COMMISSION DECISION

of 13 February 2001

on the State aid implemented by Germany for KataLeuna GmbH Catalysts

(notified under document number C(2001) 403)

(Only the German version is authentic)

(Text with EEA relevance)

(2001/685/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 those comments,

Whereas:

I. PROCEDURE

(1) By the notification of the aid by letter dated 8 January 1999, the Commission was informed that Germany had implemented aid measures for KataLeuna GmbH Catalysts. By letters dated 19 March, 7 May, 26 August, 28 September, 26 October, 8 December and 30 December 1999, Germany provided the Commission with further information.

(2) By letter dated 16 March 2000, 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.

(3) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* ([2]). The Commission invited interested parties to submit their comments on the aid.

(4) The Commission received comments from interested parties. It forwarded them to Germany, which was given the opportunity to react, its comments being received by letter dated 24 July 2000. Additional information was received from Germany by letters dated 11 August, 4 September and 30 November 2000.

II. DETAILED DESCRIPTION OF THE AID

(5) KataLeuna GmbH Catalysts ([3]) (hereinafter referred to as 'KataLeuna') was legally established on 1 October 1994 when it was split off from Leuna-Werke GmbH.

(6) KataLeuna produces catalysts. It is situated in Leuna, Saxony-Anhalt, which is an Article 87(3)(a) region. In 1999 KataLeuna employed 85 people. According to the notification, the company specialises in research, development and production in the field of industrial catalyst systems.

(7) The areas where catalysts are used are the chemical industry (24 %), the mineral oil industry (24 %), environmental protection (36 %) and polymerisation (16 %).

(8) The relevant market segment for KataLeuna is above all that of chemical catalysts, or more particularly hydrogenation/selective hydrogenation catalysts, which in 1998 had a world market volume of DEM 600 Million.

(9) In 1998 KataLeuna produced three products: nickel-based hydrogenation catalysts, palladium-based selective hydrogenation catalysts and nickel-based absorption masses. The breakdown of sales was as follows: Germany[…]* %; Europe (without Germany) […]* %; and outside Europe […]* %.

([1]) OJ C 142, 20.5.2000, p. 26.
([2]) See footnote 1.
([3]) Formerly Leuna-Katalysatoren GmbH. The company was the legal entity in Leuna-Werke producing catalysts.
* Business secret.

(10) KataLeuna's second privatisation, which is the subject-matter of this decision ([4]), took place when the Bundesanstalt für vereinigungsbedingte Sonderaufgaben (Federal Office for Unification-related Special Tasks — BvS) sold all its shares (100 %) to CRI Deutschland GmbH (hereinafter referred to as 'CRI'), a subsidiary of CRI International, USA, under a contract dated 24 July 1998. The purchase price was DEM 1,3 Million, which has been paid.

(11) In the context of seeking an investor for the second privatisation, discussions were held with 15 interested companies in the chemical sector, detailed discussions were held with three companies and negotiations were held with two companies. After one of the companies withdrew, CRI was left as the highest/only bidder.

(12) CRI International is a US-based entity wholly owned by the Royal Dutch/Shell group of companies. It was established on 1 January 1995 to bring together the global catalyst interests of Shell (including joint venture shares of 49 % in Criterion, 50 % in Zeolyst International and 50 % in CRI-MET) in a single entity. The main activities of CRI International are research and development, manufacture and sale, servicing and regeneration/recycling of catalysts for the refining and chemical industries. CRI Catalysts is globally focused in order to respond quickly to customer requirements and to provide state-of-art catalyst products and services. The consolidated turnover of CRI International in 1998 was USD […]* million and its profit USD […]* million.

(13) CRI has submitted a restructuring plan for KataLeuna. The plan consists of the following elements:

— The employment of at least 75 people until 31 December 2002. Of these, at least […]* should be working in R&D and at least […]* should have a science degree or comparable academic qualification. Up until 31 December 2002 a contractual penalty will be payable if the number of employees drops below the above figure.

— Pursuit of a marketing and sales strategy aimed at broadening the client and product base and at expanding into new geographic markets using contacts of CRI and Shell. Turnover is to be divided in future along the lines of Europe […]* %, USA […]* % and Asia […]* %.

— Cooperation with other companies in the Shell group in the form of using the same technologies and know-how. Considerable importance will be attached to the intra-group supply chain. […]*

— Comprehensive modernisation of production facilities. This will involve a substantial increase in total capacity. The investments would be completed by the end of 2000, the new capacities coming on stream from the beginning of 2001.

— A financing plan according to which KataLeuna should achieve a positive cash flow in 2001 and a profit in 2003. In the notification it is explained that with the existing product range it should be possible to increase annual turnover to DEM […]* Million once the investments have been carried out and the distribution network expanded. With the planned expanded product range an annual turnover of around DEM […]* Million can be achieved within ten years.

(14) As regards the development of capacity, the notification indicates that the existing facilities enable a production of 200 to 300 tonnes a year.

(15) At present KataLeuna operates three production facilities:

— A nickel contact facility with a capacity of […]* tonnes a year […]* tonnes produced in 1997).

— An argillaceous earth contact facility with a maximum capacity of […]* tonnes a year depending on the products and materials used (capacity utilisation rate in 1997: […]* %).

— A precious metal contact facility with a capacity of […]* tonnes a year (1997 production: […]* tonnes).

Consequently, the current maximum total capacity of the facilities is […]* tonnes a year.

(16) CRI intends to install a new facility for the production of heavy-metal catalysts with a capacity of […]* tonnes a year and a precious-metal catalyst facility with a capacity of […]* tonnes a year. For the precious metal facility, the existing buildings and part of the installations will be used after thorough modernisation and some installations will be new. The restructuring plan thus provides for a total capacity of […]* tonnes a

([4]) In the Commission decision opening the formal investigation procedure, it is stated (recitals 40 to 46) that the aid linked to the first privatisation was compatible with the common market as it complied with the 1992 and 1995 Treuhand regimes. Therefore, only aid linked to the second privatisation is assessed in this decision. See footnote 1, pp. 31 and following.

year. The increase in capacity due to restructuring would accordingly be more than 100 %.

(17) As regards the financing of the restructuring, the contractually agreed investment amount is DEM 70 Million. Investments are to be carried out between 1998 and 31 December 2002 (30 Million by 31 December 1999 and 40 Million by 31 December 2002, subject to payment of a contractual penalty). As is explained in the notification, the modernisation investments are to be completed by the end of 2000.

(18) According to the notification and the related documentation provided by Germany, the financing of the second privatisation is divided between public bodies and the investor as follows:

Financing by the investor:

Purchase price	DEM 1,3 million
Inherited liabilities agreement	DEM […]* million
Capital increase	DEM […]* million
Reserve capital	DEM […]* million
GA ([5]) compensation	DEM […]* million
Total	**DEM 26,8 million**

Financing by the BvS:

Investments	DEM 13,744 million
Loss compensation	DEM 10,0 million
Inherited liabilities	DEM 5,0 million
Exceptional guarantees	DEM 2,0 million
GA ([6]) compensation	DEM 1,7 million
Redundancy costs	DEM 0,586 million
Dismantling, demolition	DEM 3,0 million
Infrastructure	DEM 2,0 million
Compensation from the first privatisation	DEM 0,827 million
Investments from the first privatisation	DEM 17,6 million
Total	**DEM 56,457 million**

Other public financing:

Contributions from *Land* and Federal Government for R&D in 1998 ([7])	DEM 0,670 million
GA ([8]) contributions (investment grants)	DEM 22,457 million
Investment allowances ([9])	DEM 6,700 million
Total	**DEM 29,827 million**

(19) Consequently, the total amount of public contributions is, according to the notification and the subsequent documentation provided by Germany, DEM 86,284 million, DEM 81,284 million of which is considered to be aid ([10]), while the investor's contribution is DEM 26,8 million. The total cost of the second privatisation is therefore DEM 113,084 million.

(20) In the decision opening the formal investigation procedure, the Commission noted that KataLeuna's total production capacity would be increased from the current […]* tonnes a year to […]* tonnes a year, i.e. an increase of more than a 100 %.

(21) The Community guidelines on state aid for rescuing and restructuring firms in difficulty ([11]) (hereinafter referred to as 'the guidelines') stipulate that, if there is no structural overcapacity in the relevant market, the aid may be used only for the purpose of restoring the company's viability and it may not enable the recipient during the implementation of the restructuring plan to expand production capacity, except in so far as is essential for restoring viability without thereby unduly distorting competition.

(22) The Commission noted in the decision opening the procedure that the information in its possession had not allowed it to establish that there was no overcapacity in those sectors of catalyst markets in which KataLeuna was going to operate after its restructuring and that the

([5]) Approved scheme under the 'Gemeinschaftsaufgabe' (joint Federal Government/*Länder* programme for improving regional economic structures).

([6]) See footnote 5.

([7]) Approved scheme entitled 'Förderung von Forschung, Entwicklung und Innovation in kleinen und mittleren Unternehmen in den neuen Bundesländern' (promotion of research, development and innovation in SMEs in the new German *Länder*), aid N 331/96; decision communicated to Germany by letter dated 23 Januar 1997, SG(97) 0482.

([8]) Approved scheme under the 'Gemeinschaftsaufgabe', 24th framework plan, aid N 530/95 and N 531/95; decisions communicated to Germany by letters dated 22 May 1996, SG(96) 4868 and 28 June 1996, SG (96/5950.

([9]) Approved scheme under the Investitionszulagengesetz (Investment Allowance Act) 1996, aid N 494/A/95; decision communicated to Germany by letter dated 11 April 1996, SG (96)3794.

([10]) The public funding aimed at eliminating inherited liabilities is not considered to be aid. See paragraph 69 of the Commission decision initiating the formal investigation procedure.

([11]) 1994 version: OJ C 368, 23.12.1994, p. 12; 1999 version: OJ C 288, 9.10.1999, p. 2.

aid would not unduly distort competition in those markets.

(23) The Commission further noted that the investor's contribution to the restructuring was 24 %, and the aid intensity 72 % ([12]). The Commission therefore had doubts about whether the aid was limited to the strict minimum needed to enable restructuring to be undertaken and whether the investor contribution could be considered significant as provided in the guidelines. Moreover, in view of the fact that the investment seemed to be more in the nature of a new investment than of a restructuring measure, the Commission had doubts about the true nature of the project.

(24) Consequently, for the reasons set out above, the Commission had doubts about the absence of undue distortion of competition caused by the aid, the proportionality of the aid to the restructuring costs and benefits and the nature of the investment in question.

III. COMMENTS FROM INTERESTED PARTIES

(25) The Commission received comments on the opening of the procedure from the United Kingdom and CRI Catalysts.

(26) The United Kingdom welcomed the Commission's investigation and stressed the importance of ensuring that State aid guidelines were properly implemented by Member States. It explained that, following consultations with its chemical sector, it was of the opinion that aid granted by Germany had given KataLeuna an unfair competitive advantage which had had a detrimental impact on competition in this market and a distorting effect on competition in the European industry.

(27) CRI Catalysts referred in its comments to public and third-party information on the hydrogenation catalyst market. The annual growth rates indicated by the information were in the 4 to 5 % range. Hence KataLeuna's current market share was only […]* %. Furthermore, the long-term KataLeuna business plan indicated sales growing to a maximum of USD […]* million, resulting in an ultimate market share of only […]* %. This supported the conclusion that KataLeuna's business plans would have very little impact on competition in this large, growing market. CRI Catalysts stressed that customers had expressed serious concerns about the concentration of the industry and the numerous takeovers that had occurred in recent years and that they viewed KataLeuna as a benefit to competition in that it amounted to a reversal of the trend towards fewer and fewer competitors in the market with the associated threat of higher prices. In addition, KataLeuna's actual turnover in 2000 was at least 50 % higher than in 1999, lending additional weight to the conclusion that there was more than enough room in the market for at least one, smallish competitor.

(28) CRI Catalysts also contested the Commission's calculation resulting in an investor contribution of 24 % and stated that it believed Germany's calculation resulting in an investor contribution of at least 33 % to be more accurate. With regard to the question of the nature of the operation, it stressed that the operation was clearly a simple restructuring. There were no new elements since the technology, customers, manufacturing processes, types of equipment, suppliers and employees all remained the same both before and after the restructuring. A new building shell was necessary in order to meet health and safety standards. Much of the new equipment was simply an updated version of similar equipment that had existed before the privatisation. The business was not manageable with unsafe and environmentally unsound buildings and equipment.

IV. COMMENTS FROM GERMANY

(29) Germany's comments focused on four issues: the market situation, the nature of the project as restructuring, the aid calculation and the increased investor contribution. Germany submitted documentation to the Commission in support of its arguments.

(30) As regards the market situation, Germany explained that it was in general correct to say, as the Commission had done when opening the procedure, that overcapacities existed in some segments of the catalyst markets. By way of example it cited catalysts for the motor vehicle industry. However, Germany stressed that KataLeuna was not active in these sectors, nor would it be under the restructuring plan. KataLeuna's activities were restricted to the sector of chemical catalysts and within that sector mainly to the area of hydrogenation catalysts. In this sector there were no overcapacities. KataLeuna focused on market niches and tailor-made catalysts to meet the specific requirements of individual customers.

(31) Germany noted that the Commission's calculations in the decision opening the procedure regarding KataLeuna's market share, based as they were on market shares in subsegments of the hydrogenation catalyst market, were inaccurate and potentially misleading. An accurate definition of market shares on this basis was very difficult as it was almost impossible to allocate existing production capacities to the different subsegments. For this reason, market shares could only

([12]) See footnote 10.

realistically be defined on the basis of wider market segments, such as the hydrogenation catalyst sector.

(32) Germany explained that some catalyst producers had built additional capacities particularly in the area of chemical catalysts in recent years and would continue to do so in the near future. This showed in Germany's opinion that the relevant market could not suffer from overcapacities but rather that the building of additional capacities was necessary in order to meet the increasing demand for catalysts used in chemical processes. This view was borne out by highly favourable market forecasts and by the expected increase in demand for chemical catalysts. The market would accordingly grow further, by an amount greatly exceeding KataLeuna's planned increase in turnover.

(33) Germany also explained that the catalyst markets were highly concentrated, being characterised by a few big suppliers with high market shares. The possibility of establishing an additional supplier in these markets could only be positive for competition and would also benefit consumers.

(34) According to Germany, the increase in KataLeuna's capacity was limited to the minimum strictly necessary to ensure the company's viability. An increase of that size had been provided for in the restructuring plan from the outset. Germany also explained that production capacities could never be fully (100 %) utilised in the catalyst industry. This was due to the production processes, which required regular production stops in order to equip and reorganise the facilities after production of each customer-specific order. The production of hydrogenation catalysts was essentially production of small batches and not mass production of homogenous goods. In addition, it was not profitable to produce that kind of product in large quantities for storage and a degree of flexibility of production was needed owing to seasonal fluctuations in demand.

(35) As regards the nature of the project, Germany stated that the project was to be seen as a genuine restructuring measure which fulfilled the requirements of the guidelines. When CRI took over KataLeuna, the company's activities continued without interruption on the existing basis. KataLeuna was carrying on with the same staff performing the same duties, the existing orders, the existing contracts with the same suppliers, the same production and product range, the same existing facilities using the same processes and raw materials and under the same technical conditions. In parallel with this continuation of activities, the restructuring plan drawn up by CRI was gradually being implemented.

(36) Germany explained that the restructuring plan consisted of the following elements:

1. Internal measures of the company

— reduction in staff numbers; reinforcing the scientific areas and employing new marketing personnel with appropriate experience;

— marketing/distribution: developing new strategies, use of the distribution channels and contacts of CRI/Shell, penetration into new markets as part of the Shell group, expansion of the customer base;

— product range: adaptation of the existing range by discontinuing unprofitable lines and concentration on new products and promising market segments;

— concentration on research into and the development of new high-quality products and new processes by reinforcing the company's R&D activities.

2. Investments

— modernisation of the existing facilities in order to satisfy safety and environmental standards;

— in cases where modernisation was not economical, demolition of the old facilities and replacing them with new facilities which met safety and environmental standards.

3. Financial measures

— injection of capital (by CRI and the BvS) and loss compensation.

(37) According to Germany, investments were only one aspect of the restructuring of the company and formed an integral part of the whole restructuring plan. Investments alone could not ensure the company's long-term viability, other measures such as product-range reorganisation, new marketing strategies and financial restructuring being essential in order to reach that goal. Consequently, the restructuring plan complied with the guidelines and the project was to be considered a genuine restructuring measure.

(38) Germany pointed out that the lion's share of the investments had been devoted to replacing outdated facilities which could no longer be used owing to the risk they posed to the health and safety of workers.

Modernisation of these old facilities without replacement was not practicable and would have cost even more than investing in new facilities.

(39) As regards the aid calculation, Germany partly contested the Commission's calculation of the aid amount.

(40) Regarding the financing of investments, Germany stated that, while the privatisation contract stipulated that CRI had to invest a minimum of DEM 70 million, additional investments were envisaged, bringing the total up to DEM 86,6 million. CRI would, however, invest more than the amount stipulated in the privatisation contract (DEM […]* million in all) and those investments would be carried out before the end of 2000. For that reason, the amount of the reserve capital to be paid by the investor had been corrected accordingly to DEM […]* million, in keeping with the privatisation contract.

(41) Regarding the DEM 2 million of investments in infrastructure which, according to the restructuring plan, were to be financed by the BvS, Germany explained that that commitment by the BvS to finance the infrastructure would not be carried out. Since Commission Decision 1999/646/EC of 25 November 1998 on measures by Germany to assist InfraLeuna Infrastruktur und Service GmbH ([13]) stated that the financing of the provision of infrastructure by the BvS via InfraLeuna was not considered to be aid, the measures in question would be financed by the budget of InfraLeuna, in accordance with the Commission decision. The DEM 2 million of public financing of infrastructure in the restructuring plan had therefore been dropped as being general infrastructure measures to be carried out by InfraLeuna.

(42) Regarding the dismantling and demolition costs of DEM 3 million, Germany advanced two separate arguments as to why these costs should not be considered restructuring costs under the present restructuring plan.

(43) Firstly, in a letter dated 11 May 2000 Germany explained that the dismantling and demolition measures were in any case necessary and not directly linked to the restructuring plan. The measures consisted in demolishing and dismantling old facilities and buildings which had become obsolete owing to the capacity reductions carried out before the second privatisation. They were measures to be carried out by a public body. Their costs were not to be considered restructuring costs under the present plan but were to be assigned to the period before the second privatisation.

(44) Secondly, in its letter of 30 November 2000 Germany explained that the dismantling and demolition measures concerned mainly buildings 7671 (built in 1940) and 8320 (built in 1944) and consisted of demolition measures and soil decontamination. It pointed out that the soil west of building 7671 had been heavily contaminated by heavy metals and that the endangering of workers could not be ruled out owing to the possibility of transmission of the hazardous substances through soil and air. Building 8320 was used in the production of heavy metal catalysts which also contained dangerous substances. In addition, the state of the building was so bad and its structural integrity so impaired that there was a real danger of it collapsing. The building could no longer be used for the company's production activities.

(45) According to Germany, KataLeuna had decided in August 1998 to stop all production activities in those buildings because of the risk to the health and safety of workers. The dismantling and demolition measures were therefore absolutely essential for health and safety reasons, and even if they did not fall under the provisions on inherited liabilities, their cost would have to be borne by the authorities regardless of the privatisation. They could not therefore be considered to be aid to the second privatisation.

(46) Regarding the exceptional guarantees of up to DEM 2 million, Germany explained that these were linked to supply contracts entered into during the first privatisation. The taking-over of these costs by the BvS was directly linked to the first privatisation and therefore they were not to be considered restructuring costs of the second privatisation. The same applied in Germany's view to the DEM 0,827 million compensation from the first privatisation. These costs had no connection with the second privatisation but dated back to the first privatisation.

(47) Regarding the DEM 17,6 million from the first privatisation to be used for investments, Germany explained that, when the first privatisation failed, DEM 17,6 million was still available in the form of liquid assets. The aid granted for the first privatisation was compatible with the common market since it complied with the provisions of the Treuhand regime. When the privatisation contract was concluded with CRI, the BvS wanted to use these assets to finance the new plan.

([13]) OJ L 260, 6.10.1999, p. 1.

However, this was not to be considered new aid since it stemmed from the free resources of a company created by approved aid. It was therefore not to be considered a contribution by the BvS to the second privatisation.

(48) As regards the increased investor contribution, Germany explained that the investor CRI had contributed significantly more to the restructuring than was provided for in the privatisation contract.

(49) Firstly, Germany explained that in 1999 and 2000 CRI had contributed an additional DEM […]* million to KataLeuna's R&D activities.

(50) Secondly, Germany explained that CRI had placed at KataLeuna's disposal two marketing and production managers from other European locations and had provided support in the areas of information technology, health and safety and management, *inter alia* by transferring marketing/sales personnel from the USA. These measures had cost DEM […]* million in 1999 and 2000 and had been financed by CRI.

(51) Thirdly, CRI had invested DEM […]* million, i.e. DEM […]* million more than the maximum of DEM 86,6 million provided for in the privatisation contract.

(52) As a fourth point Germany explained that the additional total losses for the restructuring period would be greater than expected. These additional losses of DEM […]* million would be born exclusively by CRI. They had been caused mainly by increased interest costs, the GA contributions having been financed by bank loans pending the Commission's favourable decision.

(53) In addition, as regards the original loss compensation provided for in the privatisation contract, Germany explained that that part of the losses which under the contract was to be borne by the investor needed to be taken into account as an investor contribution. According to the original planning these losses would have amounted to DEM […]* million. Under the privatisation contract the loss compensation to be paid by the BvS during the restructuring period came to DEM […]* million. Germany claimed that the DEM […]* million of losses originally intended to be borne by the investor should be taken into account as an investor contribution to the restructuring.

V. **ASSESSMENT OF THE AID**

(54) According to Article 87(1) of the EC Treaty, any aid granted by a Member State or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market. Pursuant to the established case-law of the European Courts, the criterion of trade being affected is met if the recipient firm carries on an economic activity involving trade between Member States.

(55) The Commission notes that the notified aid is being granted through State resources to an individual company and favours it by reducing the costs it would normally have to bear if it wanted to carry out the notified restructuring project. Moreover, the recipient of the aid, CRI, through its parent company CRI International, is a company the activities of which are research and development as well as manufacture and supply of catalysts for the refining and chemical industries, which are economic activities involving trade between Member States. The aid in question therefore falls within the scope of Article 87(1) of the EC Treaty.

(56) The notified project concerns restructuring of the company according to the restructuring plan submitted by the investor. The Commission notes that restructuring aid for firms in difficulty must be assessed pursuant to the Community guidelines on State aid for rescuing and restructuring firms in difficulty.

(57) The Commission notes that the new Community guidelines on State aid for rescuing and restructuring firms in difficulty came into force on 9 October 1999 ([14]). According to point 101 of the guidelines, the Commission will examine the compatibility of any non-notified aid on the basis of the new guidelines if some or all of the aid is granted after their publication and on the basis of the guidelines in force at the time the aid is granted in all other cases. Since in the present case all the aid was granted before the new guidelines were published, the aid must be examined on the basis of the 1994 version of the guidelines ([15]).

(58) In accordance with the guidelines, the Commission considers that a rescue and restructuring measure within the meaning of Article 87(3)(c) of the EC Treaty may contribute to the development of economic activities without adversely affecting trade in a manner which conflicts with the Community's interests if the conditions laid down in the guidelines are met.

([14]) See footnote 11.
([15]) See footnote 11.

(59) According to point 2.1 of the guidelines, typical symptoms of a firm in difficulty are deteriorating profitability or increasing size of losses, diminishing turnover, declining cash flow and low net asset value. The Commission notes that KataLeuna has been making losses ever since it was set up in 1994. The losses in 1998 were around DEM […]* million and the liquidation value of the company on 31 December 1997 was DEM −4,8 million. The company is therefore considered to be a firm in difficulty and aid for its restructuring falls to be assessed according to the guidelines.

(60) The Commission notes that, of the total of DEM 86,284 million of public contributions to the second restructuring, DEM 29,827 million will be aid granted on the basis of approved schemes. This aid is therefore considered to be existing aid within the meaning of Article 1(b)(ii) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ([16]), and its compatibility with the common market does not therefore need to be assessed by the Commission in this decision. However, the DEM 29,827 million of existing aid is taken into account in assessing the proportionality of the aid pursuant to point 3.2.2(iii) of the guidelines.

(61) The Commission further notes that, in line with its practice regarding the restructuring of east German enterprises, the privatisation of a company should be carried out by open tendering procedure to allay any suspicions that it involves state aid to the investor. The Commission stresses that this decision concerns the restructuring aid to KataLeuna only, without prejudice to any aid to the purchaser as such.

Absence of undue distortion of competition

(62) According to the guidelines, the aid must not unduly distort competition. Point 3.2.2(ii) of the guidelines stipulates that, in the event of structural overcapacity in the sector, the restructuring must involve a reduction of capacity in the company concerned. If there is no structural overcapacity in the relevant market, the aid may be used only for the purpose of restoring the company's viability and it may not enable the recipient during the implementation of the restructuring plan to expand production capacity, except in so far as is essential for restoring viability without thereby unduly distorting competition.

(63) It is noted that in this case the present total production capacity will be increased by more than 100 %. The expanded capacity will be available from the beginning of 2001.

(64) The Commission noted in its decision opening the procedure that the information in its possession at that time had not allowed it to establish that there was no overcapacity in those sectors of catalyst markets in which KataLeuna was going to operate after its restructuring and that the aid would not unduly distort competition in those markets.

(65) The Commission notes that KataLeuna operates in the chemical catalyst market in the market segment of hydrogenation catalysts, the global value of which is around DEM 600 million. In this market the three largest producers (Engelhard, Süd Chemie and Synetix) cover 75 % of the market, and the four largest (including Degussa-Hüls) 82 %. The remaining 18 % of the market is divided among several firms, such as Procatalyse SA, BASF, W.R. Grace, Activated Metals & Chemicals, Boreskov Institute, Kawaken Fine Chemicals, Nikki Universal and N.E. Chemcat.

(66) The information in the Commission's possession confirms that the catalyst industry is highly concentrated. There were 31 companies in the chemical hydrogenation catalyst sector in 1997, and only 27 in 1999. The trend towards concentration is expected to continue and maybe even to accelerate, as it is becoming increasingly difficult to maintain the technical service levels needed for a smaller number of larger clients, without both critical mass and diversity. The effect in the catalyst industry is consistent for all players, who will need to sell globally in multiple segments and industries in order to survive.

(67) According to the information in the Commission's possession, hydrogenation is the most widely used catalytic process in industry. It is not limited by end-user industry definitions and it is important in refining, chemicals, fine chemicals/pharmaceuticals and is also used by the polymer industry. In the chemical hydrogenation catalyst market there are basically two sub-segments: oleochemical and industrial hydrogenation processes. The growth rate across all segments is close to 4,5 % ([17]). In the USA, the chemical processing catalyst market is expected to grow by over 8 % a year. The average growth rate for chemical catalysts during the period from 1990 to 1998 was 4,5 %.

([16]) OJ L 83, 27.3.1999, p. 1.

([17]) See table in paragraph 68.

(68) The development of the global catalyst market for chemical hydrogenation during the period 1999 to 2005 is as follows (USD million) ([18]):

Sub-segment	1999	2002	2005
Oleochemical hydrogenation	166	183	201
Industrial hydrogenation	88	100	116
Other	67	78	88
Total	**321**	**361**	**405**

(69) According to Germany, KataLeuna specialises in operating in niche markets, above all in the area of 'tailor-made' catalysts produced to customers' specifications. Because of the production techniques used, production in the oleochemical hydrogenation sub-segment is ruled out as far as KataLeuna is concerned. Consequently, KataLeuna operates in the industrial hydrogenation subsegment, which is the one with the best growth prospects.

(70) The Commission notes that KataLeuna's turnover of DEM […]* million in 1999 translates into a […]* % share of the total hydrogenation catalyst market and a […]* % share of the market for industrial hydrogenation. KataLeuna's forecast turnover for 2005 is DEM […]* million, which translates into a […]* % share of the total market and a […]* % share of the market for industrial hydrogenation catalyst systems.

(71) The Commission notes that world production of finished chemical catalysts may be estimated at around 90 000 tonnes a year, give or take 10 %. The total worldwide capacity utilised may be estimated at around 120 000 to 130 000 tonnes a year. Since producers view information on capacity as highly confidential, there is no compiled information on capacity by catalyst producer ([19]). Given that KataLeuna's capacity will be […]* tonnes a year, this translates into a share of […]* % of worldwide capacity.

(72) According to the information in the Commission's possession, catalyst producers rarely maintain dedicated manufacturing lines or units for fixed-bed catalyst manufacture. In the chemical catalyst industry, production lines are campaigned. This means that, because of the high-toll manufacturing environment, coupled with small catalyst volume runs, producers produce a few thousand tonnes, then stop and clean out the production line before running a new order. The actual operating capacity of a plant is therefore only 50 to 70 % of the theoretical maximum.

(73) In a letter dated 21 October 1999, Germany explains that the planned future capacity of KataLeuna will be utilised as follows:

— a portion ([…]* %) of the proposed KataLeuna capacity will be focused on new types of catalyst that are undergoing development within the KataLeuna R&D department. For these types of catalyst, there is no capacity available anywhere. This would continue to be a source of novel catalysts for new applications and new market segments;

— a portion ([…]* %) of the proposed KataLeuna capacity will be focused on custom catalyst production for customers who, despite having in-house catalyst R&D departments, look to independent catalyst producers to scale up and produce their proprietary catalysts;

— a portion ([…]* %) of the proposed KataLeuna capacity will be focused on exporting catalysts to the Americas and the Pacific Rim. Grouping KataLeuna products with other CRI catalysts can give these export customers value and help KataLeuna expand its export market;

— a significant portion (at least […]*) of the proposed KataLeuna capacity will be devoted to producing catalysts in conjunction with sister companies within the Shell/CRI group.

(74) The Commission notes that maximum technical production capacity alone is not indicative because, owing to the catalyst production process, the actual operating capacity of a plant is only 50 to 70 % of the theoretical maximum. It observes, however, that, according to the information in its possession, there are no structural overcapacities in this market. In view of the particular circumstances surrounding this case, it is, moreover, very important to note that the market is a growth one. Therefore, according to the guidelines, although capacity reductions are not required, the aid may be used only for the purpose of restoring the company's viability and it may not enable the recipient during the implementation of the restructuring plan to expand production capacity, except in so far as is essential for restoring viability without thereby unduly distorting competition.

([18]) Source: The Catalyst Group.
([19]) Source: The Catalyst Group.

(75) The Commission notes that the restructuring plan provides for expansion of the existing capacity of […]* tonnes a year to […]* tonnes a year.

(76) According to Germany's letter of 26 August 1999, KataLeuna expects to produce some […]* tonnes a year with the planned facilities, taking into account the necessary flexibility in production (possibility of peak periods) and the product mix reflecting different customers' needs. In Germany's opinion, an output of […]* tonnes a year with the same product mix would not be sufficient to achieve a positive operating result. Whereas a […]* tonnes a year output would generate a DEM […]* million profit, 1 000 tonnes a year would result in a similar loss. This is because the fixed costs, the R&D costs and the cost of replacing worn-out machinery will remain the same regardless of the amounts produced. The production of at least […]* tonnes a year is needed in order to cover these costs and to be able to produce positive results. For this reason, the planned expansion of production capacities is crucial to the success of the restructuring plan and to the company's long-term viability.

(77) According to the information in the Commission's possession, the actual operating capacity of a plant is only 50 to 70 % of the theoretical maximum. Consequently, the actual planned production of […]* tonnes a year with facilities having a total capacity of […]* tonnes a year is consonant with the general information in the Commission's possession. Moreover, the calculation with a production of […]* tonnes a year has been made on the basis of KataLeuna's expected maximum turnover from 2007 onwards, i.e. DEM […]* million, whereas the negative result with a production of […]* tonnes a year has been calculated using a turnover of DEM […]* million. The Commission notes that the negative result indicated with the turnover of DEM […]* million and the stable cost elements corresponds to the profit/loss forecast of KataLeuna for the period 2002 to 2007 submitted with the notification.

(78) As regards the fixed cost elements of the restructuring plan, the Commission notes that these cost elements match the characteristics of the relevant sector. Relatively high maintenance costs and high costs of research and development are normal, essential elements of catalyst production. Maintenance is necessary owing to the constant interruptions to the production process. Investment in R&D is a prerequisite for remaining competitive in this global market and for being able to offer products which meet the specific requirements of different customers.

(79) Under these circumstances it does not appear to be possible to re-establish the company's profitability by lowering the fixed cost elements. The Commission therefore considers that it has no reason to doubt that the actual production of […]* tonnes a year is to be considered the minimum necessary to restore the company's long-term viability. Consequently, since the restructuring plan provides for the expansion of production capacity to the extent necessary for restoring the company's viability, the Commission has to assess whether this expansion of capacities unduly distorts competition.

(80) The Commission notes that the chemical hydrogenation catalyst market is a global and highly concentrated one where the three largest providers cover 75 % of a market consisting, in 1999, of 27 suppliers. According to the information in the Commission's possession, this trend towards concentration is likely to continue owing to the global nature of the business.

(81) KataLeuna's production capacity is equivalent to a […]* % share of worldwide capacity for chemical hydrogenation catalysts. Its DEM […]* million turnover in 1999 translates into a […]* % share of the total hydrogenation catalyst market and a […]* % share of the market for industrial hydrogenation. In 2005, KataLeuna's turnover is expected to be DEM […]* million, which translates into a […]* % share of the total market and a […]*share of the market for industrial hydrogenation. It is expected that turnover will break down in future as follows: Europe […]* %, USA […]* % and Asia […]* %.

(82) The Commission notes that the relevant market is the market for chemical hydrogenation catalysts. According to the information in the Commission's possession, calculating market shares on the basis of sub-segments is very difficult and can be misleading as it is almost impossible to allocate existing production capacities to the various sub-segments with a sufficient degree of accuracy. Producers view information on production capacities as highly confidential and there are no breakdowns of production capacity by producer. Players are active in several segments. The Commission finds that there is substitutability of supply in these markets. Substitutability of supply exists where undertakings sell a wide variety of products or products which differ considerably quality-wise. These various products are assigned to a single product market if most suppliers are in a position to sell them immediately without incurring substantial extra costs.

(83) The Commission notes that KataLeuna's current share both of worldwide capacity ([…]* %) and of the relevant market, i.e. the chemical hydrogenation catalyst market ([…]* %), is modest. The expected future market share for 2005 is […]* %. In addition, the Commission takes note of Germany's comment to the effect that KataLeuna's presence in the market as an additional supplier should have a positive impact on competition and on the market structure in view of the global and concentrated nature of the market.

(84) For the reasons indicated, the expansion of KataLeuna's capacity to […]* tonnes a year does not unduly distort competition in the relevant market.

(85) For the reasons set out in recitals 63 to 84 the Commission considers that the notified aid fulfils the condition in point 3.2.2(ii) of the guidelines according to which the aid may not unduly distort competition.

Proportionality of the aid

(86) According to the guidelines the aid must be in proportion to the restructuring costs and benefits. Point 3.2.2(iii) of the guidelines stipulates that the aid must be limited to the strict minimum needed to enable restructuring to be undertaken and must be related to the benefits anticipated from the Community's point of view. Aid beneficiaries should make a significant contribution of their own to the restructuring plan.

(87) In its decision opening the procedure the Commission noted that the investor's contribution to the restructuring was 24 % and the aid intensity 72 % ([20]). The Commission therefore had doubts as to whether the aid was limited to the strict minimum needed to enable restructuring to be undertaken and whether the investor contribution could be considered significant as provided in the guidelines.

(88) The Commission notes that Germany made several comments on the calculation of the amount of aid and on the increased investor contribution.

(89) Firstly, as regards the financing of investments, Germany states that, although the privatisation contract only commits CRI to investing a minimum of DEM 70 million, additional investments are provided for in the contract, bringing the total up to DEM 86,6 million. According to the privatisation contract, investments on this scale increase the amount of reserve capital to be paid by CRI.

(90) The Commission notes that Germany has submitted by its letter of 4 September 2000 a detailed investment plan for KataLeuna which indicates that the actual status of investments carried out by the end of August 2000 was DEM 76 million. The total amount of planned investments is DEM […]* million. The remaining investments, DEM […]* million, were to be carried out by the end of 2000.

(91) Consequently, the Commission notes that, since the investments exceed the minimum indicated in the privatisation contract and reach the amount of DEM 86,6 million, which, according to the privatisation contact, increases the amount of reserve capital to be paid by the investor to DEM […]* million, this increase will be taken into account in the calculation of the investor contribution to the cost of the restructuring.

(92) Secondly, as regards the DEM 2 million of investments in infrastructure which, according to the restructuring plan, are to be financed by the BvS, Germany explains that this commitment by the BvS to finance the infrastructure has been dropped since the measures in question will be financed out of the budget of InfraLeuna, in accordance with Commission Decision 1999/646/EC.

(93) The Commission notes that, in accordance with Commission Decision 1999/646/EC, InfraLeuna has taken over from the BvS responsibility for providing the necessary infrastructure and services on the Leuna chemical complex site. In Article 1 of that decision it is stated that payments made by Germany to InfraLeuna of up to DEM 1 018 million do not constitute aid within the meaning of Article 87(1) of the EC Treaty. Therefore, since the infrastructure is to be provided by InfraLeuna and will not be financed by the BvS, in accordance with the above-mentioned Commission decision the DEM 2 million earmarked for infrastructure investment will not be considered to be aid to the second privatisation.

(94) Regarding the dismantling and demolition costs of DEM 3 million, Germany submits on the basis of two different sets of arguments that these measures cannot be considered to be aid to the second privatisation. Firstly, the measures are not directly linked to the restructuring plan and their costs are to be assigned to

([20]) The DEM 5 million of public funding aimed at eliminating inherited liabilities was not considered to be aid. See the Commission decision opening the formal investigation procedure.

the period before the second privatisation. Secondly, the costs of these measures would have to be borne by the authorities anyway owing to the danger the buildings pose to workers' health and safety.

(95) The Commission notes that it already stated in the decision opening the procedure that demolition and dismantling works, when carried out on-site, are normally to be financed by the investor in question. If these measures are financed by public contributions, a company is released from the costs it would normally have to bear and therefore public contributions to these measures are considered to be aid. The fact that the demolition and dismantling of the buildings in question needs to be carried out since production in them is no longer possible owing to the health and safety hazards they pose for KataLeuna's workers does not alter the position. On the contrary, it is KataLeuna's obligation as an employer to make sure that the health and safety of its workers is not put in jeopardy by the state of the installations on the site. The financing of measures that guarantee safe working conditions is normally borne by the company in question and not by the public purse. For this reason, public contributions to these measures are considered to be aid.

(96) Regarding the exceptional guarantees of up to DEM 2 million and the DEM 0,827 million compensation from the first privatisation, Germany explains that these costs have no connection with the second privatisation but date back to the first privatisation and are therefore not to be considered restructuring costs of the second privatisation.

(97) The Commission notes that CRI took over KataLeuna with all its assets and liabilities. These include the exceptional guarantees and compensation dating back to the failed first privatisation. Consequently, they would normally be financed by the investor in question. Since these liabilities are being taken over by a public body, the company is being released from costs it would normally have to bear. For this reason, public contributions to these measures are considered to be aid.

(98) Regarding the DEM 17,6 million from the first privatisation to be used for investments, Germany explains that this is not to be considered new aid as it originates from the free resources of a company created by the compatible aid linked to the first privatisation. It is therefore not to be considered a contribution by the BvS to the second privatisation.

(99) The Commission notes that aid earmarked for restructuring must always be linked to a detailed restructuring plan worked out with the investor in question. It is an integral part of the project and approval of the aid presupposes also approval of the project for which the aid is intended. Therefore, if the specific project for which the aid is approved fails, the aid linked to it also loses its legitimacy and cannot as such be used freely for other projects as approved aid.

(100) In addition, the Commission stresses that, as explained in the decision opening the procedure, the first privatisation involved a plan which included activities in two locations, KataLeuna in Leuna and Chemie GmbH in Bitterfeld-Wolfen. When the first privatisation failed, the two locations were separated and the investor under the first plan carried on with the activities in Bitterfeld, whereas the BvS made further attempts to privatise KataLeuna. Consequently, the first and the second privatisation were entirely separate and what is more concerned different companies.

(101) As regards Germany's argument that the DEM 17,6 million was part of the free resources of KataLeuna created by the aid linked to the first privatisation, the Commission notes that, according to the January 1999 notification, the DEM 17,6 million was part of the total amount of DEM 55,8 million earmarked for investments and loss compensation under the contract concerning the first privatisation. Germany explains in the notification that this amount was deposited in a special bank account from which money was released for the above purposes. However, since almost no investments were carried out, most of the money was never released, leading to considerable savings for the BvS. Therefore, when the first privatisation failed, a considerable amount of money set aside for investments and loss compensation was still left over.

(102) Consequently, the Commission notes that the DEM 17,6 million was not free resources of KataLeuna but money set aside under the privatisation contract for certain purposes involving two companies in different locations which was never paid out since the investments it was meant for were never carried out. This money was controlled and managed by the BvS and was considered as having being saved by the BvS when the first privatisation failed.

(103) For these reasons, the DEM 17,6 million contribution by the BvS to investments carried out in the course of the

second privatisation is considered to be new aid for restructuring.

(104) As regards the increased investor contribution, Germany lists four different categories of additional measures that should be considered investor contributions to the second privatisation.

(105) Regarding the additional contribution of DEM […]* million to research and development, the additional investment amount of DEM […]* million and the additional losses of DEM […]* million, the Commission considers that these can be considered an investor contribution to the second privatisation and they will therefore be included in the total costs of the restructuring as such.

(106) However, as regards the costs of DEM […]* million for management and personnel and the DEM […]* million of losses to be borne under the privatisation contract by the investor, the Commission takes the view that these amounts are not to be considered an additional investor contribution to the second privatisation. Coverage of losses of DEM […]* million and reinforcement of the management, marketing and distribution activities of KataLeuna were provided for in the privatisation contract and are therefore already covered by the original investor contribution indicated in that contract.

(107) In the light of the considerations in recitals 86 to 103, the Commission notes that the total cost of the restructuring may be broken down as follows:

Financing by the investor:

Purchase price	DEM 1,3 million
Inherited liabilities agreement	DEM […]* million
Capital increase	DEM […]* million
Reserve capital	DEM […]* million
GA compensation	DEM […]* million
Research and development	DEM […]* million
Additional investments	DEM […]* million
Additional losses	DEM […]* million
Total	**DEM 44,64 million**

Financing by the BvS:

Investments	DEM 13,744 million
Loss compensation	DEM 10,0 million
Exceptional guarantees	DEM 2,0 million
GA compensation	DEM 1,7 million
Redundancy costs	DEM 0,586 million
Dismantling, demolition	DEM 3,0 million
Compensation from the first privatisation	DEM 0,827 million
Investments from the first privatisation	DEM 17,6 million
Total	**DEM 49,457 million**

Other public financing considered to be aid:

Contributions from *Land* and Federal Government for R&D in 1998 ([21])	DEM 0,670 million
GA ([22]) contributions (investment grants)	DEM 22,457 million
Investment allowances ([23])	DEM 6,700 million
Total	**DEM 29,827 million**

Other public financing not considered to be aid:

Infrastructure	DEM 2,0 million
Inherited liabilities	DEM 5,0 million
Total	**DEM 7,0 million**

(108) Consequently, the total cost of the restructuring is DEM 130,924 million. The amount of public contributions is DEM 86,284 million, DEM 79.284 million of which is considered to be aid ([24]), and the investor contribution

([21]) See footnote 7.
([22]) See footnote 8.
([23]) See footnote 9.
([24]) DEM 29,827 million of the aid is granted on the basis of approved schemes.

is DEM 44,64 million. The aid intensity is therefore 60 % and the investor contribution 34 %.

(109) When it opened the procedure, the Commission expressed doubts about the nature of the project as a restructuring exercise as it seemed to be more in the nature of new investment. It is the Commission's opinion that, in cases in which costs for new investments form a major part of the restructuring costs, this fact should be reflected in the amount of the investor contribution. This opinion is based on the fact that, in the case of pure investment projects in assisted areas, regional aid ceilings apply, whereas under the guidelines much higher aid amounts are allowed.

(110) The Commission notes that the investor has raised its contribution to 34 % of the costs of the restructuring. It acknowledges, moreover, the comments made by Germany and CRI to the effect that the lion's share of the investments was used to replace outdated facilities in order to enable adaptation to safety and environmental standards and production of such quality and quantities as would ensure the company's long-term viability. This was not possible with the existing facilities, some of which dated back to the 1960s.

(111) The Commission considers that in this case the investor contribution of 34 % is to be considered significant within the meaning of the guidelines and sufficient in that it takes into account the fact that investments form a major part of the restructuring costs.

(112) Therefore, for the reasons set out in paragraphs 90 to 111, the Commission considers that the notified aid fulfils the condition in point 3.2.2(iii) of the guidelines according to which the aid must be in proportion to the restructuring costs and benefits.

(113) Germany is required to provide the Commission, during the period 2000 to 2005 with yearly reports on the progress that is being made with the restructuring. The reports must be provided by the end of March of the year following the report period. They must contain all relevant information needed to enable the Commission to monitor receipt of the aid by the company, implementation of the agreed restructuring plan and the company's financial position.

CONCLUSION

(114) The Commission regrets that Germany has unlawfully implemented the aid in question in breach of Article 88(3) of the EC Treaty. However, it notes that, since the aid complies with the 1994 Community guidelines on State aid for rescuing and restructuring firms in difficulty, it is compatible with Article 87(3)(c) of the Treaty,

HAS ADOPTED THIS DECISION:

Article 1

The State aid totalling EUR 25,287 million (DEM 49,457 million) which Germany has implemented and will implement for KataLeuna GmbH Catalysts, Leuna, Saxony-Anhalt, is compatible with the common market within the meaning of Article 87(3)(c) of the EC Treaty.

Article 2

The State aid referred to in Article 1 may be used only for the restructuring of KataLeuna GmbH Catalysts in accordance with the restructuring plan notified to the Commission.

Article 3

Germany shall provide the Commission, during the period 2000 to 2005, with yearly reports on the progress that is being made with the restructuring. The reports shall be provided by the end of March of the year following the report period. They shall contain all relevant information needed to enable the Commission to monitor receipt of the aid by the company, implementation of the agreed restructuring plan and the company's financial position.

Article 4

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 13 February 2001.

For the Commission

Mario MONTI

Member of the Commission