.

The scheme offered the BvS the possibility of transferring its privatisation function and all its related obligations to InfraLeuna. InfraLeuna has also taken over supply and service contracts concluded by LWS and LWG in connection with the privatisations, releasing them from their supply obligations towards the investors on the site.

Thus the respective interests of the parties were the basis of the scheme and an essential condition of its success: the BvS was under an obligation to carry out its public mandate to privatise the site and to perform the contracts it had concluded in the course of privatisation, while the firms on the site needed a functioning infrastructure at an acceptable price and a process of rational settlement of new investors. The BvS consequently had an interest in keeping the costs of development as low as possible and in securing a guarantee that the infrastructure manager would not misuse its monopoly position. Such a guarantee could be given only by firms which had located on the site themselves, since it would be against their own interests to raise the prices of InfraLeuna's services and to establish and exploit monopolies.

In addition to being the only firms on the site interested at this stage in acquiring shares in InfraLeuna, Caproleuna and Linde were also the right partners for the task. As established chemicals firms they possessed sufficient expertise to be able to canvass and negotiate with firms that might be interested in setting up on the site, and had extensive knowledge of structure of the chemicals industry, its technical and economic aspects, and its development. They were in a position to judge and plan the effects of the integration of new arrivals, and had the necessary contacts, experience and qualified staff. As the largest manufacturing companies on the site, they had a strong interest in seeing InfraLeuna develop successfully within a short time: Caproleuna is a large or at least medium consumer of almost all the services offered and can expect further cooperative integration effects from any new firms that might move in. Linde can expect greater sales of industrial gases only if the site develops well.

InfraLeuna is consequently not designed to make a profit, but instead is governed by the low-profit principle. This means that it is required to organise its business in such a way that its costs are covered and its cash flow is sufficient to cover current reinvestment and maintenance. It can distribute no more than 10 % of its capital as dividends to the shareholders. Any remaining profit must be retained in the company.

On 1 January 1996, InfraLeuna employed 906 people. But the number of employees is steadily being cut down to 600. In 1996, InfraLeuna achieved a turnover of DEM 437 million and in 1997, the figure was DEM 409 million. Ordinary activities resulted in losses of DEM […] (*) in 1996 and DEM […] (*)in 1997, while the ongoing repair work and restructuring measures brought net annual losses of DEM […] (*)in 1996 and DEM […] (*) in 1997. Cash flow totalled DEM […] (*)in 1996 and DEM […] (*) in 1997.

4. **InfraLeuna's activities in detail**

4.1. ***Investment and restructuring***

In the first place, the existing facilities have to be repaired, modernised, and adapted to the real needs of the site and to the safety and environmental standards laid down by law or imposed by the authorities. A large proportion of the existing networks and facilities are completely obsolete, neglected and oversized, and can be operated only at a heavy loss owing to the high level of unused capacity and similar factors. The rail network is to be cut back from 156 km to 55 km, the drinking water network from 90 km to 31 km, and the road network from 120 km to 20 km. The BvS, in collaboration with Caproleuna, Linde and experts, has worked out a programme of measures for the site stretching over the period from 1 January 1995 to 31 December 2000, and this has become a business plan forming an integral part of the privatisation contract. The business plan details every measure and investment needed for reconstruction, restructuring, the repair of environmental damage, and so on. InfraLeuna will also make its specialised knowledge available so that changes to the plans which prove necessary as restructuring progresses can be made in full knowledge of the facts. The measures are vital if InfraLeuna is to be able to operate the facilities economically in the long term.

4.2. ***Site clearance***

Site clearance comprises all measures taken to dismantle plant and technical facilities, to demolish buildings, to remove and dispose of rubble, excavated material, building materials, plant and stored substances, and to fill and level the site. The clearance plan forms part of the business plan, which also calls for excavation of subsurface rubble where this is made necessary by the planned use of the area. On most sections there are buildings and plant which have served for the production of chemicals for decades and which in view of their ramshackle and contaminated condition are no longer

usable. The costs of demolition and disposal are substantial; they frequently cannot be estimated in advance, and are usually several times higher than the price of the land. If it did not clear the site first, InfraLeuna would not be able to interest investors in the possibility of locating there and could not sell those plots. The bulk of the restructuring and clearance work is being put out to Community-wide tender in accordance with Directives 92/50/EEC ([5]), 93/36/EEC ([6]) and 93/37/EEC ([7]) on procedures for the award of public contracts. For other orders and contracts InfraLeuna obtains at least three estimates.

4.3. ***Canvassing and new settlement***

InfraLeuna is taking over responsibility for the further privatisation of the site from the BvS. It is conducting an intense advertising campaign for the site in the specialist press, and distributing information packages and brochures it has prepared among potential buyers. It is negotiating with investors and trying to persuade them to buy plots at the site and to invest there.

Land is sold at the market price for developed industrial sites. The German Government has given the Commission three valuations by independent valuers. The valuers concluded that an average price of more than DEM 25 per m² would not be obtainable, as there was a surplus of industrial sites in the new *Länder*.

4.4. ***Provision of infrastructure***

InfraLeuna has also taken over from the BvS the responsibility for providing the necessary infrastructure and services on the site. This includes roads, the supply of electricity and steam, the supply of drinking water, fresh water and cooling water, waste-water disposal, laboratory services, electricity-supply cabling, fire-fighting services, posts and telecommunications, provision of bridges to carry pipes for the supply of gases and liquids between the different production lines, waste disposal site, and so on. InfraLeuna also receives revenue from the rental and leasing of sections of buildings in its ownership.

Those using the services pay charges to InfraLeuna. Pipes and cables are laid at the expense of the recipient firms and are their property; the recipients pay a fee for the use of pipe bridges. When it calculates its prices InfraLeuna is required to comply with certain principles laid down in the privatisation contract. It may not give preference to its own shareholders or place other firms at a disadvantage. In what are known as the 'core' areas, which are areas of business where it is in a monopoly position (the road network, the rail network, pipe bridges, water supply and disposal, and power generation and distribution), InfraLeuna has to apply a system of charges based on the following principles:

— the low-profit principle,

— costs to be allocated in accordance with recognised commercial principles to all consumers on a non-discriminatory basis,

— prices to be differentiated on the basis of the quantities and services provided,

— prices to be governed by sliding-scale clauses in accordance with practice in the industry,

— account to be taken of the necessary reinvestment ratios and financing costs ([8]),

— supplies and services to be provided on an arm's-length basis.

In other areas, InfraLeuna is to supply its services at prices negotiated with the recipient. Here, too, it is prevented from advantaging or disadvantaging individual recipients.

5. **Funding of InfraLeuna**

The scheme, including the business plan, was submitted for appraisal by the BvS Steering Committee ([9]); the end result is that InfraLeuna is to receive total funding of DEM 1,13 billion. Altogether, the BvS is to provide DEM 730 million of this, while the *Land* of Saxony-Anhalt is to provide DEM 300 million for investment under the nationwide regional aid scheme ([10]). The Commission had previously authorised investment costs of DEM 100 million for the year 1995 in Decision 96/545/EC concerning aid proposed by Germany to Buna GmbH, Sächsische Olefinwerke GmbH, Leuna-Werke GmbH, Leuna-Polyolefine GmbH, and BSL Polyolefinverbund GmbH ([11]).

([5]) OJ L 209, 24.7.1992, p. 1.
([6]) OJ L 199, 9.8.1993, p. 1.
([7]) OJ L 199, 9.8.1993, p. 54.

([8]) Capital costs are also taken into account in the price calculations, in line with recognised commercial principles.
([9]) The Steering Committee (*Leitungsausschuß*), is an independent body of the BvS which assesses schemes and carries out checks to ensure that public resources are properly used. It is appointed by the Federal Ministry of Finance and consists of independent auditors. At the relevant time its members were experts from Roland Berger and C&L.
([10]) The 24th outline plan adopted under the Joint Federal Government/*Länder* programme (Gemeinschaftsaufgabe), a Commission-approved aid scheme (N 531/95, SG(96) D/4868 of 22 May 1996).
([11]) OJ L 239, 19.9.1996, p. 1.

Breakdown of InfraLeuna's total funding

Measure	Amount (in million DEM)
Investment/restructuring ([1])	800
Site clearance ([1])	250
Cash flow compensation ([1])	50
Working capital	30
Total	1 130

([1]) The privatisation contract provides for flexible use of resources between these headings; the following transfers are allowed: between clearance and losses, DEM 50 million; between clearance and investment, DEM 100 million, and between investment and losses, DEM 50 million. This means that the budget for loss compensation can be increased by a total of DEM 100 million, to DEM 150 million.

Initially, in the business plan, the BvS, Caproleuna and Linde estimated the restructuring and investment costs at DEM 960 million. But after careful study of the catalogue of measures they had drawn up, the Steering Committee came to the conclusion that these costs were exaggerated, and reduced them by DEM 160 million, to DEM 800 million. The business plan called for investments totalling DEM 550 million by the beginning of 1998. Owing to delays, however, only DEM 275 million was actually invested by that time, so that the programme is running late, but the remaining measures are still being taken.

The BvS undertook to provide a total of DEM 250 million for site clearance. For the year 1996 it also granted InfraLeuna a further DEM 135 million under paragraph 249h of the Employment Promotion Act ([12]). In the event that this funding for costs of materials was not spent in its entirety in the year 1996, the BvS undertook to pay InfraLeuna the difference, provided that it was used for the same measures ([13]). When the Commission initiated proceedings, it worked on the assumption that the money taken up under the Employment Promotion Act in 1996 would total DEM 100 million, and concluded that the extra to be considered would amount to DEM 35 million. In the event, the sum taken up in 1996 was only DEM 35,4 million, so that the difference to be made up by the BvS amounted to DEM 99,6 million. Following negotiations, the BvSsucceeded in having its liability reduced to DEM 38 million, so that the financing it is to provide for site clearance measures will amount to a maximum of DEM 288 million. According to information supplied by the German Government, spending on site clearance will turn out about DEM 100 million lower than the cost originally calculated. Here InfraLeuna has had the benefit of a substantial fall in prices.

Under paragraph 12 of the privatisation contract, the BvS is bound to make good any losses or negative cash flow arising during the restructuring phase. The approximate cash flow currently forecast on this basis for the period 1996 to 2000 is a positive DEM 36,8 million.

The BvS is providing InfraLeuna with working capital of DEM 30 million.

Furthermore, if the funding provided by the *Land* of Saxony-Anhalt should turn out to be less than the DEM 300 million planned, the BvS has undertaken to make up the difference under certain strict conditions.

The privatisation contract also provides that InfraLeuna has no responsibility under public law or liability under private law for damage caused by the operation of the plant or the use of the land before 1 July 1990 (known as 'inherited liabilities' (*Altlasten*)). It is also freed from 90% of any liability for the cost of protection against hazards arising as a result of damage caused before 1 July 1990, and the cost it may be called on to bear in this connection is limited to DEM 5 million. The German authorities estimate the total expenditure needed here at approximately DEM 150 million.

Breakdown of funding by source ([1])

(in million DEM)

BvS	Investment/restructuring	400
Land of Saxony-Anhalt	Investment/restructuring	300
BvS	Site clearance	288
BvS	Loss compensation/negative cash flow	50
BvS	Working capital	30
Total		1 068

([1]) The table does not include the DEM 100 million for investment and restructuring granted by the BvS in the past, the funding under paragraph 249h of the Employment Promotion Act, and the exemption from inherited liabilities granted by the BvS.

6. **Payment and monitoring the use of funds**

The privatisation contract regulates the granting and provision of funds by the BvS. The BvS is to lodge a sum of DEM 657 million in an account with the Landeszentralbank Berlin ('the Bank'). This sum is to be entered in InfraLeuna's capital

([12]) State aid measure NN 117/92. Measures under paragraph 249h of the Employment Promotion Act (Arbeitsförderungsgesetz, AFG) are intended to repair environmental damage and to prevent hazards resulting from such environmental damage on former industrial sites in the new *Länder*. The provision allows subsidies towards wage and other costs; the measures also serve to create employment, especially for unemployed young people, older people and the handicapped. The Commission found that the provision of public funds for the repair of environmental damage brought about before 1 July 1990 did not constitute state aid, in line with the transfer date provision in the first Treuhand Decision, and that the schemes to assist young people and in the framework of social services were not services for which there was competition. The Commission held that the measures in question did not constitute state aid.

([13]) The flexibility ceilings for transfers to investment or losses would increase correspondingly, and in addition the flexibility ceilings could be raised by the value of the measures taken in 1996 using funding under paragraph 249h of the Employment Promotion Act.

reserve. InfraLeuna does not have sole disposal of the account. The BvS is also to give InfraLeuna a claim for DEM 73 million, which falls due only when the sum in the account is exhausted. The money in the account with the Bank and InfraLeuna's claim on the BvS bear interest of 3,5 % per annum to offset inflation, and this interest is likewise available to InfraLeuna.

Acting in accordance with the liquidity schedule in the business plan, InfraLeuna is to ask the BvS to transfer money to its own business account. Departure from the business plan is possible only with the agreement of the BvS; cases of disagreement are to be settled by a conciliation and arbitration procedure laid down in Article 27 of the privatisation contract. InfraLeuna's resources must remain outside the buyers' group finances. The BvS may refuse to pay if it has reason to doubt whether the funding is being properly used.

InfraLeuna must report to the BvS every quarter, showing how the money provided has been used. The use of the funding allocated for the compensation of losses must be documented every six months. The documents submitted must be verifiable; the BvS is to be allowed access to InfraLeuna's premises and papers at any time, and is entitled to have the documents examined by an independent expert. Differences of opinion regarding the use of the money are to be settled by the conciliation and arbitration procedure in Article 27. The arbitrator is to be either a certified public accountant nominated by the chairman of the board of the Institute of Certified Public Accountants (*Institut der Wirtschaftsprüfer*), in Düsseldorf, or the Federal Audit Office (*Bundesrechnungshof*).

7. **Closure of accounts, repayment and incentive clause**

When restructuring operation is complete, InfraLeuna is to submit a final account which BvS is free to verify by any means at its disposal. Funds remaining in the account with the Bank and funds called by InfraLeuna but not used by the end of the restructuring phase are to be repaid to the BvS.

The BvS is required to pay 25 % of the returned money to each of the buyers, as an incentive to achieve savings. But the sum payable to each may not exceed DEM 20 million, so that savings in excess of a total of DEM 80 million would not result in any increase in the incentive payments.

8. **Neutralisation of losses carried forward beyond the restructuring operation**

InfraLeuna must not be enabled to take advantage of further concessions in addition to the compensation of losses by the BvS after the restructuring operation is complete, by carrying forward losses for purposes of corporation tax or local trade tax. At the end of the restructuring phase, therefore, the current carry-forward of losses will be established by means of a tax audit. InfraLeuna will then repay the entire compensation for losses it has received from the BvS, using the funds in the account with the Bank; the BvS will make an equivalent payment to InfraLeuna to be entered as revenue and attracting tax.

9. **The relevant markets**

The Commission had to consider whether trade between Member States might be affected. There would certainly be trade between Member States in the products manufactured on the site, which meant that the measures might distort competition. Domo produces synthetic carpet fibres on the site, which is a product in a sensitive industry and is within the scope of the code on aid to the synthetic fibres industry ([14]). If aid were to be given, therefore, the code might require a capacity reduction in return. However, as far as the services of InfraLeuna itself were concerned, it was rather doubtful whether there would be trade between Member States.

III. OBSERVATIONS SUBMITTED BY OTHER INTERESTED PARTIES ON THE INITIATION OF PROCEEDINGS

After it initiated proceedings the Commission received observations from one other Member State, three trade associations and four companies.

The Member State argued that the chemicals industry in the region had already received substantial state aid in the past and that strict criteria should be applied in the case of InfraLeuna to ensure that there could be no indirect advantage for Sächsische Olefinwerke and Buna. It calculated that the funding paid out would amount to state aid per job of DEM 1,78 million, easily exceeding the aid intensity permitted in the case of large enterprises, namely 35 %. It was unclear how much money would be used to attract new investors and whether investors in Leuna would qualify for other forms of aid. The Member State acknowledged that the scope for trade between Member States in industrial gases was small. But producers of industrial gases other than Linde ought to have the same opportunities as Linde to compete in the region and establish air separation units in Saxony-Anhalt at the same intensity of state aid. Otherwise it shared the Commission's misgivings and pointed out that the Community code on aid to the synthetic fibres industry applied to the production of polyamide fibres, so that financial assistance might well entail a reduction in capacity.

The other observations submitted supported the doubts the Commission had expressed when it initiated the proceedings. The trade associations drew attention to the distorting effect on trade in caprolactam and polyamide fibres between Member States. They pointed to the sensitivity of the industry,

([14]) OJ C 346, 30.12.1992, p. 2.

in which capacity utilisation had been running at only 71% in 1996. They stressed the indirect effect that the aid towards the production of caprolactam could have on the production of polyamide fibres if a single producer were to produce both products. As it seemed highly unlikely that InfraLeuna could be profitable, the measures being taken by the BvS could be regarded only as a means of enabling the manufacturers on the Leuna site, specially Linde and Caproleuna, to reduce their production costs and thereby increase their competitiveness. According to the trade associations's information, spending on services of this kind often accounted for up to 30% of the total cost of the final product. They feared that InfraLeuna would offer its services below cost and that final consumers would enjoy those services without having to provide them themselves or to pay an appropriate price to a supplier. They were especially concerned at the prospect of compensation of losses of up to DEM 150 million, which would lead to manifest distortion of competition. They contended that the measures ran directly counter to the efforts of the European chemicals industry to maintain and improve its international competitiveness.

The competitors pointed out that Caproleuna was a wholly-owned subsidiary of the Domo group […](*). The Beaulieu group accounted for about 54% of all European polyamide carpet fibre production. Aid to InfraLeuna would result in an unjustified and lasting improvement in the competitiveness of Caproleuna, thus adversely affecting the competitiveness of other manufacturers, and would help Domo […](*) to consolidate its dominant position on the market. The fear was expressed that the measures would very probably affect the prices of caprolactam and its intermediate products.

Two of the interested parties also feared that Caproleuna and Linde would offload advertising costs onto InfraLeuna. They referred to advertising for the site that had appeared in *European chemical news*. InfraLeuna had there used the names of Caproleuna and Linde to advertise the site.

In its reply the German Government argued that there could be no distorting effect on competition, as the payments to InfraLeuna served to cover spending on services of general interest and on hazard protection.

The measures being financed were a necessary condition for the continued operation of the site, for the privatisation of the plant and land, and consequently for the completion of privatisation which the BvS had a public mandate to carry out. The elimination of inherited liabilities, site clearance, and the provision of infrastructure had no effect on competition, as the state measures merely served to bring the land and the plant to a point where it could be privatised.

The German Government contended that as no advantage was conferred and there was no effect on competition, there was no state aid within the meaning of Article 92(1) of the EC Treaty. All of InfraLeuna's infrastructure and supply facilities were to be used jointly and concurrently by a large number of firms, against payment, and none would serve for particular product lines only. Plant of that kind would have to be provided by the firms involved themselves, on their own responsibility and at their own expense. Taking over the cost of providing an efficient infrastructure in Leuna could not affect competition, because competitors at other locations in market-economy systems never had to bear comparable costs, and the companies on the Leuna site were not being relieved of costs that firms usually had to bear. Quite the reverse: without state assistance no investor would have been prepared to bear the expense of overhauling the infrastructure in Leuna, given the backlog of repairs that had accumulated over decades. There was simply no possibility that a private party might take over the inherited installations in their dilapidated condition and undertake the clearance, disposal and replacement work necessary. The case had no precedent in western Europe, and the necessity for the measures that were being taken arose directly out of the circumstances of the planned economy and the mismanagement which had taken place. A further ground for maintaining that no advantage had been conferred was that the financing was confined to the absolute minimum, and all measures taken had been examined to ensure that they were necessary and proportionate; where required they had been put out to public tender. The prices that final consumers would be paying for InfraLeuna's services were ordinary market prices, and would cover costs.

Consequently, an assessment on the basis of the jobs preserved was not possible either, as the financial contribution was being made in performance of public obligations, and bore no relation to the preservation of employment.

The shareholders in InfraLeuna could not earn a return of more than 10% on the capital they had subscribed. Because of the restricted financial prospects this offered, it could not be expected of them that they should invest substantial capital of their own in InfraLeuna. The functioning of the plan rested instead on a balance between conflicting interests which were only indirectly of a material nature, so that payment of the price for the use of InfraLeuna's services constituted a proportionate consideration, and no further contribution could be expected.

Investors wishing to settle in Saxony-Anhalt would find comparable terms at other sites, and there was nothing to prevent them from taking advantage of such terms because there was in fact a surplus of industrial sites.

The German Government contended that, contrary to the misgivings which had been expressed, the loss-compensation arrangement was not operating aid which would help to keep unprofitable plant in operation. InfraLeuna had the exceptional task of keeping the installations in operation during the restructuring process so that the necessary services were available on the site. This involved enormous additional costs by comparison with normal operation, because the installations were obsolete and oversized, and so could not be operated efficiently, and also because in order to maintain them special steps had to be taken, such as bypasses, alternative circuits, etc. Thus the compensation of losses merely served to bridge the difficult period necessary to enable InfraLeuna to operate in the long term efficiently, economically

and without further assistance. The flexibility between the budget items had been decided because at the time the privatisation contract was concluded it was not possible to estimate the scale of the different risks. On the basis of a worst-case scenario, it was agreed for safety to allow for an increase to DEM 150 million.

The German Government denied that the funding was being misused by including Caproleuna and Linde in the advertising for the site. InfraLeuna's advertising mentioned the names of firms that were already operating successfully on the site. It was hoped that this would promote and consolidate the image of the site as a location for the chemicals industry. Agreements of this kind had been concluded not only with Caproleuna and Linde but also with Chemtec Leuna and Leuna Harze GmbH, and it was expected that similar agreements would be concluded with Leuna Polymer, Atochem and Spezialchemie Leuna GmbH. InfraLeuna and the firm involved would each bear half of the cost.

IV. **ASSESSMENT**

It has to be settled whether or not the measures are within the scope of Article 92(1) of the EC Treaty. Article 92(1) states that aid is incompatible with the common market if it is granted by a Member State or through state resources, favours certain undertakings or the production of certain goods, and thereby distorts or threatens to distort competition, in so far as it affects trade between Member States.

Article 92(2) and (3) lays down exceptions to this general prohibition.

The assistance given to InfraLeuna by the *Land* of Saxony-Anhalt and the BvS is granted through state resources. The *Land* of Saxony-Anhalt is part of the federal structure of Germany and, as a constituent state of the federation, shares in public authority. The BvS is likewise a public body. It finances its activities with public money, and acts as a public institution whose terms of reference require it to privatise the enterprises in its keeping on behalf of the authorities and in the public interest.

Article 92(1) is intended to prevent trade between Member States from being affected by state aid. The Court of Justice of the European Communities has repeatedly held that the only question here is the effect of the measure, and not its motivation, form or aims ([15]). A measure will therefore be caught by Article 92(1) only if it really affects trade between Member States and distorts competition.

([15]) Case 173/73 Italy v Commission [1974] ECR 709; Case 310/85 Deufil v Commission [1987] ECR 901.

In pursuance of this principle, then, the effects of the measures must be considered one by one in order to determine whether there is state aid within the meaning of Article 92(1).

1. **The costs of site clearance**

The BvS is making DEM 288 million available for site clearance. Including funding of DEM 35,4 million received under the Employment Promotion Act in 1996, therefore, InfraLeuna has a total of up to DEM 323,4 million at its disposal for site clearance. The use made of the money has to be documented every quarter, under paragraph 14(3) of the privatisation contract. In the course of the proceedings, the German Government has assured the Commission that InfraLeuna puts the clearance work out to tender or, where that is not a legal requirement, calls in at least three reliable estimates.

The decision to carry on and privatise the chemicals industry sites in the former German Democratic Republic was taken at the time of unification or shortly thereafter. If investors were to be attracted to the Leuna site it was essential that the site be cleared and cleaned; the Treuhand accordingly approved an outline clearance plan and began work. Under paragraph 10 of the privatisation contract, the obligation to clear the site passed to InfraLeuna, and led to the present clearance plan. During the restructuring phase InfraLeuna is required to dismantle, demolish, clear and dispose of the obsolete or superfluous plant, equipment and other objects on the site. The Commission observes that most of the buildings are badly contaminated and that in some cases rubble has to be excavated below ground level and contaminated soil removed after demolition.

From the information supplied by the German Government, it is clear that the site would have had to be cleared in any event, regardless of the identity of the buyers or the business they carried on, and that site clearance had been decided on before the transfer to InfraLeuna. In addition, the work is not being carried out in order to favour a particular undertaking, but rather in order to render the land on the chemicals site usable. Purchasers buy the land at a price of about DEM 25 per m^2, which corresponds to the market price for comparable ready-to-use services industrial sites in the new *Länder* ([16]). It is clear, therefore, that the assumption of the cost of clearance by the public authorities does not favour InfraLeuna or the buyers of the land ([17]).

The conclusion must therefore be that the DEM 288 million made available for site clearance does not fall within the scope of Article 92(1).

([16]) See Commission Communication on state aid elements in sales of land and buildings by public authorities (OJ C 209, 10.7.1997, p. 3).

([17]) See also Decision 95/253/EC (OJ L 159, 11.7.1995, p. 21).

2. **The costs of environmental damage**

In paragraph 17 of the privatisation contract, BvS releases InfraLeuna from any liability for the cost of environmental damage already in existence before the date on which the management of the assets is actually transferred, or which is caused by a factor already in existence at that date but which itself arises as a result of industrial exploitation during the restructuring phase. This paragraph 17 provides that the environmental damage is to be investigated by an independent valuer, and that the BvS must approve the plan of costs and measures presented by InfraLeuna before it is put in to effect. Here, too, InfraLeuna is required to obtain at least three estimates for each measure from three competent contractors; the BvS is entitled to collaborate in the drafting of the tenders, to supervise progress and to approve the finished work. In the course of the proceedings Germany estimated the cost at DEM 150 million.

When it approved the transfer date in the first Treuhand decision ([18]), the Commission found that the provision of public resources for environmental improvement and protection measures caused before 1 July 1990 did not constitute state aid. Firms in the new *Länder* could not be held responsible for pollution of the environment occasioned under the system of the former German Democratic Republic, when they had had no say in the matter. The Commission and the German Government have agreed that the greater part of the pollution in evidence was caused before 1 July 1990 and that it is not possible to quantify the remainder, which derives from the operation or existence of the plant after that date. Firms in the new *Länder* could not adapt their plant to the standards of the old *Länder* immediately on 1 July 1990. The closure of plant and adaptation to the legal requirements would take time, while the pollution caused would inevitably continue.

Under point 3.2.2 of the Community guidelines on state aid for environmental protection ([19]), such aid for investment to repair past damage to the environment may not fall under Article 92(1) of the EC Treaty in cases where the person responsible for the pollution cannot be identified or called to account, in that the aid does not confer a gratuitous financial benefit on particular firms or industries. However, with reference to InfraLeuna the Commission took into account that the company would be released from a statutory obligation as owner of the polluted land. The Commission therefore applied point 3.4 of the guidelines: here, an exception can be made to the 'polluter pays' principle laid down in point 1.2 of the Community guidelines and in Article 130r(2) of the EC Treaty, and the aid can instead be allowed as operating aid, relieving InfraLeuna of the costs resulting from pollution. Moreover, the unquantifiable part does not favour the buyers, since they pay a market price to acquire the land.

The conclusion must therefore be that only part of the DEM 150 million cost of releasing InfraLeuna from liability for environmental damage constitutes state aid, and the amount involved is impossible to quantify. It is, however, compatible with the common market.

3. **The costs of investment and restructuring**

During its investigations the Commission proceeded on the assumption that the investment and restructuring contributions from the BvS and the *Land* of Saxony-Anhalt might have the effect of favouring final consumers and InfraLeuna and its members.

The German Government argued that the contributions to the restructuring and investment should not be classed as aid as they did not have the effect of favouring certain undertakings or the production of certain goods and hence did not restrict competition or affect trade between Member States. They remedied past omissions and represented costs which no undertakings in western Europe other than in the new *Länder* had to bear. An infrastructure had to be created which served only to perform public tasks in the sense of the provision of basic public services and hence did not favour any particular undertaking or the production of any particular good. The BvS had been unable to influence the situation on the ground and had had to accept the one that it had inherited. It was accordingly obliged to privatise the product lines piecemeal and the infrastructure *en bloc*. Under the restructuring, only DEM 38 million would be used for building entirely new facilities. This included parts of the central waste-water system (DEM 15 million), a central freight clearance building (DEM 4,5 million), a central service centre for tank cleaning (DEM 13 million), a gas reduction and distribution system (DEM 2,9 million), and various pipe bridges, etc. These facilities would be available, against appropriate payment, to all firms on the site. On the other hand some DEM 115 million would be needed for replacement investment (such as for adapting facilities to bring them up to environmental and safety standards, scaling-down in line with requirements). In keeping with the BvS's public mandate, infrastructure repair and construction for the site was a *sine qua non* for its privatisation. In view of the state of the plants and the related costs, no private investor had been willing to take them over without a substantial contribution from the public purse. For instance, DEM 547 million was needed for modernisation, including renovation. But because of overlaps it was not always easy to draw a clear line between the different items. Simply for rail, fresh water, waste water, sewerage, road, drinking water and fire-fighting services, requirements totalled DEM 171,7 million for renovation and DEM 277 million for capitalisable investment. Thus the only other option had been for the BvS to continue to operate the infrastructure. That being so, the BvS would have had to assume all costs, bearing the risk of the restructuring failing and of having to run the plants itself. The expenditure was thus entirely a matter for, and the responsibility of, the public authorities, the BvS having merely

([18]) State aid measure NN 108/91, SG(91) D/17825, 26.9.1991.
([19]) OJ C 72, 10.3.1994, p. 3.

transferred its responsibility for restructuring and reorganising the plants to a private operator.

3.1. ***Favouring of final consumers/pricing***

The Commission proceeded on the assumption that producers on the site would be favoured indirectly if InfraLeuna offered its services at below cost. It was unclear to what extent the cost of renovation would be borne by the resident production companies. An unjustified cost reduction would, in the Commission's view, have led to a distortion of competition that would have affected trade between Member States.

The Commission also had misgivings about whether InfraLeuna's obligation to abide by the low-profit principle might lead to customers being further favoured, since prices might be kept artificially low, an advantage not enjoyed by consumers elsewhere.

The Commission accordingly examined how InfraLeuna set its prices. Under Article 15 of the privatisation contract, InfraLeuna is in principle required to offer its services to all undertakings, favouring or disfavouring none. The privatisation contract distinguishes between so-called 'core' areas, in which InfraLeuna holds a monopoly, and other areas of activity. To rule out the possibility of abuse of a monopoly position, the price calculation for these monopoly areas is explicitly laid down. InfraLeuna is required to divide all costs, applying recognised business principles, among all customers. This includes depreciation, financing, reinvestment and maintenance costs. Prices must be differentiated according to quantity and service, and sliding-scale formulae must be used, paying due regard to the low-profit principle. In the other areas, InfraLeuna must offer its services on the terms and at the prices normally obtaining in the industry. It may negotiate them freely, but here too it must take account of the low-profit principle.

The above provisions, in combination with the underlying overall plan, convinced the Commission that sufficient safeguards were in place to rule out any direct favouring of customers. In the areas where it has a monopoly, InfraLeuna is required to pass on all its costs to its customers. By including depreciation in the price calculation, any increases in value and all maintenance and restructuring costs are passed on to consumers, who thus share the costs through the prices payable. The Commission notes that any subsidising of prices by payments from the authorities is ruled out, as rates are calculated independently from these payments, and in particular from the loss compensation payments, and reflect only actual expenditure irrespective of the origin of the funds. The price calculations also include the opportunity cost of interest payments in accordance with recognised commercial principles, and the costs entailed by InfraLeuna's activities (including development costs). In the course of the proceedings, the German Government submitted to the Commission numerous supply contracts between InfraLeuna and various customers and described the cost calculations used in various fields. This satisfied the Commission that the prices charged for InfraLeuna's services do fall within the normal range and are by no means especially favourable.

The Commission discussed with the German Government the possibility of introducing the pricing system described above for InfraLeuna's other areas of activity as well. It perceived in particular a risk of price subsidisation through the loss compensation payable inasmuch as the privatisation contract required InfraLeuna only to supply 'on the terms normally obtaining in the industry and at the most favourable prices possible'. The German Government remarked in this connection that the strict price provisions in respect of the monopoly were intended as an additional safeguard to prevent any abuse of the monopoly position through unjustified price increases, thereby keeping prices down. There was no such risk in the other areas of activity. InfraLeuna faced competition there, which compelled it to align itself on its competitors and fix prices accordingly. Introducing the pricing system would be superfluous and would simply be an additional burden. The desired result of preventing any abuse of the monopoly position and keeping prices down could be achieved in these areas by market forces alone.

The Commission accepted the German Government's arguments in part. Basically it was in the members' interests to offer InfraLeuna's services at a cost-covering price, but it had to be remembered that the members were at the same time consumers of those services and hence had at least as great an interest in being able to obtain them as cheaply as possible. In the Commission's view it was therefore essential to the system's operation that an additional safeguard be built in which might help to rule out any price subsidisation and which gave the members an incentive actually to set prices at a cost-covering level. The Commission and the German Government agreed that the exclusion of any lump-sum loss compensation was an appropriate means to this end. This would rule out both the inclusion of any loss compensation when calculating prices and costs, and the subsidising of prices through such loss compensation.

The Commission also examined whether InfraLeuna's obligation to apply the low-profit principle represented a lightening of the burden on resident companies that was relevant from an aid point of view and likely to restrict competition. Setting a price can, in principle, be regarded as aid where it is attributable to action by the Member State concerned and where the requirements of Article 92 of the EC Treaty are met. In such a situation the Member State, or the entity under its control, does not apply the price like an ordinary economic agent but uses it to confer a pecuniary advantage on a company, foregoing the profit which it could normally realise ([20]).

([20]) Joined Cases 67, 68 and 70/85 Kwekerij Bebroeders van der Kooy BV and others v Commission [1988] ECR 219.

The Commission therefore had to decide whether the commitment to the low-profit principle was attributable to government action and hence was to be classed as 'aid granted by a Member State or through state resources'. Account had to be taken here of the fact that InfraLeuna took the form of a quasi-cooperative society, of the particular circumstances in which it had been set up, and of the fact that only a minority shareholding was in public ownership. Under German law the peculiarity of the cooperative as an organisational form is that it 'seeks to promote the trade or business of its members through the common conduct of their business activities' ([21]). The main objective, then, is to facilitate the economic activity of the parties through cooperation and common organisation rather than to promote the realisation of profit through the society's activities, although this is not ruled out altogether. The BvS, in conjunction with the other members, deliberately opted for this course in order to ease the site's privatisation. The scheme is based on the cooperative ideal and will work only if, through cooperation in InfraLeuna, the investors themselves provide the necessary services on the site at a low cost. The current minority stake of the public authorities is only a transitional measure of a temporary nature pending the sale of the BvS's shares to other investors.

The Commission found on balance that the commitment to the low-profit principle did not constitute conferring an advantage attributable to action by the German Government. Rather it is an essential precondition for the working of the privatisation plan and has to be seen in the context of the notion of the cooperative, as rooted in German law.

3.2. *Favouring of InfraLeuna*

InfraLeuna receives the financial support direct and can freely dispose of the funds. The facilities it owns are being modernised with the help of public resources to bring them up to a state-of-the-art standard. The question arises, however, whether InfraLeuna was favoured from an economic point of view by the grants, as economic advantage flows not only from the fact of ownership itself, but also from the economic exploitability of the thing owned and the opportunities available for turning it to advantage.

In answering this question, the Commission took into consideration the fact that InfraLeuna's objects are narrowly defined, its activities being limited to the provision of infrastructure services and the privatisation of the remaining industrial sites. The conduct of its affairs has to be entirely subordinated to this goal. Any divestiture, sale or lease of individual businesses or parts thereof requires a unanimous resolution of the members. InfraLeuna cannot therefore dispose freely of its property, tied as this is to its objects. It is also bound by the low-profit principle. The use of any profits to increase its capital is ruled out. Any amendment to, extension of, or departure from this principle again requires a unanimous members' resolution.

In the light of the above, the Commission came to the conclusion that InfraLeuna was not to be regarded as favoured from an economic point of view by the measures. InfraLeuna does not derive any actual economic benefit from the plants by maintaining and modernising them, because they are governed entirely by its objects and because it is obliged as a matter of principle to earn low profits from its activities. In order to improve monitoring and prevent facilities from being sold and used for purposes other than those for which they were intended, the Commission considers that the BvS should retain at least a 1 % share in InfraLeuna pending completion of the restructuring drive.

3.3. *Favouring of the members*

The fact that Caproleuna and Linde were at one and the same time site developers, operators and end-users of the infrastructure caused particular difficulties when it came to assessing the aid measures. It was to be feared that they might unduly exploit their position as members to the detriment of other resident companies in order to create, with the help of public resources, an infrastructure on the site that was specifically tailored to their needs. Nor could it be ruled out that superfluous plants might be built at inflated prices, as the Commission was unable for the time being to determine to what extent the uses to which the resources were put would be monitored. There was also a risk that Caproleuna and Linde might earn substantial profits from their participation in InfraLeuna without giving any commensurate *quid pro quo*.

3.3.1. *Favouring of shareholders as customers of InfraLeuna*

The Commission considered first of all to what extent the members might be able to obtain preferential terms (for example, lower prices than other purchasers) for the use of InfraLeuna's services. It should be noted here that InfraLeuna is subject to a ban on discrimination, being prohibited from distinguishing between customers and from applying anything other than objective criteria to the services it renders. The ban on discrimination may be modified only by a unanimous members' resolution. There is a further control mechanism in the form of InfraLeuna's membership structure. InfraLeuna will ultimately be completely privatised, with the BvS selling its shares to other investors on the site, thus ensuring the spreading of interests. Various companies have, in fact, submitted binding offers and up to 4 % of the BvS's shares are currently up for sale. Steag and MEAG will each take 12,25 %, Rhodia GmbH 10 %, and InfraLeuna Beteiligungs GmbH will also acquire 10 % of InfraLeuna's shares. InfraLeuna Beteiligungs GmbH was founded by five investors on the site exclusively for the purpose of buying the shares. None of the

([21]) Paragraph 1 of the Act concerning commercial and industrial cooperatives (Gesetz betreffend die Erwerbs- und Wirtschaftsgenossenschaften — GenG).

undertakings is linked to Linde or Caproleuna. The effectiveness of the respective purchase agreements is subject to the suspensive condition of approval of the privatisation plan by the Commission. This bundling of the various interests ensures that no single member receives favourable treatment, since the membership structure allows members to monitor one another and obliges them to take balanced account of the others' points of view.

The Commission concluded that the existing mechanisms are indeed likely to prevent a member from taking advantage of its position in order to secure a preferential status for itself. Customer contracts are concluded by InfraLeuna's management, acting on instructions from the members' general meeting. Under the articles of association, the management needs prior consent in the form of a unanimous members' resolution before it can conclude contracts with members of InfraLeuna if the total value of the contract exceeds DEM 1 million a year or DEM 5 million over the contract's lifetime. A system of two-way checks has thus been put in place, and decision-making by the members' general meeting is shaped by the various positions and interests and must take these into account.

Since the Commission considers one of the key difficulties of this case to be the possibility that a member might take advantage of its position, the monitoring system as described must in its opinion be consolidated. The following points must be acted on:

— Article 11 of InfraLeuna's articles of association must be amended so as to provide that Article 6(5)(a) of those articles (requirement of prior unanimous consent of the members' general meeting for the conclusion of contracts with members) may be amended or deleted only by a unanimous members' resolution. A provision must be also added to InfraLeuna's articles of association stating that this clause may not be amended for a period of at least 15 years after the restructuring is completed,

— the value threshold on the requirement for unanimous consent does not go far enough, as it may be possible to circumvent the rule using certain contractual provisions. The provision in Article 6(5)(a) limiting the unanimous consent requirement to contracts with members where the total value exceeds DEM 1 million a year or DEM 5 million over the contract's lifetime must therefore be deleted so that all contracts are subject to the requirement of unanimous consent,

— Article 13(4) and Article 3 of InfraLeuna's articles of association must be amended to provide that the limitation on profit distribution and InfraLeuna's binding commitment to the low-profit principle must remain in place for at least 15 years after the restructuring is completed,

— as was explained, monitoring rests on the basic principle that the members' general meeting ensures a spread of interests. To guarantee this, a member or a related or ancillary company must not be allowed to acquire more than 24,5% of the shares in InfraLeuna for at least 15 years after the restructuring is completed.

3.3.2. *Favouring as shareholders*

The Commission examined to what extent Caproleuna and Linde would be favoured in their capacity as shareholders by the contributions from the BvS and the *Land*. It had to be borne in mind here that the members had paid only the nominal value (DEM 1,53 million) for their 51% shareholding, whereas it had to be assumed that the fixed assets, and possibly the shares themselves, might increase in value substantially as the measures went forward, and this could be realised by selling them. Since any such increase in value would be due solely to payments from the public purse, the Commission saw the possibility of making a sizeable profit through selling assets and shares or through dividends as an advantage to the members that might be relevant from an aid point of view.

The Commission established that, as far as their usability was concerned, InfraLeuna's fixed assets were strictly confined to their prescribed purposes and required the unanimous consent of the members' general meeting before they could be sold. Under paragraph 15(2) of the privatisation contract, InfraLeuna is obliged to run the facilities for a period of 15 years from the transfer date (1 January 1996). Plant is always written off by the straight-line method over a long period, depending on its lifetime, and so the book value does not tally with the actual value. This seems to rule out the possibility of the shareholders' obtaining an additional advantage from selling the assets, as they will have been written off, that is to say, their value will be minimal after more than 15 years of use. Moreover, the cost of dismantling individual plants is so high that the scrap value, especially after 15 years, will scarcely cover it. The dividends earned by the members from their participation in InfraLeuna are limited to no more than 10% of its capital, and in the event of a transfer of shares to other shareholders the restrictions as to use still apply to the purchaser.

The Commission concluded that in these circumstances the possibility of the shareholders being favoured could essentially be ruled out. Realising the net asset value of the plants was de facto impossible as the demolition costs would, as a rule, exceed the scrap value and hence would scarcely be recoverable. Any sale of assets would, moreover, provide only the company and not the members with resources, the use of which was subject to the restrictions described earlier as regards distribution among members. Even if an asset's book value were to increase, it appears impossible for this to lead to any appreciable increase in the market value of the company's shares beyond their nominal value, as an increase in the effective earning-power value is excluded by the commitment to the low-profit principle, the limiting of the maximum dividend to 10% of the capital, and the continuing restrictions as to use placed on a purchaser. This prevents the members from appropriating, through the payment of large dividends, the value of the state-aided assets and makes the acquisition of

shares unattractive to an investor outside the site. The Commission also took into account that from a fixed-interest investment in the capital markets a minimum dividend of 4 to 5% can be earned, and that with greater risk-taking 10% is easily attainable. In 1997 a dividend of up to 40% could be earned from shares. Consequently, and bearing in mind that the likelihood of InfraLeuna's turning in a profit, and hence making a dividend payment, is fairly slim and that the investment is therefore rather risky, a maximum dividend of 10% is appropriate.

In view of the above, the Commission concluded that the members were not favoured from an economic point of view. To exclude any unjustified advantage whatsoever, the Commission has asked Germany to have the market value of the shares assessed by an independent expert. The valuation must be based on InfraLeuna's capitalised value over 15 years and non-distributed profits. The price that purchasers pay for shares must correspond to the market value determined in this way. If the market value of the shares were actually found to be higher than their nominal value, Caproleuna and Linde AG would have to pay the difference to the BvS. In addition, InfraLeuna must be obliged to run the facilities for 15 years after the restructuring is completed (31 December 2000). Article 15(2) of the privatisation contract therefore needs to be changed accordingly, thereby ensuring that the value of the facilities after more than 15 years of use will indeed be so far reduced as to rule out the possibility of making a profit from any sale.

3.3.3. *Favouring as site developers*

The Commission feared that Caproleuna and Linde in their role as site developers might influence the construction of installations in such a way that they met their own requirements, thereby placing them at an advantage. Nor was it apparent to what extent expenditure would be monitored to check the necessity of individual measures and the scale of the costs. In the Commission's opinion there was a risk that either Caproleuna and Linde or the contractors who carried out the work might claim excessive costs and in so doing waste public money. A further problem area was the payment to Caproleuna and Linde of incentives amounting to 25% of any funds not spent and returned to the BvS.

The Commission established first of all that Caproleuna and Linde had only limited influence over the implementation of the restructuring and investment measures. The necessary measures had been decided on before InfraLeuna was formed and before the privatisation contract was signed. The Commission was therefore satisfied that the business plan attached to and forming part of the privatisation contract set forth all the planned measures and that the restructuring programme had accordingly been laid down before the privatisation contract was concluded. The business plan describes in detail the individual measures, the relevant sites, the particular part of a building, etc., including the estimated costs. Employees of Caproleuna, Linde and the BvS took part in formulating the business plan, as did a number of independent experts. The BvS's Steering Committee carried out an audit, which resulted in the costs as originally estimated being reduced from DEM 960 million to DEM 800 million ([22]). Revisions of and amendments to the business plan may be decided on by the members' general meeting by a simple majority. However, there are checks and balances in that the BvS can oppose the modified business plan. In this event, the members' general meeting must reach unanimity on the changes to the plan. Should agreement not be reached, the difference will be settled in an objective mediation and arbitration proceeding under paragraph 27 of the privatisation contract.

In the light of the above mechanisms and the fact that the investment and restructuring programme was laid down before privatisation, the Commission concluded that it would be basically impossible for Caproleuna and Linde to tailor the installations to their special requirements. This will be monitored in any event, as the German Government has been asked to submit quarterly investment reports, checked by an independent expert beforehand as regards the costs and the necessity of the measures.

As far as the ongoing control of expenditure is concerned, the Commission established that InfraLeuna applies the provisions of the law on public contracts, and in particular of the Commission's public procurement Directives. For contracts which, under those provisions, do not have to be put out to public tender, InfraLeuna has to seek at least three bids from competent tenderers unless the contracts are only very minor. This was expressly confirmed by the German Government. InfraLeuna has to take the award decision on the basis of cost and quality considerations. Paragraph 11(3)(a) of the privatisation contract provides in this respect that in the event of two or more bids being equal, firms in the new *Länder* must be given preference. The German Government has given an assurance that this goodwill clause will be deleted in accordance with the Commission's position of 7 July 1997 and Germany's communication of 9 September 1997. As already indicated, InfraLeuna's expenditure is subject to quarterly review by the BvS. Any increase in the amounts provided for in the business plan may be opposed by the BvS, with the result that the members' general meeting subsequently has to agree to it unanimously. In the absence of a consensus, the mediation and arbitration procedure under paragraph 27 of the privatisation contract has to be initiated. If the BvS comes to the conclusion that funds have not been used properly or costs have been overestimated, an attempt must first be made to bring about an agreement between the members, failing

([22]) InfraLeuna's business plan lists in detail all measures, together with their expected cost. Unlike in the case of other privatisation schemes, the BvS's Steering Committee was therefore able for the first time to analyse in depth the need for and cost of the individual measures. The Commission accordingly assumes that a necessary adjustment was carried out to reduce excessive costs to a reasonable level.

which the mediation and arbitration procedure under paragraph 27 of the privatisation contract must be initiated.

In the Commission's opinion the BvS has introduced the control mechanisms needed to enable it, not only as a member but also as provider of financing for the necessary investment, to exercise absolute, precise and continuous control over the scale and suitability of the investment and the restructuring measures through its right of approval and opposition. The provisions on putting contracts out to tender and seeking several bids constitute an additional guarantee that costs will not be exceeded and that contracts will be executed at market prices.

Lastly, the Commission views the incentive arrangements as a further control mechanism aimed at cost reduction. The promise to allow Caproleuna and Linde to share in any savings helps to limit the measures to that which is absolutely necessary and therefore warrants approval in principle. In Decision 96/545/EC, for instance, the Commission authorised such an incentive payment to the Dow Chemical Company as aid ([23]).

The Commission then examined both sets of circumstances to see whether they were comparable and whether the incentive arrangements in favour of Caproleuna and Linde might be admissible, as in the case of Dow. Basically, the funds made available to the investors in both cases amounted to a payment from the public purse. Dow took over the production plants from the Treuhand with a view to restructuring them and ultimately operating them at a profit. However, it also put in a substantial amount from its own resources, whereas the financial contribution by Caproleuna and Linde is equivalent only to their nominal stake. On the other hand, they cannot expect any return from their investment in InfraLeuna apart from uncertain dividends amounting to 10 % of the capital at most.

Germany argued that unlike in the Dow case, where the advantage was mainly, though not solely, on the side of the investors, the participation of the investors in the InfraLeuna case mainly benefited the public purse. The BvS paid the incentives as a consideration for this benefit. Caproleuna and Linde made their know-how available and were entrusted by the BvS with the development of the site, establishing new investors there and providing the infrastructure. They were also making substantial financial and human resources available. Throughout almost the whole of 1995 a team of independent advisers hired by the BvS, Caproleuna and Linde was engaged in drawing up the necessary investment measures and preparing a cost analysis. Moreover, savings were to be made under the guidance of Caproleuna and Linde and the participation of both was therefore altogether desirable. They were the two largest investors on the Leuna site and had considerable experience of implementing restructuring and investment measures, experience which could be put to good use. Against this background the Treuhand at the time proposed that they should both share in all savings, the size of the share being both big enough to serve as an attractive incentive, but not so big as to be out of proportion to the overall volume of the measures. Subsequently a ceiling of DEM 20 million each was finally agreed on. Therefore, in the case of Caproleuna and Linde the incentive was to be regarded as a success-dependent reward for the contribution made by the investors.

The Commission, however, could not accept this argument. The InfraLeuna scheme is based on the fundamental assumption that the real advantage to all those involved, including investors and members, lies in providing the infrastructure and attracting new firms to the site. The underlying principle implies that an adequate consideration must be paid for the use of the services to cover all the costs, including development costs. Only if this principle, repeatedly put forward by the German Government, is applied can the Commission conclude that the measures do not constitute an advantage to the parties that is relevant from the aid point of view. Allowing incentive payments would be at odds with this system. First, the German Government was unable to give a proper account of what the investors were actually providing, either in terms of quality or quantity. The Commission therefore held that the investors were not providing something to warrant payment of a consideration in return. On the contrary, the state funding constitutes a one-sided payment from the public purse. This is an essential feature of aid. Secondly, the incentive payment represents an economic advantage for investors that is not admissible as aid since, unlike in the Dow case, Linde and Caproleuna are not making a substantial contribution to the scheme as a whole.

The Commission accordingly concludes that the incentive payment cannot be accepted.

The conclusion on point 3 overall is that the DEM 700 million intended for investment and restructuring does not constitute aid. To ensure that this remains so, certain conditions and requirements have to be fulfilled.

4. **Working capital**

The BvS is placing DEM 30 million at InfraLeuna's disposal as working capital during the restructuring phase. Evidence of the uses to which the working capital is put must be furnished quarterly in the form of documents on the basis of which the BvS can verify the amount of and need for any expenditure. As long as InfraLeuna is able to cover expenditure using its own income, public funds ought not to be disbursed.

The Commission has reservations in principle about making working capital available, as the reduction in costs may lead to an advantage being conferred and hence to a distortion of competition within the Community.

([23]) See footnote 11.

In the Commission's opinion, however, providing working capital should be assessed in exactly the same way as covering investment and restructuring costs from the public purse. Consequently InfraLeuna cannot be regarded as being favoured, as it cannot use the resources to its own advantage but must employ them for the company objects as referred to above. Final consumers are not favoured either, as the costs paid with the help of the working capital provided are to be included in calculating prices, with the result that no price reduction is possible. Similarly, there is no possibility of InfraLeuna's members being favoured, since the abovementioned control mechanisms, where appropriate in the form which the Commission considers necessary, are sufficient to prevent the funds from being used for purposes other than those for which they were intended.

The conclusion therefore has to be that the DEM 30 million working capital for InfraLeuna does not constitute aid.

5. **Loss compensation**

InfraLeuna is a complicated structure, founded on a balance between various interests and designed to rule out any favouring of or discrimination against individual participants. The Commission welcomes the scheme and takes a basically favourable view of it. Nevertheless, despite the balanced control system, there remains a risk that freely available loss compensation might be misused to subsidise prices. In the Commission's opinion the scheme can be viewed favourably as a whole only if price subsidisation is definitively ruled out by prohibiting loss compensation. As the Commission sees it, compensation for losses is not even necessary. The German Government stated that loss compensation was agreed on mainly for safety, to cover various individual risks whose occurrence and extent could not be foreseen when the contract was concluded. The Commission cannot agree to such 'precautionary' cover, and the actual figures show that the risks have not materialised.

The Commission's conclusion has to be that loss compensation cannot be authorised. Should it prove necessary, it must be notified separately to the Commission and approved by it.

6. **The particular concerns of third parties**

The Commission finds that the objections raised by third parties are unfounded. The vast majority of the measures constitute not aid, but indirect support for individual firms, so the possibility of reducing production costs and improving competitiveness can be ruled out. A capacity reduction under the Community code on aid to the synthetic fibres industry is accordingly not necessary.

In addition, almost all the services offered are geographically limited infrastructure services. Misuse of the resources made available and overstating of individual cost factors are ruled out by the wide-ranging system of checks. InfraLeuna's plan of advertising the site using firms on the site and naming them in the advertisements is unobjectionable in the Commission's opinion, provided that the firms bear a reasonable share of the cost. As costs are shared 50/50 by InfraLeuna and the firm concerned, this condition is met.

The Commission dismisses concerns that competitors of Caproleuna and Linde will be prevented from establishing themselves in the area. In the new *Länder*, and especially in the *Land* of Saxony-Anhalt, there is an overabundance of industrial sites just waiting to be bought, where competitors can set up in business on the same terms as Caproleuna and Linde.

As regards establishment in Leuna itself and possible participation in InfraLeuna as a member, the Commission would point out that the privatisation contract provides for protection against competitors. Under paragraph 6(2) of the contract, members are entitled to object if the BvS exercises its option of selling plots to direct competitors of InfraLeuna or of the other members. Paragraph 3(4) of the contract stipulates that a direct competitor of a member may purchase shares in InfraLeuna only with the express consent of all members. This is important from the point of view of the BvS's call option (paragraph 3(5) of the contract), which obliges Caproleuna and Linde each to sell 1 % of their shares to an investor of the BvS's choice.

The Commission would point out in this connection that a general need to obtain permission for the admission of new members into a private limited company is normal in company law. In addition, however, all but 4 % of the shares are already earmarked for sale, so the protection against competitors in paragraph 3(4) is scarcely relevant. Since it is so commonplace, the Commission therefore considers the clause unobjectionable.

When it comes to the right of objection under paragraph 6(2) of the contract, however, the Commission takes a different view. A general exclusion of competitors such as this clause seems to allow cannot be justified. On the contrary, in view of the balanced nature of the interests concerned and the principle of non-discrimination to which InfraLeuna is committed, such a blanket exclusion would be incompatible with the overall scheme.

7. **Conclusion**

Overall, the Commission views the scheme underlying InfraLeuna favourably. The public authorities faced a difficult task in privatising the chemical site. First, the existing

conditions on the site had to be taken into account. Secondly, they had to keep pace with new developments, to satisfy the needs of the firms established on the site and to fulfil the obligations they had assumed in the course of privatisation. After years of trying to find a private investor for the infrastructure, the scheme which the Treuhand/BvS has come up with seems, in the Commission's view, to be the best solution. It allows the public authorities to fulfil their obligation to privatise undertakings in the new *Länder* and bring the task to completion.

The investigations have shown that the planned measures do not confer an advantage on any of the parties involved so long as the conditions imposed by the Commission are adhered to. The measures contribute to InfraLeuna's viability, and a balanced cash-flow will be achieved during the period following completion of the restructuring phase, with the result that the financing of InfraLeuna can be regarded as assured in the long term.

The Commission further notes that the cost of investment and restructuring measures may need to be increased. Should the implementation of additional measures prove necessary or should the cost of investment and restructuring measures increase owing to external factors, up to DEM 100 million of the amount earmarked for site clearance may be used for investment or restructuring. The resources may be reallocated, however, only with the agreement of the BvS, which must assess whether the measures are necessary and appropriate. Any further transfer between budgets is ruled out,

HAS ADOPTED THIS DECISION:

Article 1

The following payments made by Germany to InfraLeuna Infrastruktur und Service GmbH (hereinafter referred to as 'InfraLeuna') do not constitute aid within the meaning of Article 92(1) of the EC Treaty:

Payments for investment and restructuring, up to	DEM 700 million
Payments for site clearance, up to	DEM 288 million
Working capital up to	DEM 30 million
Total	DEM 1 018 million

Article 2

An unquantifiable part of the costs for rectifying environmental damage totalling DEM 150 million constitutes aid within the meaning of Article 92(1) of the EC Treaty; it is, however, compatible with the common market. The remaining part does not constitute aid.

Article 3

Germany shall ensure that all services set up and offered by InfraLeuna are made available, against an appropriate charge, to all on-site producers without exception, on a non-discriminatory basis.

Article 4

Germany shall ensure that the privatisation contract between InfraLeuna, Linde AG, Caproleuna GmbH and the Bundesanstalt für vereinigungsbedingte Sonderaufgaben (hereinafter 'BvS') and the articles of association of InfraLeuna are amended as specified below:

1. The privatisation contract, and in particular paragraph 12 thereof, shall be amended to exclude the assumption of loss compensation by the BvS amounting to DEM 50 million.

2. The privatisation contract, and in particular paragraph 3 thereof, shall be amended so as to state that for the duration of the restructuring (until 31 December 2000) the BvS shall hold at least 1 % of the shares in InfraLeuna.

3. The privatisation contract shall be further amended in such a way that for the duration of the restructuring and for a period of 15 years thereafter, none of the members may hold more than 24,5 % of the shares. Germany shall ensure that the shareholdings of Caproleuna GmbH and Linde AG are reduced to 24,5 % in each case. In the second sentence of paragraph 3(5), the words 'at the end of the restructuring phase' shall be deleted in order that the BvS may exercise its call option at any time. The first sentence of Article 3(3) shall be amended so as to state that no purchaser may acquire more than 24,5 % of InfraLeuna's capital.

4. The 'goodwill' clause in paragraph 11(3) of the privatisation contract shall be deleted.

5. The privatisation contract, and in particular paragraph 11(3)(b) thereof, shall be amended in such a way that, of the amount made available by the BvS for site clearance, InfraLeuna may use up to a maximum of DEM 100 million for investment and restructuring, provided always that the implementation of additional investment and restructuring measures proves necessary or that the cost of investment and restructuring measures increases owing to external factors. The resources may be so

reallocated, however, only with the agreement of the BvS. The BvS shall examine the necessity and suitability of the measures in cooperation with an independent expert. Any further transfer shall be ruled out.

6. The third subparagraph of paragraph 14(4) of the privatisation contract shall be deleted.

7. In the second sentence of paragraph 6(2) of the privatisation contract, the words 'or to direct competitors of InfraLeuna' shall be deleted.

8. Paragraph 15(2) of the privatisation contract shall be amended in such a way that InfraLeuna is obliged to run the facilities for at least 15 years after completion of the restructuring (31 December 2000).

9. Article 11 of InfraLeuna's articles of association shall be amended in such a way that Article 6(5)(a) of those articles may be amended or deleted only by a unanimous resolution. In Article 6(5)(a) of InfraLeuna's articles of association, the words 'where the total value of the contract exceeds DEM 1 million a year or DEM 5 million over the contract's lifetime' shall be deleted.

10. InfraLeuna's articles of association shall be amended in such a way that InfraLeuna's commitment to the low-profit principle, the ban on discrimination (Article3) and the prohibition on the distribution of dividends (Article 13(4)) shall remain unchanged for at least 15 years after completion of the restructuring.

Article 5

Germany shall ensure that any purchaser of shares in InfraLeuna pays the market price. The market value of the shares shall be assessed by an independent expert. The valuation shall be based on InfraLeuna's capitalised value over 15 years and non-distributed profits. If necessary, the privatisation contract as well as the articles of association shall be amended accordingly. If the market value of the shares turns out to be higher than their nominal value, Germany shall ensure that Caproleuna GmbH and Linde AG will pay the corresponding difference to the BvS.

Article 6

1. Germany shall send the Commission a copy of the amended contract within one month of its being concluded.

2. Pursuant to Article 93(3) of the EC Treaty, Germany shall give notice of any deviations from the amended contract and any tax or other advantages granted.

Article 7

1. Germany shall submit to the Commission half-yearly reports on the progress of restructuring and the amount of aid actually awarded under the various items in the privatisation contract, so as to allow it to verify that this Decision is being complied with. They shall be submitted during the first half of the year following the reporting period.

2. Germany shall also submit to the Commission the evidence referred to in paragraphs 10(3) and 11(3) of the privatisation contract, the evidence referred to in paragraph 14(3), and quarterly investment reports which shall be checked in advance by an independent expert as to the necessity and appropriateness of the costs. The final statement referred to in paragraph 14(4) shall also be submitted to the Commission.

Article 8

Germany shall refrain from granting any further funds to InfraLeuna in support of the restructuring plan which is the subject of this Decision.

Article 9

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

Article 10

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 25 November 1998.

For the Commission

Karel VAN MIERT

Member of the Commission