II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION
of 14 March 2000
on State aid granted by Germany to Elpro AG and its successor companies

(notified under document number C(2000) 808)

(Only the German text is authentic)

(Text with EEA relevance)

(2000/537/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],

Whereas:

I. PROCEDURE

(1) By letter of 15 October 1996, registered as received on the same date, Germany notified the Commission of aid granted to Elpro AG/Berlin (Elpro). On 3 December 1996 it informed the Commission that, as additional aid would be granted, the notification would have to be amended, although it did not formally withdraw the notification. At a meeting held on 30 June 1997 in Berlin, the German authorities provided the Commission with further information.

(2) By letter dated 9 October 1997, the Commission informed Germany that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid and called on it to provide all relevant information. The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* [2],

[1] OJ C 99, 1.4.1998, p. 9, and OJ C 84, 26.3.1999, p. 9.
[2] See footnote 1.

(3) By letter dated 3 February 1999, the Commission informed Germany that it had decided to extend the procedure initiated in September 1997 to cover the additional aid granted in connection with the sale of an Elpro subsidiary. The Commission decision to extend the procedure was also published in the *Official Journal of the European Communities* ([3]).

In both notices the Commission invited interested parties to submit their comments on the aid measures.

(4) The Commission received no comments from interested parties.

II. **DETAILED DESCRIPTION OF THE AID MEASURES**

(5) When the procedure was initiated, the information available to the Commission was fragmentary. It was for this reason that Germany was asked to provide complete information. The following description of the aid measures takes account of the supplementary and updated information on the restructuring programme provided by Germany in the course of the procedure.

(6) Elpro, the successor to VEB Elektroprojekt and Anlagenbau Berlin, was privatised in June 1992 following an open unconditional tender procedure. It was sold without its real estate for DEM 12 million to the highest bidder, a consortium of private individuals. Elpro's real estate was sold separately at a market price of DEM 261,9 million to the Treuhandanstalt (THA) and the proceeds were used to repay Elpro's outstanding debts to banks and the THA. The Bundesanstalt fur vereinigungsbedingte Sonderaufgaben (BvS, the successor organisation to the THA) submitted copies of the independent evaluations of the property carried out at the time to prove that no aid had been granted in connection with the privatisation of Elpro. The property consisted of extensive land and buildings located mainly in the eastern part of Berlin.

(7) One of the new owners of Elpro bought the Technische Gebäudeausrüstung Berlin GmbH (TGA) in June 1992 from the THA as highest bidder after an open unconditional tender procedure for a price of DEM 6,9 million. Again, the real estate was sold separately, first to the THA and subsequently for the market price of DEM 36 million to a real estate company founded by the investors in Elpro. No aid was granted in the context of the privatisation of TGA. In 1995 TGA was [...] (*).

(8) In the autumn of 1992, as sole bidder after an open, unconditional tender procedure, Elpro bought Berliner Lufttechnische Anlagen and Gerate GmbH (BLA) for DEM 1,5 million. That company too was sold without real estate. The proceeds of DEM 49,7 million were used by the THA to repay debts incurred at the time of the German Democratic Republic, loans granted in the meantime and several other liabilities. The valuation of the property was based on an independent report made available to the Commission. No aid was granted in connection with the privatisation.

(9) In 1993 the buyers of Elpro and the THA entered into a long-running dispute concerning the purchase price of the company. Many of the claims involved in this dispute stemmed from the fact that, when Elpro was transferred to its new owners in 1992, the valuation of numerous assets and liabilities had been provisional. By 1995 a whole set of figures needed to be revised. Elpro's buyers demanded repayment by the BvS of part of the purchase price of DEM 12 million as the value of various assets (e.g. various outstanding demands) was lower than originally expected. For its part, the BvS entered claims increasing the purchase price by a total of DEM 5,6 million, in particular because the buyers had not fully used up the reserves earmarked for the social compensation plan. At the start of 1996, in a bid to avoid lengthy court proceedings the outcome of which was uncertain, the BvS sold its claims for DEM 1 million to the owners' creditor banks that had financed the purchase of the company. The parties agreed that this payment settled all claims from both sides relating to the privatisation contract of 1 and 2 June 1992 ([4]).

([3]) See footnote 1.
(*) Business secret.
([4]) Notification from the German Government to the Commission of 27 February 1998, p. 33.

(10) Until the end of 1995 the three companies (Elpro, TGA and BLA) carried out the investments agreed in the privatisation contracts. These investments of DEM 87 million for plant modernisation received assistance from the generally available, Commission-approved aid programmes under the joint Federal Government/Länder scheme for improving regional economic structures and under the Investment Allowance Law. By the beginning of 1996 Elpro had become a company with a turnover of DEM 250 to 300 million and 1 700 employees. The group consisted of two main divisions: (a) energy and control wiring systems for railways and industrial facilities (LET) ([5]) and (b) electrical and technical equipment for buildings (GVT) ([6]), From the outset, one of Elpro's chief problems was its insufficient capital base. The new owners had financed all their acquisitions with bank loans. This caused serious difficulties in 1995/96, when the crisis in the construction sector in Berlin began, Elpro's traditional markets in Eastern Europe weakened further and the company suffered heavy losses in connection with certain large engineering projects. By the spring of 1996 Elpro had used up a substantial part of its equity capital and was close to insolvency.

(11) On 24 June 1996, in order to restore its liquidity, Elpro agreed on a rescue package with its banks, the Land of Berlin and the BvS and a tentative restructuring programme was devised. Its shares were transferred to one of the initial investors and subsequently pledged to the creditor banks that had financed the privatisation. As described in detail in the Commission decision initiating the Article 88(2) procedure ([7]) the plan at the time was to close the GVT division and sell the LET division to an international industrial investor. The consultancy company Price Waterhouse was instructed to explore the possibilities of a sale and to prepare a tender procedure. However, a lack of interest from any suitable industrial investor made it clear at a very early stage that the plan envisaged was not feasible and that further modifications were needed. However, the GVT division was closed (at a total cost of DEM 56,3 million), as was the basic industries division and overheads in the LET division were also reduced (at a total cost of DEM 42,7 million). Repayments on long-term loans totalling DEM 54,3 million had to be made and Elpro needed an injection of fresh working capital to continue operations (DEM 47,1 million). The total cost of these measures was DEM 200,4 million. In addition, a new guarantee facility was provided up to a limit of DEM 30 million.

(12) The above measures were financed as follows:

— profit from the sale of E-Plus shares held as a financial participation by Elpro (*)	DEM 121,2 million
— short-term cash resources liquidity generated within Elpro	DEM 13,6 million
— waiver of loans by commercial banks	DEM 18,0 million
— new loan from commercial (80 % guaranteed under the state guarantee scheme)	DEM 18,5 million
— loan from the BvS (first tranche of DEM 4,5 million in summer 1996, remainder in January 1997)	DEM 20,0 million
— loan from the BvS (to be converted into a grant after approval of the restructuring by the Commission)	DEM 9,0 million
— residual payment of regional aid (joint Federal Government/Länder scheme)	DEM 0,1 million
Total (loans/cash)	DEM 200,4 million

(*) E-Plus is a major mobile phone company. Elpro AG had bought a 2,5 % participation in E-Plus for DEM 26,3 million and sold it for DEM 147,5 million.

A guarantee of DEM 30 million was provided by commercial banks against a counter-guarantee of DEM 15 million from the Land authorities and the BvS.

([5]) Leit- und Energietechnik.
([6]) Gebäudesystem- und Versorgungstechnik (communications, air-conditioning systems, lighting).
([7]) See footnote 1.

(When the procedure was initiated, only the BvS loans and counter-guarantees were mentioned as new aid in paragraph 2.5.1, but the text was based on inexact figures. For this reason, the Commission originally viewed the loan of DEM 9 million as a grant. Germany later explained that it was a loan. The Commission was aware only of counter-guarantees to a value of DEM 7,5 million, and not DEM 15 million.)

(13) Consequently, the various State agencies supported the financial rescue of Elpro with loans of DEM 29 million and guarantees totalling DEM 29,8 million. The company contributed DEM 134,8 million from its own funds. Commercial banks participated by waiving claims of DEM 18 million and assuming risks in respect of a DEM 3,7 million loan and the new guarantee line of DEM 15 million. Elpro had previously received from commercial banks guarantees not backed by the State totalling DEM 114 million.

(14) The failure to find an industrial investor and substantial losses on large export contracts towards the end of 1996 made it necessary to adapt the restructuring plan envisaged. It was concluded that Elpro could not survive alone as a contractor for large projects in basic industries (such as cement and steel plants) on export markets because of the very high financing capacity needed and the risks involved. Elpro could not on its own compete against the leading multinationals ([8]) which had a far stronger market position. It was decided to concentrate on activities that were viable for a medium-sized company and to wind down the remaining parts of the business, either by means of a sale or through an orderly liquidation. The objectives of this strategy were: (a) to avoid insolvency because of the very high financial liabilities associated with outstanding performance bonds, (b) to stabilise the retained parts of the business and to make them financially viable, and (c) to safeguard as many jobs as possible.

(15) The main elements of the final restructuring plan of May 1997 are as follows:

1. Concentration of activities on:

   (a) production and assembly of electrical installations (substations, overhead lines) for railways and urban rail transport;

   (b) production and installation of control wiring systems for the utilities sector;

   (c) assembly of electrical and electronic equipment (circuit breakers, transformers, etc.).

2. Further reduction in the workforce from 1 700 (beginning of 1996) to 900 (beginning of 1997) and finally to about 400 (end of 1997).

3. Sale of the reduced basic industries division and of the communications technology division (in all, it proved possible to save the jobs of a further 180 employees and 55 apprentices; with the exception of the sale of a branch of Elpro Leit- und Energietechnik (LET) GmbH (see recitals 25 to 27), no State aid was granted in connection with these sales).

4. Reduction of outstanding guarantees and bank liabilities.

5. Improvement of management, controls and finance; modernisation of data processing facilities.

6. Organisational separation of the Elpro group into those parts to be closed down and those to be continued, with transfer of the latter to the new owners in the second phase of the restructuring programme.

7. Reduction in the stock of real estate, first through leasing and afterwards by selling the main building (planned for 2001).

Implementation of some of these measures began in early 1997. Most have since been completed, while others, including the reduction of guarantees, the training of staff and modernisation, are ongoing or have been deferred until a decision on the State aid programme has been made.

([8]) Including Siemens, ABB and General Electric.

(16) The cost is involved in the first phase of the restructuring (from June 1997 to the end of 1998) [9] were:

— winding-up and closure costs (termination of loss-making projects, settlement of claims, warranties, social plan)	DEM 13,6 million
— repayment of short-term loans used for the rescue operation (see paragraph 12)	DEM 13,6 million
— cash injection to increase working capital	DEM 7,0 million
— loss compensation for two projects	DEM 3,9 million
— debt reduction	DEM 9,8 million
Total	DEM 47,9 million
guarantee for outstanding claims	DEM 3,0 million
Grand total	DEM 50,9 million

(17) These costs were financed as follows:

— residual profit from the sale of E-Plus shares	DEM 16,0 million
— other Elpro funds	DEM 0,9 million
— bank loans (of which DEM 14 million secured by a state guarantee)	DEM 31,0 million
Total cash	DEM 47,9 million
— bank guarantee for outstanding claims	DEM 3,0 million
Grand total	DEM 50,9 million

The State participated in this phase by extending the guarantees, while the loans granted to save Elpro were given junior-ranking status and made interest-free (see point paragraph 13). It also provided a further guarantee of DEM 14 million to secure a proportion of the above-mentioned bank loans. All other funds came from private sources. When the total costs of the restructuring are calculated, an amount of DEM 13,6 million needs to be deducted from the gross costs of DEM 50,9 million since the temporary financing of this amount by Elpro in 1996 was replaced by the residual proceeds from the sale of E-Plus shares.

(18) After the first year of the restructuring and stabilisation of the group, the creditor banks decided to embark on the second phase and to sell the retained parts of the business, which were the subject of a management buyout by one of Elpro's managers, Mr Lelbach. By a contract dated 18 December 1998, Mr Lelbach acquired the shares of the five Elpro subsidiaries which are to continue in business under the new holding company Elpro GmbH Berlin Industrieholding (EUB; unless otherwise stated, it includes Elpro Verkehrstechnik GmbH (EVT), which is legally separate from the holding company). New shares in EUB are to be offered to other members of the management at a later date. By the end of 1998 the parts of Elpro that were to be wound up had ceased all operations and they have had no employees since then, their remaining activities being limited to meeting outstanding guarantee and credit commitments by 2001, when liquidation is to take place. The commercial banks will provide the necessary interim financing until Elpro's main building is sold.

[9] Some winding-up and closure measures will continue until 2001.

(19) The creation of EUB is a continuation of the first phase of the restructuring as described above. EUB is active almost exclusively on the German market; it hopes to re-enter to some of Elpro's traditional CIS markets when the economic situation improves. EUB plans to invest DEM [...] million by 2001, primarily to modernise its electronic data processing facilities and to buy equipment for contact-line contracts. An additional DEM [...] million or so has been earmarked for staff training (including further training). As EUB will basically be an engineering company (more than [...] % of its workforce are engineering graduates), it intends to spend [...] % of turnover on research and development every year and to obtain about DEM [...] million of aid under general R&D programmes.

(20) At the end of 1998 the annual accounts of EUB and EVT were as follows (in DEM million):

(a) *EUB (excluding EVT)*

Assets		Equity capital and liabilities	
A. Fixed assets	[...]	Subscribed capital	[...]
B. Current assets	[...]	Reserves	[...]
— inventories	[...]	Retained profits	[...]
— accounts receivable	[...]	A. Equity capital	[...]
— cash on hand	[...]	B. Reserves	[...]
C. Prepayments and accrued income	[...]	C. Liabilities	[...]
Total assets	[...]	Total equity capital and liabilities	[...]

(b) *EVT*

Assets		Equity capital and liabilities	
A. Fixed assets	[...]	Suscribed capital	[...]
B. Current assets	[...]	Reserves	[...]
— inventories	[...]	Retained profits	[...]
— accounts receivable	[...]	A. Equity capital	[...]
— cash on hand	[...]	B. Reserves	[...]
C. Prepayments and accrued income	[...]	C. Liabilities	[...]
Total assets	[...]	Total equity capital and liabilities	[...]

The equity ratio is therefore [...] % in the case of EUB and [...] % in the case of EVT.

(21) The new owner had to make an equity capital contribution of DEM 1 million in cash and to provide a personal guarantee of DEM 500 000. The BvS will grant a loan of DEM 1,5 million for three years at 5 % to finance half of the training and retraining costs mentioned above. In order to finance the investments totalling DEM 7 million, EUB will receive regional investment aid of DEM 2,1 million (30 %) under the relevant joint Federal Government/*Länder* scheme.

The banks will provide a new guarantee of DEM 42 million, of which DEM 8 million can be used as an overdraft by EUB. The State will provide a counter-guarantee of DEM 33,6 million gross against a reduction of DEM 10 million in the previous guarantee; the net State contribution here is therefore DEM 23,6 million.

In addition, the commercial banks will provide a separate guarantee for a total amount of DEM [...] million to secure advance payments and performance bonds [...].

The financial measures related to the management buyout basically consist in granting the guarantees needed to enable small independent enterprises in the plant construction sector to provide the required advance payment and performance bonds.

(22) The development of EUB's order book and turnover is as follows:

(in DEM million)

	1996	1997	1998	1999 (provisional)
Orders received	124,5	99,2	138,1	121,8
Order book (end of year)	106,2	119,1	158,9	180,5
Turnover	96,0	88,4	93,2	105,3

The table shows the fairly stable positive development of EUB, which is now working at full capacity. In 1998 the group recorded an operating result of DEM 1,8 million and after-tax profits of DEM 932 000. In 1999 and the following years the group expects fairly stable pre-tax profits equivalent to about 2 to 3 % of turnover, a good average for similar enterprises in the sector. It is currently no longer in difficulties.

(23) EUB is primarily active on the German rail transport market, but only in the contact lines and substations segments. Its main clients are Deutsche Bahn AG, the Berlin S-Bahn and other public transport operators. Its chief competitors are subsidiaries of Siemens, ABB, Adtranz, Alstom and General Electric Company (GE). In spite of its relatively small market share, its lower overheads keep the company competitive. With its long-standing experience and technical competence, it managed to meet the strict pre-qualification requirements imposed by Deutsche Bahn AG and to win a series of open contracts. As its main client, Deutsche Bahn AG is interested in keeping medium-sized suppliers on this market so as to avoid an even greater degree of concentration among the few large industrial groupings.

In the industries such as electricity supply, gas, water and wastewater treatment, EUB acts basically as an engineering firm for the electrical and process control equipment. Clients include large gas utilities, such as Ruhrgas, Thyssengas and Gazprom, and local water utilities. Depending on the type of project, it competes against the engineering divisions of large multinational corporations as well as against other engineering firms of a similar size. In the light of Elpro's negative experience in the past, EUB confines itself to smaller projects costing DEM 5 million or less.

(24) Elpro was, and EUB is, essentially a service enterprise that produces and assembles electrical equipment; most of the equipment is manufactured by other firms. Its capacity can therefore be measured only in man-hours. In 1990 the old Elpro had a capacity of some 8 million hours/year; this had fallen to about 2,15 million hours/year by 1996. The various closures resulting from the restructuring have reduced EUB's capacity to about 450 000-500 000 hours/year. The capacity of the hived-off subsidiaries is approximately 200 000 hours/year. Restructuring has therefore reduced capacity by about 65 to 70 %.

(25) The restructuring plan of May 1997 originally envisaged the complete closure of the basic industries section of Elpro's LET division. In the course of the failed bidding procedure for Elpro one of the bidders, the General Electric Finance Holding GmbH, a subsidiary of GE, showed an interest in taking over LET's metalworking division and over its building materials and transportation division. On 17 October 1997 a contract was concluded for the sale of these divisions, which had 67 employees, to the newly founded GE Industrial Systems GmbH Berlin (GE IS), which is 100 %-owned by General Electric Finance Holding GmbH. GE IS is linked to GE's industrial control systems division. With some 240 000 employees, of whom 6 000 work in Germany, and a turnover of some USD 80 billion (1996), GE is one of the leading electrical equipment suppliers worldwide. The new GE IS has no production capacity; it is an engineering company intended to serve as a technical marketing and support centre for incorporating GE components into major investment projects in the building materials and mining industries. As Elpro had been very much oriented towards eastern Europe, GE would like to exploit this experience and these skills to strengthen its market position in Germany and in central and eastern Europe. Consequently, GE IS intends to market 60 % of its services in central and eastern Europe, 30 % in Germany and 10 % in the other Member States of the European Union.

(26) The business plan of GE IS is as follows:

(in DEM million)

	1997 (actual) [1]	1998 (actual)	1999 (planned)	2000 (planned)	2001 (planned)
Turnover	[...]	[...]	[...]	[...]	[...]
Total production	[...]	[...]	[...]	[...]	[...]
Materials	[...]	[...]	[...]	[...]	[...]
Operating result	[...]	[...]	[...]	[...]	[...]
Profit/loss before tax	[...]	[...]	[...]	[...]	[...]
Profit/loss after tax	[...]	[...]	[...]	[...]	[...]
Number of employees	68	73	[...]	[...]	[...]

[1] Incomplete year: August to December 1997.

In 1996 the corresponding divisions of LET had 165 employees and made a loss of DEM 4,4 million on a turnover of DEM 54,8 million. The losses of GE IS in the start-up period 1997-99 were attributable to primarily intangible investments of DEM 13,1 million, in the form of training and technology transfer, which cannot be capitalised. The remaining investments were in engineering tools and in electronic data processing equipment and systems, which are written off over a very short period. A comparison of the results forecast in 1997 with the actual results up to September 1999 shows that the restructuring of activities by GE IS was slow to get under way. The results were also influenced by the delay in payment of the expected state aid due to the pending state aid procedure. During 1999, however, there was a marked improvement broadly in line with the original plan.

As part of GE, GE IS competes on the market for electrical industrial equipment, its main competitors being very large groups such as Siemens AG, Cegelec (Alstom) and ABB. In Germany its market share is around 1 % of a market worth some EUR 20 billion.

(27) GE IS purchased the divisions of LET at the book value of their assets (made up almost exclusively of used computers and software), namely DEM 0,237 million. GE committed itself to financing the negative cash flow in the start-up period by means of a variable credit line under its cash pool. This credit amounted to DEM 13,4 million by the end of September 1999, far more than the DEM 5,1 million planned in 1997. Germany intends to provide the following restructuring aid:

— Grant from the BvS to cover some of the start-up losses of DEM 5,1 million (from October 1997 until the end of 1998)	DEM 1,3 million
— Training aid from the Land of Berlin to Part-finance training measures costing DEM 3,4 million	DEM 1,5 million
— Investment aid under the joint Federal Government/Länder scheme for eligible investment costs of DEM 7,66 million	DEM 2,0 million
Total aid for the restructuring of GE IS	DEM 4,8 million

By September 1999 DEM 94 600 of the investment aid and DEM 43 200 of the training aid had been disbursed.

The investor is contributing 74 % of the total restructuring costs of DEM 18,4 million.

(28) The total costs of the rescue and restructuring of Elpro and its successor companies can be summarised as follows (in DEM million, all loans and guarantees at nominal value):

(in DEM million)

Item/period	Total cost	Of which: State loans/ grants	State guarantees	Banks	Owners/ investors	Total private share	Finance from private sources %
1. Elpro rescue (mid-1996 to mid-1997)	230,4	29,1	29,8	36,7	134,8	171,5	74,4
2. Restructuring of Elpro and later development (1997-2001)	50,9	0,0	14,0	20,0	16,9	36,9	71,7
3. Restructuring under EUB/EVT (management buyout)	56,0	3,6	23,6	27,3	1,5	28,8	51,4
4. Restructuring under GE IS	18,4	4,8	0,0	0,0	13,6	13,6	73,9
Total restructuring costs (broken down by economic risk)	355,7	37,5	67,4	84,0	166,8	250,8	70,5

(29) The Commission had initiated the Article 88(2) procedure as it had serious doubts as to the compatibility of the aid with Article 87(3) of the Treaty. In view of the sketchy information available at the time, it doubted in particular whether the aid was in line with the requirements set out in the guidelines on state aid for rescuing and restructuring firms in difficulty (hereinafter the 'guidelines') ([10]). Particularly critical points were the lack of a new investor and the fact that Germany did not provide the Commission with a comprehensive restructuring plan.

([10]) OJ C 368, 23.12.1994, p.12, read in conjunction with the final provisions of the new guidelines (OJ C 288, 9.10.1999, point 101(b)). The criteria for applying this provision are met since all the aid was granted prior to the publication of the new guidelines.

III. COMMENTS FROM INTERESTED PARTIES

(30) The Commission received no comments from interested parties.

IV. COMMENTS FROM GERMANY

(31) Germany responded to the initiation of the procedure by answering the questions raised in this connection by letters dated 27 February and 19 August 1998. It provided further information at a meeting with the Commission on 15 June 1998. The additional aid, which eventually led the Commission to extend the procedure, was notified by letter dated 29 July 1998. Further questions from the Commission concerning the new aid were answered by letter dated 19 August 1998.

In response to the extension of the procedure, which had been communicated to Germany by letter dated 3 February 1999, Germany submitted on 22 June 1999 a comprehensive written presentation of the restructuring programme and of the progress in implementing it. The presentation was discussed at two meetings between the German authorities and the Commission on 1 September and 29 October 1999. Answers to the questions raised at those meetings were given by letters dated 9 September and 13 December 1999, and the Commission received the corresponding technical annexes on 22 December 1999. The information provided by Germany can be divided into the five main parts:

— the valuation reports on the property sold when Elpro was privatised in 1992/1993,

— Elpro's complete annual accounts for the period from 1992 to 1997,

— the 1996 and 1997 rescue and restructuring plans for Elpro and Germany's comments (Communication from the German Government dated 22 June 1999),

— the restructuring and business plans and the annual accounts of EVB and EVT until the end of 1999,

— the restructuring and business plans and the annual accounts of GE IS until September 1999.

In the interests of clarity, the contents of these documents have been summarised in Part II of this decision.

V. ASSESSMENT OF THE MEASURES

(32) It can be concluded from the information provided by the German authorities during the investigation that Elpro and the two companies that subsequently merged with it, BLA and TGA, were all sold at a positive price following an open unconditional tender procedure. All three companies were sold without their substantial real estate, which had been sold separately to the THA or one of its subsidiaries before privatisation to cover the debts that had accrued prior to privatisation. Independent real estate experts had assessed the value of the property at the time and the valuation reports have been made available to the Commission, which has no reason to question the results. It can therefore be concluded that Elpro, BLA and TGA were privatised in 1992 without State aid.

(33) The form of the privatisations in 1992 was problematic from a financial and commercial point of view, as the new owners financed the entire transaction via the banks. Elpro was therefore undercapitalised from the beginning. Many of its international contracting activities required though a very strong capital base since the clients insisted on bidding, performance and long-term warranty bonds being provided. The extent of the problem became evident at end of 1995, when, owing to losses on a few large industrial projects, the debt-equity ratio reached 726 % ([11]). It can therefore be concluded that the subsequent need to restructure Elpro resulted mainly from structural shortcomings not addressed at the time of its privatisation in 1992.

([11]) Corporate Treuhand GmbH and C&L Deutsche Revision AG, Bericht über die Prüfung des Jahresabschlusses 1996 der Elpro AG Berlin, point 92.

(34) At the beginning of 1996, the BvS and the commercial banks that had financed the purchase of Elpro by the new owners at the time of the first privatisation and acted in their name reached an agreement to settle once and for all the contested claims and counter-claims in connection with the purchase price agreed in the privatisation contract of June 1992 ([12]). Following the sale the THA and the new owners had entered claims in respect of a number of discrepancies regarding the originally assumed balance-sheet values, payment deadlines or fulfilment of obligations by the buyer. The claims arose primarily as a result of the failure before privatisation in 1992 to establish the exact financial position of the enterprises and hence their net worth (which determined the purchase price). A number of points in the privatisation contracts were left for later clarification, and these gave rise to a number of complicated disputes which lasted for several years ([13]). In the light of the auditor's comments on Elpro's annual accounts, the Commission accepts the argument that the BvS acted in accordance with standard commercial practice when it waived its claims for DEM 5,6 million against payment of DEM 1 million and renunciation of all counter-claims by the buyer in order to avoid lengthy legal proceedings the outcome of which was uncertain. It therefore concluded that these transactions did not involve state aid within the meaning of Article 87 of the Treaty.

(35) The financial participations by the BvS and the *Land* of Berlin in Elpro and subsequently in EUB, EVT and GE IS from June 1996 onwards constitute state aid within the meaning of Article 87(1). As all these companies produced or produce goods and services which are traded between Member States, they could also hamper trade between them. The aid granted in the form of loans and grants by the BvS is unlawful state aid since Germany failed to notify these measures prior to implementation. The state guarantees were granted as part of joint application of the relevant federal and *Land* rules. The former were approved by the Commission as State aid cases N 297/91, N 81/93 and E 24/95, albeit with a reservation regarding large companies and hence Elpro. The guarantees granted by the *Land* of Berlin were approved as State aid case N 130/95. Germany undertook to notify individual cases of aid to large companies. For this reason, the aid granted in the form of guarantees is also unlawful since Germany failed to comply with the notification requirement. Accordingly, all the aid must be assessed under Article 87 of the Treaty in the light of the criteria set out in the guidelines ([14]).

(36) Elpro was in difficulties before its rescue and restructuring got under way in June 1996. It had lost half of its equity capital in 1995 and losses continued in 1996. Its asset position was better than appeared from the annual accounts since the market value of its participation in the mobile phone company E-Plus significantly exceeded its book value. However, the amount of potential liabilities from outstanding guarantees was in the same range, and this was not reflected in the balance sheet either. The various companies constituting the Elpro group were therefore lacking in liquidity and were very close to insolvency in the spring/early summer of 1996.

(37) On 24 June 1996 Elpro concluded an agreement on the group's financial and organisational rehabilitation with its creditor banks, the *Land* of Berlin and the BvS ([15]). From a Sate aid perspective, this was a rescue plan containing elements of a future restructuring plan. However, the auditor's report makes it clear that the agreement was only a temporary measure to secure the liquidity of Elpro in the short term. At the time, it was hoped that Elpro could be sold as a single entity to one industrial investor. However, market research revealed that this was not feasible. At the beginning of 1997 the BvS asked the auditor KPMG to prepare a revised and detailed restructuring plan. KPMG presented its report on 12 May 1997. It is therefore appropriate to distinguish between a rescue period running from 24 June 1996 until 12 May 1997 and a restructuring period starting on 12 May 1997 and expected to continue until the end of 2000.

([12]) See recital 9.
([13]) Corporate Treuhand GmbH, Bericht über die Prüfung des Jahresabschlusses 1992 der Elpro AG Berlin, points 266-275 and 337.
([14]) See footnote 10.
([15]) Konzept zur weiteren Entwicklung der Elpro AG, 24 June 1996.

(38) The agreement of 24 June 1996 was the basis for the granting of two loans of an initial DEM 13,5 million and a final total of DEM 29 million as well as the provision of guarantees for a total amount of DEM 29,8 million ([16]). For the period until May 1997 these measures are to be considered as rescue aid within the meaning of the guidelines whose terms were in line with requirements set out in the guidelines. The loans supplemented the DEM 134,8 million provided by the company and were used primarily to finance the closure of about 50 % of the group's activities, including the social plan for the employees made redundant. The financial scope of the guarantees was limited to provision of the liquidity necessary to keep the remaining parts of Elpro in business. The high unemployment in Berlin, and in particular the enormous loss of employment in industry since 1990, justified the financial involvement of the BvS and the *Land* of Berlin. The rescue of Elpro caused no unjustified restrictions of competition in other Member States. Elpro ceased its activities in the housing installations sector, which had been concentrated on the regional market anyway. As regards Elpro's other activities (electrical installations for railways and industry), its competitors are far larger and enjoy significantly more favourable financing conditions than Elpro, even taking account of the rescue aid granted. The Commission can accept that the rescue period lasted 11 months as it is evident that the BvS and the banks took immediate action to sell the company, hoping that the buyer would take charge of the subsequent restructuring. When they realised in early 1997 that this would not be feasible, they adapted the restructuring plan without delay. The Commission can therefore accept that the granting of the abovementioned rescue aid, which was subsequently transformed into restructuring aid, was in compliance with the guidelines. For the calculation of the aid element, see paragraph 42.

(39) The final restructuring plan of 12 May 1997 is in essence a more detailed, updated version of the earlier rescue plan. It implemented the decision to close down loss-making activities but, as no financially powerful industrial investor could be found, it was decided to close a large part of the electrical control business (LET) division as well, given its inherent high risks and its substantial capital requirements. The main aim of the restructuring plan was to minimise losses for the financing banks, which had taken control of Elpro. In view of the high risks from outstanding guarantees it was important to avoid insolvency proceedings while ensuring the orderly completion of ongoing projects and fulfilment of the warranty obligations during the guarantee period. The State supported this programme with the primary objective of safeguarding as many jobs as possible given the high unemployment in Berlin, which had lost 140 000 jobs in industry between 1991 and 1997, i.e. 54 % of all industrial jobs. The division of Elpro into activities to be closed down and activities to be continued can be accepted as two elements of one coherent overall plan. As regards the continuation of EUB/EVT and GE IS, the plan was supplemented by the new owners' business plans. From a State aid perspective, therefore, it is appropriate to divide the restructuring of Elpro into three parts:

1. Measures in favour of Elpro to finance the winding down of the activities to be terminated and to prepare the activities to be continued for a separate sale (from May 1997 to the end of 2001);

2. Measures in favour of EUB, including EVT, after their separation by means of a management buyout (from December 1998 to the end of 2000);

3. Measures in favour of GE IS after the sale of the metalworking and building materials/mining divisions to GE (from October 1997 to the end of 2000).

Compliance of the restructuring programme(s) with the requirements of the guidelines can, however, be assessed only as regards the activities to be continued as the closures had no separate impact on the common market.

(40) The EUB restructuring plan can also be regarded as viable in view of the experience gained in over one year of implementation. Recent business results show that the firms now concentrate on fields in which they are competitive, which are less capital-intensive and in which they can generate profits comparable to other medium-sized enterprises in the electrical industry. The Commission cannot,

([16]) See recitals 11 to 13.

however, regard EUB and EVT as separate SMEs. However, while both of them are legally separate entities with workforces, balance-sheet totals and turnovers below the relevant thresholds (EUB is very close to the threshold), the notification and the business plan make it clear that EUB and EVT are a single unit commercially, organisationally and from a financial perspective. It is therefore not appropriate to apply the special rules for SMEs to EUB.

(41) The restructuring aid to Elpro and its main successor company EUB will not lead to excessive distortions on the market. The Commission recognises that Elpro reduced its capacity by 65 to 70 % from 1996 to 1998. As Elpro and EUB are primarily engineering, companies, it is appropriate to measure their capacity in terms of man-hours. Moreover those loss-making activities that could have had the most distortive impact on the marke in that offers had been made which did not cover costs were closed down. The impact of Elpro and EUB on the market was and is, however, minimal since they were very small players on an oligopolistic market dominated by large groupings. The Commission acknowledges that the continued existence of EUB, whose activities are confined almost exclusively to the eastern part of Germany, improves the market structure. In contrast to the rolling stock segment of the rail transport market, there is no overcapacity in the substations and contact lines segments, where EUB is active. Demand in these segments is driven mainly by the replacement and modernisation needs of the Deutsche Bahn AG and urban rail transport organisations.

(42) The restructuring aid granted to Elpro consists of the following measures:

1. The loans of DEM 29 million granted originally as rescue aid have been given junior-ranking status (DEM 20 million) and claims will be waived after approval by the Commission. These funds served to finance the losses and closure costs in the period 1996 to 1998; the aid intensity is 100 % in each case.

2. Prolongation of the guarantees of DEM 29,8 million granted originally as rescue aid and new guarantees of DEM 14 million: although it is now unlikely that the State will have to honour a larger amount of claims in connection with these guarantees, the risks involved were initially very high and so no private financial institution would have provided such guarantees. In accordance with the Commission's usual decision-making practice and given extremely high risk of default and the lack of other appropriate securities, the aid intensity of these guarantees has to be set at 100 % ([17]).

Taking into account the DEM 138,1 million contributed by the enterprise itself (most of which came from the proceeds of the sale of its share in E-Plus) and the contribution made by the banks, which waived claims amounting to DEM 18 million and assumed a risk equivalent to more than 40 % of their total new loans of DEM 49,5 million, the total private contribution to the financing of the restructuring exceeds 70 % ([18]). The Commission concludes therefore that the aid was kept to the minimum and that no excess liquidity was provided.

(43) The restructuring aid granted to EUB in connection with the management buyout consists primarily of counter-guarantees (net amount of DEM 23,6 million) to secure a credit line of up to DEM 8 million and of bid or performance bonds totalling DEM 42,9 million to be provided by the commercial banks on market terms. In view of the nature of the projects secured by these guarantees, the Commission came to the conclusion that the losses to the guarantor would not have exceeded DEM 8 million. This amount is to be regarded as State aid ([19]). In addition, EUB will receive from the BvS a loan of DEM 1,5 million for three years to finance its training costs at an annual interest rate of 5 %. This is below the market rate. As EUB is not required to secure the loan, the aid intensity must be fixed at 100 %. For its investments of DEM 7 million, EUB will receive DEM 2,1 million of investment aid under the joint Federal Government/*Länder* scheme. Therefore, the total restructuring aid amounts to DEM 11,6 million. In view of the risks assumed by the private banks (DEM 27,3 million) and the costs to be met by the private investor of DEM 7,8 million ([20]), it can be concluded that the aid is kept to a mmmum.

([17]) See Commission Notice on the application of Articles 87 and 88 of the EC Treaty to state aid in the form of guarantees (OJ C 71, 11.3.2000, p. 14, point 3.2).
([18]) See recitals 12, 17 and 28.
([19]) Calculation: 80 % of a credit line of DEM 8 million = DEM 6,4 million, assuming a 10 % risk on the residual guaranteed amount of DEM 15,6 million, and this gives a total of DEM 7,96 million.
([20]) Calculation: DEM 1 million working capital provided by the investor, DEM 4,9 million private share of the investments and DEM 2,9 million private share of training costs.

(44) As regards the sale of the two sections of Elpro's former LET division to GE, the Commission shares the view that the price paid for the assets reflects their market value and that therefore no aid is involved. Germany provided a comprehensive restructuring plan within the meaning of the guidelines ([21]). The Commission has no reason to question the viability of the GE IS project. GE IS (Berlin) is, however, so closely integrated into GE's worldwide industrial systems activities that an individual analysis of its financial results would be meaningless. The future activities of GE IS are aimed predominantly at areas outside the Community. Its market share in Germany is around 1 %. Given the significant overall reduction in Elpro's capacity, the Commission acknowledges that the planned capacity of GE IS of about 100 employees (owing to the nature of GE IS's activities, capacity can be measured only in terms of the numbers employed) is lower than LET's corresponding capacity in the relevant sectors. Consequently, no undue distortions of the market are to be expected.

(45) The aid granted to GE IS to help it complete its restructuring consists of three elements:

1. A grant of DEM 1,3 million to cover some of the start-up losses: this is clearly operating aid. The Commission recognises, however, that it was used to finance some of the underemployment costs of DEM 5,1 million during the period 1997/98 so as to avoid additional lay-offs;

2. Training aid of DEM 1,5 million in order to part-finance training measures costing DEM 3,4 million: the aid intensity of 44,5 % is just below the threshold set in the framework on training aid for training projects of large firms in an Article 87(3)(a) area ([22]). In view of the high number of older employees at GE IS, the supplement of 10 % is in line with point 33 of the framework;

3. Investment aid of DEM 2 million under the joint Federal Government/*Länder* scheme for total eligible investments of DEM 7,66 million: the intensity of this aid is below the 35 % approved for investment aid in this Article 87(3) region.

Therefore, only DEM 1,3 million out of a total DEM 4,8 million in aid for the further restructuring of GE IS has not been granted in accordance with the general rules applicable to all enterprises. As the private investor contributes about 74 % of the overall restructuring costs, the aid is not to be considered as disproportionate.

(46) Germany should be required to report to the Commission twice a year on progress in restructuring EUB and GE IS and on the use of the restructuring aid by Elpro, EUB and GE IS in 1999 and 2000.

VI. **CONCLUSIONS**

(47) The Commission finds that Germany has unlawfully granted rescue and restructuring aid to Elpro and its successor companies EUB and GE IS and has, therefore, infringed Article 88(3) of the Treaty. However, on the basis of its investigation, it has decided that the aid is to be regarded as being compatible with the common market within the meaning of Article 87(3)(a) and (c) of the EC Treaty,

HAS ADOPTED THIS DECISION:

Article 1

The State aid which Germany has granted to Elpro AG Berlin (Elpro) amounting to DEM 72,8 million is compatible with the common market within the meaning of Article 87(3)(c) of the Treaty.

Article 2

The State aid which Germany has granted to Elpro GmbH Berlin - Industrieholding (EUB) and Elpro Verkehrstechnik GmbH (EVT) amounting to DEM 11,6 million is compatible with the common market within the meaning of Article 87(3)(c) of the Treaty.

([21]) See recitals 25 to 27, which contain details of the plan.
([22]) OJ C 343, 11.11.1998, p. 10, points 32 and 33.

Article 3

The State aid which Germany has granted to GE Industrial Systems GmbH Berlin amounting to DEM 4,8 million is compatible with the common market within the meaning of Article 87(3)(c) of the Treaty.

Article 4

Germany shall submit to the Commission twice-yearly reports on the progress in restructuring EUB and GE IS and on the use of the restructuring aid by Elpro AG, EUB and GE IS in 1999 and 2000.

Article 5

This Decision is addressed to Germany.

Done at Brussels, 14 March 2000.

For the Commission

Mario MONTI

Member of the Commission