COMMISSION DECISION

of 26 May 1999

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

(notified under document number C(1999) 1469)

(Only the German text is authentic)

(Text with EEA relevance)

(1999/679/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

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

Whereas:

I. PROCEDURE

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

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

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

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

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

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

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

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

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

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

II. DETAILED DESCRIPTION OF THE AID

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. **COMMENTS FROM INTERESTED PARTIES**

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

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

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

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

IV. **COMMENTS FROM GERMANY**

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

A. **The changes in production capacity**

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

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

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

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

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

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

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

(51) The relevant infrastructure projects were as follows:

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

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

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

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

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

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

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

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

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

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

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

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

[1] See Section IV, point 9.

B. **The energy supply contracts**

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

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

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

(66) The study arrived at the following conclusions:

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

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

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

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

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

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

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

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

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

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

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

V. ASSESSMENT OF THE AID

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

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

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

A. Changes in production capacities

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

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

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

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

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

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

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

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

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

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

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

B. **Energy supply contracts**

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

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

C. **The two additional infrastructure projects**

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

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

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

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

VI. **CONCLUSION**

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

HAS ADOPTED THIS DECISION:

Article 1

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

Article 2

1. Germany shall submit an Amendment Agreement stipulating that:

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

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

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

Article 3

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

Article 4

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

Article 5

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 26 May 1999.

For the Commission

Karel VAN MIERT

Member of the Commission