COMMISSION

COMMISSION DECISION

of 2 March 2005

on the State aid implemented by Germany for Chemische Werke Piesteritz

(notified under document number C(2005) 427)

(Only the German text is authentic)

(Text with EEA relevance)

(2005/786/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

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

Whereas:

I. PROCEDURE

(1) By letter dated 7 March 1997, received on 15 April and registered on 18 April, Germany notified State aid measures in favour of Chemische Werke Piesteritz GmbH (hereinafter CWP). According to the notification, part of the aid had been granted beforehand. The Commission asked for additional information by letters dated 14 May 1997, 22 July 1997 and 4 November 1997. Germany replied by letters dated 10 July, registered on the same day, and 2 September, registered on the same day. The questions raised by the Commission in its letter of 4 November 1997 were discussed in a meeting with the German authorities on 24 November.

(2) On 17 June 1997 the Commission received a request for information from a direct competitor of the beneficiary. On 28 July 1997 Société chimique Prayon-Rupel SA (Prayon-Rupel), a direct competitor, expressed concern about the situation from the point of view of competition.

(3) On 16 December 1997 the Commission decided not to raise any objections. Germany was informed accordingly on 22 January 1998. A summary of the decision was published in the *Official Journal of the European Communities* [2]. In addition, the Commission informed Prayon-Rupel on 19 December 1997 and transmitted the full decision on 5 March 1998.

(4) On 5 May 1998 Prayon-Rupel brought an action for annulment to the Court of First Instance (CFI). On 15 March 2001 the decision in question was annulled [3]. The judgment was notified to the Commission on 19 March 2001.

(5) Following this judgment, the Commission initiated the formal investigation procedure on 20 June 2001. The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* [4]. The Commission invited interested parties to submit comments on the aid. By letter dated 20 August 2001, registered on 21 August, comments were submitted by a competitor, Chemische Fabrik Budenheim Rudolf A. Oetker (CFB). By letter dated 10 September 2001, registered on 13 September, Prayon-Rupel added to its comments of 15 June 2001, which had been registered on the same day. By letter dated 26 September 2001, registered on the same day, comments were submitted by BK Giulini GmbH (BK Giulini). These comments were transmitted to Germany by letters dated 29 October 2001 and 6 August 2002. Germany replied to these comments by letter dated 8 October 2002, registered on the same day, by submitting CWP's response to the comments from third parties.

[1] OJ C 226, 11.8.2001, p. 2.

[2] OJ C 51, 18.2.1998, p. 7.

[3] Judgment of the Court of First Instance of 15 March 2001, Case T-73/98 *Société chimique Prayon-Rupel SA* v *Commission of the European Communities* [2001] ECR II-867.

[4] See footnote 1.

(6) Germany's response to the initiation of the formal investigation procedure was received by letter dated 21 September 2001, registered on 27 September. The annexes to this letter, consisting of the management reports for the period 1994 to 1999, were submitted by letter dated 26 September 2001, registered on 4 October. As relevant data were still missing, the Commission requested them by letter dated 25 October 2001. On 4 December 2001 a meeting was held in Brussels with representatives of the German Government and the beneficiary. Following that meeting, the Commission sent out questions on 14 December 2001. By letter dated 20 December 2001, registered on 4 January 2002, Germany submitted the documents that had been requested at the meeting. Germany replied by letters dated 6 February 2002, registered on 8 February, and 21 February 2002, registered on the same day, to the letter of 14 December 2001. By letter of 6 February 2002, Germany also submitted the beneficiary's comments. By letter dated 7 February 2002, registered on 14 February, Germany submitted the annexes to the letter dated 6 February 2002. By letter dated 22 February 2002, registered on 26 February, Germany submitted the management report for 2000. Additional information was submitted by letters dated 13 March 2002, registered on 14 March, and 4 April 2002, registered on 5 April. On 14 August 2002 the Commission requested clarifications on the aid involved. Germany provided the requested information by letter dated 15 October 2002, registered on the same day.

(7) On 6 March 2003 the Commission informed Germany of its decision to issue an information injunction in order to clarify the facts of the case and whether certain measures ranked as aid.

(8) By letters dated 17 April and 5 May 2003, registered on 22 April and 6 May respectively, Germany submitted the information requested by the Commission. The relevant annexes to those letters were submitted by letter dated 28 April 2003, registered on 6 May. Additional information was submitted by letter dated 13 June 2003, registered on the same day, and by letters dated 4, 9 and 29 July 2003, registered on 7, 17 and 29 July, as well as by letter dated 13 August 2003, registered on the same day. On 22 August 2003 the Commission held a meeting with representatives of the Federal and *Land* Governments as well as with representatives of CWP. The questions raised at the meeting were answered in letters dated 3 and 26 September 2003, registered on 4 and 26 September.

(9) A further meeting with the German authorities was held on 14 May 2004. By letter dated 18 June 2004, registered on 24 June, Germany submitted additional comments. On 6 July 2004 a final meeting was held with the German authorities, following which information was submitted by Germany by letter dated 29 July 2004, registered on the same day. Germany submitted further information by letter dated 26 August 2004, registered on the same day.

II. **DESCRIPTION**

A. **The beneficiary**

(10) CWP is a limited liability company based in Piesteritz, Saxony-Anhalt, an assisted area under Article 87(3)(a) of the EC Treaty. It produces phosphoric acid and its derivative products, notably phosphates. It was set up in 1994 for the purpose of acquiring, as part of a privatisation, the phosphorus-based products division of Stickstoffwerke AG Wittenberg Piesteritz (Stickstoffwerke). Stickstoffwerke was a manufacturer of chemical products brought under the Treuhandanstalt (THA), a public-law body responsible for the privatisation and restructuring of enterprises of the former German Democratic Republic.

(11) The privatisation took place on 29 June 1994 following a tender organised by Goldmann Sachs. The owners of CWP were Vopelius GmbH, URSEKO GmbH, Phosphor AG (Kazakhstan) and eight private investors. The privatisation was conditional on a capital increase by Phosphor AG from DEM 30 000 to DEM 1,6 million. This capital increase did not take place and the shares of URSEKO GmbH and Phosphor AG were taken over by Vopelius GmbH and six employees of CWP. Germany states that the privatisation contract was declared legally effective on 30 November 1994.

(12) The following data on CWP's operation have been submitted by Germany:

Table 1 ([5])

(in DEM million)

	1996/97	1997/98	1998	1999	2000
Annual turnover	18,8	26,3	6,2	33,0	31,2
Operating result	– 4,8	– 4,1	– 7,2	– 5,0	– 4,1
Employees	80	99	100	100	97

(13) According to Germany, CWP has had a registered capital of EUR 288 880 (DEM 0,565 million) since December 1998. It is owned by Vopelius Chemie AG (29,2 %), Vopelius GmbH (28,3 %), Mr Thilo Koth von Vopelius (17,7 %) and BVT Industrie GmbH & Co. Chemische Werke Piesteritz KG (24,8 %).

(14) Vopelius Chemie AG and Vopelius GmbH, together with Galvano Chemie Leipzig GmbH and Vopelius-Bioprodukte GmbH ([6]), which are subsidiaries of Vopelius Chemie AG, form an integrated group (the group). Mr Thilo von Vopelius is the chairman of the board of directors of Vopelius Chemie AG. The group, including Mr Vopelius, holds 75,2 % of CWP's capital. According to information submitted by Germany following the information injunction, the group (excluding CWP) employed 43 people in 2002, generated a turnover of EUR 17 252 657 (DEM 33,755 million) and held assets totalling EUR 6 777 174 (DEM 13,255 million). It should be noted that, according to Germany, the companies do not constitute a group under commercial law.

(15) BVT Industrie GmbH & Co. Chemische Werke Piesteritz KG is part of the BVT Group, an international investment and financial services enterprise with an aggregate investment capacity of over EUR 3 billion (DEM 6 billion) ([7]). It holds 24,8 % of CWP's capital and is regarded by Germany as an institutional partner.

(16) In February 2001 CWP sold its assets linked to the production of phosphates to […]* (*) (TI), a producer of phosphorus and phosphorus derivatives. Under the sales contract, the goodwill, intangible assets, stocks, etc. were sold for EUR […]* (DEM […]* million) while the land and installations were sold for EUR […]* (DEM […]* million). However, according to Germany, the acquisition of the land and installations is still conditional on transmission of the assets free of liabilities as well as on a Commission decision on the State aid granted to CWP, from which it transpires that TI is not liable for any recovery of State aid. In the case of a positive Commission decision, the successor to the THA, the Bundesanstalt für vereiningungsbedingte Sonderaufgaben (BvS) and the *Land* of Saxony-Anhalt will waive the securities linked to the assets which will be taken over by TI so that the condition of the assets being free of liabilities would be fulfilled and the sales contract could become effective. As long as the sales contract is not effective, the payment of EUR […]* (DEM […]*) will still be outstanding. Until the contract is effective, CWP will produce phosphates exclusively for TI, which in turn provides the raw material.

B. **Financial measures by the public authorities**

(17) In connection with the privatisation of 29 June 1994, CWP agreed to pay a price of EUR 3 181 769 (DEM 6,223 million) for the phosphorus-based products operating division of Stickstoffwerke. The price was to be paid in three instalments of EUR 511 292 (DEM 1 million) on 30 June 1995, 1 June 1996 and 30 June 1996, with a remaining instalment of EUR 1 647 894 (DEM 3,223 million) payable on 1 July 1997. CWP also committed itself to guaranteeing 70 jobs until 1 October 1999 and to carrying out investments of EUR 5 112 919 (DEM 10 million) by 31 December 2002.

(18) In turn, the THA made available several measures. Some of these measures were subsequently modified following numerous amendments to the privatisation contract during the period 1994 to 2003. The following table gives an overview:

([5]) CWP changed its accounting method in 1998. The data for 1998 correspond to October-December 1998.

([6]) Following the information injunction, Germany informed the Commission that CWP had a wholly owned subsidiary, KEB Kali Elektrolyse GmbH, Bitterfeld. The subsidiary had been set up in 1998 in order to operate a potassium electrolysis unit. Since this did not function properly, the company was renamed Vopelius-Bioprodukte GmbH and subsequently sold to Vopelius Chemie AG.

([7]) http://www.bvt.de/

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

Table 2

(in EUR million)

Measures in the context of the privatisation (THA)		
1	Guarantee	1,02
1a	*Prolongation of guarantee and transformation into grant*	*(1,02)*
2	Investment grant	3,06
3	Treatment of residues	0,31
	Total	4,39

(19) Measure 1: Guarantee of EUR 1 022 583 (DEM 2 million) on an operating credit. The loan was originally granted by Deutsche Bank before being transferred to Commerzbank in 1996 and then to Hypovereinsbank in 1998.

(20) Measure 1a: Originally, the guarantee under Measure 1 was to run until December 1995. However, following the initiation of the formal investigation procedure, Germany reported that, as a result of various amendments to the privatisation contract, this guarantee was prolonged several times, on the last occasion until 30 November 2000. Before expiry of the deadline, on 21 November 2000, BvS granted CWP a loan for the same amount in order to repay the credit covered by the guarantee. The loan then replaced the existing credit and the guarantee was terminated. Germany stated that this new loan was to run until 31 December 2005 and that the interest rate corresponded to the reference rate set by the Commission ([8]). The latest amendment to the privatisation contract, which took place in July 2003, provided for the transformation of this loan into a grant, i.e. the waiver of its repayment by CWP, in the event of a positive Commission decision.

(21) Measure 2: A non-repayable grant of EUR 3 067 751 (DEM 6 million) to finance investments to safeguard production.

(22) Measure 3: The THA took over the costs of treating residues, which amounted to some EUR 623 776 (DEM 1,22 million). This grant was later increased by EUR 306 775 (DEM 0,6 million). According to Germany, however, since the project, which was to be subsidised by the increase, turned out not to be technically feasible, this additional amount was never paid out.

([8]) http://europa.eu.int/comm/competition/State_aid/others/reference_rates.html

Financial measures notified by Germany in 1997

(23) The first amendments to the privatisation contract provided, among other things, for the prolongation of the guarantee under Measure 1 (Measure 1a) and the deferred payment of the purchase price.

(24) A further agreement was reached at the end of 1996/beginning of 1997 between the company and the BvS in order to avoid the insolvency of CWP. It provided for a series of measures by the public authorities which constituted the core of the 1997 notification. The following table gives an overview of the restructuring measures notified in 1997.

Table 3

(in EUR million)

Measures by the THA/BvS		Amount
4	Waiver of purchase price	3,18
5	Waiver of interest on deferral of purchase price	0,23
6	Investment grant	1,79
7	20 % guarantee covering private investment loan of DEM 6,3 million	0,64
8	20 % guarantee covering private operating loan of DEM 8,5 million	0,87
7a/8a	*Transformation of guarantees into loans/ grants*	*(1,51)*
Measures by the *Land* of Saxony-Anhalt		
9	80 % guarantee covering private investment loan of DEM 6,3 million	2,58
10	80 % guarantee covering private operating loan of DEM 8,5 million	3,47
Measures under approved aid schemes		
11	Direct investment grants (joint Federal Government/*Länder* scheme) of 8 July 1998	1,94
12	Investment allowances (1994-97)	0,15
	Total	14,85

(25) Measure 4: Under this agreement, the BvS agreed in December 1996 to a further deferral until 31 December 1999 of the payment of the purchase price, which had already been deferred on several occasions under amendments to the privatisation contract. The purchase price was finally waived on 5 July 1999. The Commission was notified of this by way of the *Vertragsmanagement* lists, which inform it of the contract-monitoring activities of the BvS ([9]).

(26) Measure 5: Following the initiation of the formal investigation procedure, Germany acknowledged that the interest that had accrued by the end of 1996 as a result of the payment deferral to the tune of EUR 237 239 (DEM 0,464 million) had been waived by a decision of December 1996. The BvS also agreed not to charge any future interest on the deferred purchase price.

(27) Measure 6: The BvS increased the grant for the financing of investment to safeguard production under Measure 2 by EUR 2 065 619 (DEM 4,04 million). Following the initiation of the formal investigation procedure, Germany stated that, of the EUR 5 133 370 (DEM 10,04 million) granted in total to finance investment (Measures 2 and 6), only EUR 4 867 499 (DEM 9,52 million) had been used. The increase in the grant thus totalled EUR 1 799 747 (DEM 3,52 million).

(28) Measure 7: In April 1998 CWP obtained an operating loan of EUR 3 221 139 (DEM 6,3 million) from Hypovereinsbank. This loan was covered by a 20 % guarantee from the BvS for EUR 644 228 (DEM 1.26 million). The remaining 80 % was covered by a guarantee from the *Land* of Saxony-Anhalt (see Measure 9). The loan was to run until December 1998 but was subsequently prolonged several times and, according to the latest information, is still outstanding.

(29) Measure 8: In April 1998 CWP also obtained an investment loan of EUR 4 345 981 (DEM 8,5 million) from Hypovereinsbank. This loan was covered by a 20 % guarantee from the BvS for EUR 869 196 (DEM 1,7 million). The remaining 80 % was covered by a guarantee from the *Land* of Saxony-Anhalt (see Measure 10). The loan was to run until May 2013. According to the latest information, it is still outstanding.

([9]) List No 33 concerning BvS's' follow-up negotiations reported as being concluded in August 1999. The waiver was conditional on a new associate of CWP contributing a liquidity-related capital increase of EUR 2,05 million (DEM 4 million).

(30) Measures 7a/8a: Following the initiation of the formal investigation procedure, Germany stated that the 20 % guarantees from the BvS were prolonged on several occasions. On 21 November 2000 the BvS finally paid direct to the banks the part of the loans covered by these guarantees, i.e. EUR 1 513 424 (DEM 2,96 million). This cash serves as security for the repayment of the credit by CWP. Hence, for the banks it merely replaces existing securities, but for CWP it constitutes a new loan replacing 20 % of the previous ones. CWP is supposed to pay the amount of EUR 1 513 424 (DEM 2,96 million) by 31 December 2005, together with interest corresponding to the Commission's reference rate. However, in its response to the information injunction, Germany reported that since January 2003 CWP had not paid any interest and that the payments had been deferred. Interest accumulated until December 2002 and amounting to EUR 301 000 (DEM 588 705) was paid in July 2003. The latest amendment to the privatisation contract, which took place in July 2003, provided for the transformation of this loan, including interest deferred since January 2003, into a grant, i.e. the waiver of the repayment of the loan, including the outstanding interest, by CWP in the event of a positive Commission decision. Since the measures in question consist simply in the prolongation or the extension of the measures covered by the decision to initiate the formal investigation procedure, they must be assessed by the Commission in the present decision.

(31) Measure 9: The remaining amount of the operating loan of EUR 3 221 138 (DEM 6,3 million) under Measure 7 was also covered by an 80 % guarantee from the *Land* of Saxony-Anhalt amounting to EUR 2 576 911 (DEM 5,04 million). This guarantee was initially granted until 30 April 1998 but was prolonged for one year on several occasions. CWP has requested a further prolongation. According to the information submitted by Germany, the guarantee is clearly still in force. In the event of a positive Commission decision in this case, the *Land* of Saxony-Anhalt would consider a further prolongation of the guarantee.

(32) Measure 10: The remaining amount of the investment loan of EUR 4 345 981 (DEM 8,5 million) under Measure 8 was also covered by an 80 % guarantee from the *Land* of Saxony-Anhalt amounting to EUR 3 476 785 (DEM 6,8 million). The guarantee runs until April 2013.

(33) Measure 11: Direct investment grants amounting to EUR 1 937 796 (DEM 3,79 million) were made on 8 July 1998. According to Germany, an amount of only EUR 1 845 764 (DEM 3,61 million) has been used up.

(34) Measure 12: Investment allowances totalling EUR 357 904 (DEM 0,7 million).

C. **The restructuring**

(35) According to the information provided by Germany in 1997, a first restructuring effort had been undertaken in the wake of privatisation with the THA measures (Measures 1 to 3). However, this effort failed and in 1996 the difficulties facing CWP were caused by insufficient equity, an interruption in the supplies of raw materials and a lack of liquidity.

(36) The insufficiency of equity was due to the failure of Phosfor AG to increase its capital contribution of EUR 15 339 (DEM 30 000) to EUR 818 067 (DEM 1,6 million) by 30 September 1994. As regards supplies, CWP counted on using elemental phosphorus as the raw material for the production of phosphoric acid, which, in turn, is the basis for the production of phosphates. Elemental phosphorus was to be supplied by Phosfor AG from Kazakhstan. This, however, did not take place and CWP faced supply bottlenecks for the raw material between 1995 and 1996. The company only partly succeeded in making up this shortfall by buying elemental phosphorus at higher prices in other markets. Production came to a standstill, leading to losses in 1995 and 1996 that reduced considerably the company's liquidity headroom.

The original restructuring plan

(37) In order to restore the company's long-term viability, a sound restructuring plan was necessary. According to the 1997 notification, this was to be implemented during the period 1997 to 2000. The plan envisaged mainly investments in a new production process (the wet process).

(38) Until 1996 CWP's production was made up above all of common phosphates (low level of purity) used primarily in detergents. Phosphates are derived from phosphoric acid, which CWP produced both for internal consumption (processing into phosphates) and for sale to third parties. There are two processes for producing phosphoric acid, each using a different raw material. In the wet process, pure phosphoric acid is extracted from basic or crude phosphoric acid (Merchant Grade Acid, MGA) by means of a chemical reaction. In the thermal process employed by CWP, pure phosphoric acid is obtained by the combustion of elemental phosphorus. Since, according to the notification, raw phosphoric acid was easier to obtain and cheaper to process than elemental phosphorus, CWP decided under the restructuring plan to change the raw material base and, as a consequence, the production method. This was intended to resolve the supply difficulties for elemental phosphorus from Kazakhstan.

(39) Germany submitted two documents which it claimed constituted the restructuring plan. These documents contradicted the 1997 notification.

(40) The first document, dated 29 May 1996 and headed 'A new concept for continuing the business of CWP as the company that acquired the phosphorus derivatives division of Stickstoffwerke AG Wittenberg' sums up CWP's restructuring strategy. There are essentially two goals: firstly, to broaden the raw material base and, secondly, to extend the company's sphere of activity. However, there was no mention in that document of the thermal production process being abandoned. On the contrary, production was to remain based on elemental phosphorus and the thermal process, although some installations would be adapted for the processing of raw phosphoric acid which CWP would buy. It was also proposed that consideration be given to building in the medium term an extraction installation for the purification of MGA, i.e. for production using the wet process.

(41) In the second document, dated 16 October 1996 and headed 'Proposal for the long-term survival of CWP, including the investment and financing plan', CWP defined its investment priorities and the manner in which they would be financed, but it did not call into question the strategy previously formulated of maintaining the thermal process while, at the same time, introducing the wet process. Among the investment priorities was the adaptation of the existing plant and equipment to process wet phosphoric acid and the construction of the extraction installation mentioned above, the aim being to ensure by September 1998 that CWP would no longer be dependent on elemental phosphorus. The feasibility of this extraction installation was the subject of a report by a consultant, DLM, [10] which also provided a cost study [11] putting the costs of this installation at EUR 3,07 million (DEM 6 million).

[10] *Reinigung von Nassphosphorsäure durch Flüssig-flüssig-Extraktion*, DLM, November 1997.

[11] *Betriebskostenabschätzung für eine Extraktionsanlage zur Extraktion von Nassphosphorsäure*, DLM, September 1996.

Amendment of the plan

(42) In its response to the initiation of the formal investigation procedure, Germany explained that the technical plan for the construction of the extraction installation had been amended and expanded. A first amendment took place in December 1997, when tests revealed that post-treatment of the aid (defluoridation and concentration) was necessary in order to obtain the quality level required by the food industry. In February 1999 a CWP supplier who had so far provided MGA, which needed no pre-treatment, cancelled its contract. As a result, CWP had to buy standard MGA, pre-treat it and bleach it. These two changes increased costs, led to a delay of eighteen months or so in the implementation of the plan and moreover forced CWP to expand its installations, which in turn further increased costs and compounded the delay. The costs of the extraction installation rose from EUR 3,07 million (DEM 6 million) to EUR 7,772 million (DEM 15,1 million).

(43) Furthermore, in 2000 CWP faced a problem with raffinate, a highly toxic by-product. Germany's response to the initiation of the formal investigation procedure indicates that CWP had hoped that third parties would further process this raffinate but it discovered in mid-2000 that there were no offers for its raffinate. The resulting crisis, together with the delays in carrying out the restructuring measures brought the construction of the extraction installation to a halt. In the summer of 2000, despite several capital increases by the shareholders, the company was on the verge of insolvency. This danger was finally averted by an agreement with TI.

(44) The agreement, which was reached in early 2001, provided for the sale of the phosphate production to TI, as described above. Until the contract becomes effective, CWP will produce phosphates exclusively for TI, which will provide the raw material. Once the agreement is in force, CWP will withdraw altogether from the production of phosphates and will only produce phosphoric acid using the wet process once its extraction installation has been completed. This means that new measures have to be undertaken for the closure of the installations producing thermal phosphoric acid (CWP's traditional production method), phosphorus peroxide and sodium hypophosphite (one of the products introduced as part of the restructuring) and for the closure of the phosphorus warehouse (since phosphorous will no longer be used as a raw material). CWP's workforce is to be reduced by some 33 people.

(45) Germany considers that the restructuring of CWP was successfully accomplished in respect of phosphate production, which is to be taken over by TI. As regards the production of phosphoric acid, the restructuring will be successful once TI has paid the purchase price for CWP's assets. CWP will then be able to complete the extraction installation and ensure its long-term viability without substantially departing from the original plan. According to Germany, 90 % of the extraction installation has already been completed. The production of thermal phosphoric acid was discontinued in February 2001. The installations have been emptied and cleaned and will not be used any more.

D. **Costs of the restructuring**

(46) According to the document 'Proposal for the long-term survival of CWP, including the investment and financing plan', dated 16 October 1996, CWP needed investments totalling EUR 5,62 million (DEM 11 million) and working capital amounting to EUR 2,56 million (DEM 5 million) during the period 1996 to 2000. However, the same document contains an investment plan detailing investments totalling EUR 9,29 million (DEM 18,17 million). According to the 1997 notification, restructuring costs would total EUR 12,88 million (DEM 25,2 million). The restructuring measures notified in 1997 are summarised in Table 4.

Table 4

(in EUR million)

Restructuring measures	Costs
Loss compensation (1995 to 1998)	4,91
Investments in safety	2,15
Restructuring investment	5,52
Clean-up of environmental damage dating from before 1 July 1990	0,31
Total	12,88

(47) Following the initiation of the formal investigation procedure, those same costs were estimated at EUR 18,87 million (DEM 36,9 million). It should be noted that Table 5 contains two new items, i.e. 'grants' and 'waiver of purchase price', which constitute financial resources rather than restructuring costs.

Table 5

(in EUR million)

Restructuring measures	Costs
Loss compensation (1995 to 1998)	4,86
Investments in safety	2,05
Restructuring investments	7,98
Cleaning-up of environmental damage dating from before 1 July 1990	0,31
Grants	0,20
Waiver of purchase price	3,43
Total	18,87

(48) In its response to the information injunction, Germany divided the restructuring into two parts: restructuring of phosphate production and restructuring of the other areas (mainly phosphoric acid production). The costs of restructuring phosphate production were put at EUR 7,99 million (DEM 15,63 million) in total and include investments of EUR 4,71 million (DEM 9,21 million). The costs of restructuring the other business areas were estimated at EUR 27,14 million (DEM 53,08 million) in total and include investments of EUR 13,22 million (DEM 25,86 million). The overall restructuring costs thus amount to EUR 35,13 million (DEM 68,71 million). It is, however, to be noted that these restructuring costs ([12]) include costs for the period 1995 to 2001, i.e. including the failed restructuring after privatisation.

(49) In its letter of 26 August 2004 Germany finally stated that the overall costs from 1997 until then totalled some EUR 31,20 million (DEM 61 million). It does not provide any explanation of the difference with the figures previously reported in its response to the information injunction.

E. **Private contribution**

(50) According to the 1997 notification, the private contribution from CWP to the restructuring consisted in the financing of certain investments and a contribution from the shareholders.

(51) CWP was to carry out investments totalling EUR 5,11 million (DEM 10 million) by 31 December 2002. However, it is to be noted that this investment obligation had already been agreed at the time of the privatisation on 29 June 1994 and did not require these investments to be financed by private means.

(52) In its response to the initiation of the formal investigation procedure, Germany stated that investments amounting to EUR 15,70 million (DEM 30,70 million) had been made during the period 1994 to 2000 and that, of those investments, EUR 7,21 million (DEM 14,11 million) had been privately financed. However, this amount includes publicly financed measures totalling EUR 3,73 million (DEM 7,30 million). The contribution by shareholders to these investments thus amounts to EUR 3,48 million (DEM 6,81 million).

(53) As regards the second component of the private contribution, i.e. contributions from the shareholders, Vopelius Chemie GmbH was, according to the 1997 notification, to contribute a loan of EUR 0,15 million (DEM 0,3 million). In its response to the initiation of the formal investigation procedure, Germany explained that this amount related to the hire purchase (*Mietkauf*) of investment goods for which Vopelius provided a guarantee.

(54) In its response to the initiation of the formal investigation procedure, Germany also considered that the company's subscribed capital of EUR 288 879 (DEM 0,565 million) must be regarded as a contribution from the shareholders to the financing of the investments.

(55) In its response to the information injunction, Germany listed the measures which, in its view, constituted private financing (Table 6).

Table 6

(in EUR million)

Private financing	Amount
Limited partner's capital contribution (BVT)	4,84
Shareholder loan (BVT)	0,15
Shareholder grant (BVT)	0,11
Share capital	0,29
Sales price — salt	1,64
Sales price — saltworks (not yet paid)	1,66
Supplier credit (Vopelius)	2,75
Total	11,44

([12]) Annex 42 to the letter of 4 July 2003.

(56) The increase in private financing, as notified by Germany, is due mainly to the capital contribution from BVT, which became a non-typical silent partner in CWP (*atypische stille Beteiligung*) in December 1998. BVT also provided a loan in March 2001 and a grant in September 2001. In addition, Germany included as investor contributions a supplier credit by Vopelius (which was made available between January 1997 and January 1998 and consisted in deferral of the payment for raw materials supplied by Vopelius) and the revenues that CWP would obtain from the sale of its phosphate division to TI.

(57) It is unclear how the measures in Table 6 relate to the restructuring costs described in recitals 46 to 49.

F. **Market analysis**

(58) CWP was traditionally a manufacturer of industrial phosphates and produced phosphoric acid for its own consumption. Under the restructuring plan, it was to increase the quality of its phosphates in order to produce for the food industry, with the wet process being introduced for the production of phosphoric acid. It should be noted that the phosphoric acid produced with the wet process is equivalent in quality and properties to that produced with the thermal process. However, the two processes actually use a different raw material: elemental phosphorus for the thermal process and MGA for the wet process. Moreover, the wet process has different stages and generates by-products (notably raffinate) which need further processing.

(59) Phosphoric acid is the basis for the production of phosphate products requiring higher-purity raw materials. It is used in the production of phosphate fertilisers for agriculture and of phosphates for the food industry. Polyphosphates, and in particular sodium tripolyphosphate, are used in detergent formulations for laundry, dishwasher and other cleaning products. They are also used in various industrial and technical applications.

(60) The 2002 Chemical Economics Handbook reports that the demand for thermal phosphoric acid has been drastically losing ground as wet phosphoric acid becomes preferred for downstream chemicals, that there has also been stiff competition because of imports from China and that many phosphates and direct applications which formerly required thermal phosphoric acid now use purified wet phosphoric acid, with important cost advantages. It also states that raw phosphoric acid is widely available and relatively inexpensive. According to the handbook, there were still four producers of thermal phosphoric acid in Western Europe in 2002: TI (the largest), CWP, FEBEX SA and Krems Chemie.

(61) Germany states that the European market for phosphoric acid and phosphates is one of oligopoly on which there is no overcapacity. CWP, however, takes the view that there is no oligopoly on the relevant European market. Some of CWP's competitors agree but maintain that there is clear overcapacity.

(62) Both Germany and CWP consider that CWP's market share on the Western European phosphate market as a whole (industrial and food) is insignificant. It was estimated to be 5,1 % in 2000. Since 2001 CWP has been producing only for TI and is thus not present on the market any more. Its market share was taken over by TI. Germany also states that TI has not been active on the specific phosphate market like CWP but on the market for phosphorus, phosphoric acids and other derivatives.

(63) As regards the production of phosphoric acid, CWP states that its production of 40 000 tonnes of thermal phosphoric acid is to be reduced to 20 000 tonnes using the extraction process. Its originally foreseen share of the phosphoric acid market (6 %) is to be reduced to 3 % in Western Europe. As the thermal installations have been shut down and the extraction installation is not yet operational, CWP currently does not produce any phosphoric acid and its market share is zero.

III. **REASONS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE**

(64) Following an action for annulment brought by Prayon-Rupel, the CFI in its judgment of 15 March 2001 annulled the Commission decision of 16 December 1997 ([13]) on the grounds of infringement of an essential procedural requirement. It ruled that the Commission had been obliged to initiate the formal investigation procedure because of serious difficulties in assessing the compatibility of the aid with the common market.

([13]) See footnote 3.

(65) The CFI put the serious difficulties down to the fact that the Commission had taken the decision without sufficient knowledge of the technical restructuring measures. Firstly, the CFI ruled that the Commission had erroneously described the restructuring measures implemented by CWP. The Commission had based the description of the technical restructuring measures on the information provided by Germany in 1997, namely that the wet process was to replace the thermal process in the production of phosphoric acid. However, the CFI emphasised that the two draft restructuring plans of May and October 1996, submitted by Germany to the Commission, did not mention any abandonment of the thermal process. Secondly, is stated that the Commission had obviously misjudged the technical feasibility and profitability of the restructuring measures. According to the CFI, an expert opinion presented by the plaintiff provides clear evidence of this.

(66) According to the first paragraph of Article 233 of the Treaty, the Commission was required to take the necessary measures to comply with the judgment of the CFI. It undertook a preliminary assessment of the measures in favour of CWP, including the measures that had not been examined in its previous decision, and its view that the measures constituted State aid within the meaning of Article 87(1) of the EC Treaty was confirmed. However, it had serious doubts as to the compatibility of the aid with the common market. Firstly, the Commission could not determine the exact amount of aid involved overall. Secondly, a preliminary assessment under the 1994 Community guidelines on State aid for rescuing and restructuring firms in difficulty (Community guidelines) ([14]) raised serious doubts as to the compatibility of the aid with the common market. Consequently, the Commission initiated the formal investigation procedure.

IV. **REASONS FOR ISSUING THE INFORMATION INJUNCTION**

(67) The Commission initiated the investigation procedure mainly on the basis of the information submitted in 1997. However, Germany's response to the initiation of the information injunction contained details of previous measures that were presented as constituting existing aid (Measures 1 to 3), amendments to some measures (Measures 1a and 7a/8a). In addition, measures which had been regarded until then as *ad hoc* measures were regarded by Germany as existing aid following the initiation of the procedure (Measures 9 and 10). On the basis of the information available, the Commission could not verify whether the measures described as existing aid actually complied with the schemes under which they had allegedly been granted. The Commission issued an information injunction on 6 March 2003 in order to clarify the situation.

([14]) OJ C 368, 23.12.1994, p. 12.

V. **COMMENTS FROM INTERESTED PARTIES**

(68) Following the initiation of the formal investigation procedure the Commission received comments from three direct competitors of CWP and from CWP itself. These comments are summarised below:

A. **Comments from Prayon-Rupel**

(69) Prayon-Rupel submitted an exhaustive description of the two production processes (thermal and wet) as well as of the relevant products and markets. It doubted firstly that the project accounts could be regarded as a restructuring plan. According to it, a change in the production method did not amount to a viable restructuring within the meaning of the Community guidelines. Furthermore, if the difficulties of the company were due to a supply problem, the change of production process would not resolve the matter. Prayon-Rupel also considered that there was no supply problem, as the company could obtain phosphorus from China, the world's largest producer, instead of from Kazakhstan.

(70) Secondly, Prayon-Rupel doubted the viability of the restructuring plan. In its view, the switch from the thermal to the wet process envisaged in the first document was not feasible. Such a change would require substantial investments including an entirely new installation and not simply the few investments listed by Germany. In addition, it would not lead to an improved product, a view also shared by Germany. Prayon-Rupel doubted that CWP could restore its viability as the turnover forecasts were based on extremely optimistic assumptions and the operating results continued to be negative. According to Prayon-Rupel, a change in the production method not backed by sufficient investment would only lead to lower-quality products and hence to a further fall in profits.

(71) Thirdly, Prayon-Rupel considered that CWP was expanding capacity. On the basis of the first restructuring document, CWP was to introduce the wet process without abandoning the thermal process. According to Prayon-Rupel, this amounted to a doubling of capacity.

(72) Fourthly, Prayon-Rupel considered that the aid was not limited to the minimum and that the commitment of the shareholders to invest EUR 5,11 million (DEM 10 million) following privatisation was not linked to the restructuring but was hypothetical and insufficient.

(73) Lastly, Prayon-Rupel doubted that the plan would be implemented in full. In its view, the acquisition by TI of CWP's phosphate production already confirmed that the plan had not been implemented as planned.

B. **Comments from Chemische Fabrik Budenheim A. Oetker**

(74) In its letter of 20 August 2001, Chemische Fabrik Budenheim A. Oetker (CFB) expressed doubts as to the viability of the restructuring plan. It claimed that the construction of the new extraction installation was impracticable at such low cost and over the short period envisaged by CWP. It stated that this had been confirmed subsequently since, according to market information, CWP's thermal installation had been shut down and the construction of the new extraction installation interrupted. In its view, the calculation of the construction costs of the new installation was too low and CWP did not have the required know-how for a new process to produce phosphoric acid. Besides, CWP did not indicate how the noxious by-products of this new process were to be treated. CFB also noted that TI successfully produced phosphoric acid using the thermal process, refuting the claim that a change in the production process was necessary for CWP to restore its profitability. It doubted that there were problems in obtaining elemental phosphorus. The production of phosphoric acid in the new installation would not, therefore, reduce advance financing costs.

(75) In addition, CFB noted that the close cooperation between CWP and TI, including the agreement to transfer the phosphate business to TI and, after a certain period, TI's right to take over this area of operation from CWP, raised the question whether TI was not ultimately a beneficiary of the aid.

(76) Lastly, CFB pointed out that CWP was supported financially by its shareholders, notably BVT Industrie GmbH and TI. Hence, the situation of CWP's own capital should be taken into account when granting the aid.

C. **Comments from BK Giulini**

(77) In its letter of 26 September 2001, BK Giulini considered that CWP did not have any restructuring plan and that the concept was inadequate and disproportionate. The change in the production process was not necessary and, from a technical and economic point of view, was impracticable. Moreover, as CWP did not intend to abandon the thermal process, the measures constituted incompatible operating aid. According to BK Giulini, supply difficulties and a lack of liquidity were not sufficient reasons for changing the production process and for carrying out a restructuring. The aid granted was not used for investments but as a liquidity grant, and this caused market distortions in the Community. Another argument against the aid for CWP was overcapacity on the phosphoric acid market in Europe.

(78) BK Giulini also states that the aid granted by Germany had demonstrably not contributed to restoring CWP's viability. Despite the aid, the company had been making losses since 1998. The agreement between CWP and TI was evidence of the complete failure of the restructuring measures.

(79) Lastly, BK Giulini considered that TI was the actual beneficiary of the aid.

D. **Comments from CWP**

(80) By letters of 21 September 2001 and 6 February 2002, Germany gave the reaction of CWP to the initiation of the formal investigation procedure. By letter of 8 October 2002, in which Germany transmitted CWP's reaction to the comments from the above-mentioned interested parties, CWP addressed the doubts expressed by the Commission when initiating the formal investigation procedure and by all the other interested parties.

(81) As regards the existence of a restructuring plan, CWP explained that the restructuring had two main objectives: extension of the product range in the area of phosphates and establishment of a broader raw material base by procuring cheaper alternatives to phosphorus. It stated that these objectives had remained unchanged throughout the restructuring process although the plan had indeed been amended on several occasions.

(82) As regards the doubts as to the viability of the restructuring measures, CWP considered that extension of the phosphate product range could be achieved by the construction of a new fluidised-bed dryer (*Wirbelschichttrockner*) for the production of water-free phosphates. Regarding this extension, it stated that the extraction installation would allow it to produce the same products with the same quality and at lower costs than with the thermal process, without becoming dependent on supplies of elemental phosphorus by third parties.

(83) Responding to CFB's comment that TI successfully produced phosphoric acid using the thermal process, CWP pointed out that TI was not dependent on supplies of elemental phosphor as this is produced by the company itself. In addition, TI can keep costs low, particularly electricity costs (which accounted for the bulk of the costs of producing elemental phosphor) because one of TI's shareholders operated a nuclear power station and TI could buy electricity at preferential rates. Hence the situations of TI and CWP were quite different.

(84) As regards the doubts as to the success of the restructuring plan, CWP considered that the measures undertaken represented a classical restructuring of a company. In its view, constructing the two installations was a decision that would prove profitable. In particular, the extraction installation was expected to reduce production costs by 7 % compared with the thermal process and to achieve a net capital yield of 23 %. The first tests with the extraction installation had confirmed that the quality of the phosphoric acid produced was as good as that using the thermal process. Moreover, CWP noted that other competitors, notably Prayon-Rupel, had announced the construction of an extraction installation six times larger than CWP's. The delays in constructing the extraction installation were caused by supply problems and not because the installation was impracticable. CWP stated that this installation was now 90 % complete and that one institution was interested in obtaining a licence for the know-how.

(85) Furthermore, CWP considered that there were no distortions of competition. It pointed out that, in an update of the study 'The Market for Industrial and Food Phosphates' for the years 1998 to 2002, CRU International Ltd. had forecast that, whilst the industry was likely to have sufficient capacity overall to meet demand in 2003, there would be significant regional imbalances which would have to be corrected. Overcapacity for industrial and food-grade phosphates existed only 'on paper' since, according to the report, the installations were in very bad condition and had to be renovated. Moreover, CWP's market share on the relevant markets, as described in recitals 62 and 63, was insignificant. CWP also stated that it never sold below market prices.

(86) CWP went on to state that BK Giulini was not a direct competitor. The company, which produced special phosphates, had bought more than two thirds of CWP's phosphate production in 2000 and was interested in taking over CWP's production of phosphoric acid and phosphates. In CWP's view, the aid had not had any impact on BK Giulini.

(87) As regards the private contribution to the restructuring, CWP stated that it was not able to finance the restructuring plan fully out of its own funds because of the high raw material costs. However, it did contribute substantially. According to CWP, by the end of 2002 privately financed investments amounted to EUR 5,11 million (DEM 10 million). All the loans granted to the company, including those guaranteed by the BvS and the *Land*, were to be regarded as a private contribution to the restructuring since CWP paid interest and intended to repay them by selling the assets linked to phosphate production to TI.

(88) As regards the identification of the aid beneficiary, CWP stated that it has not been incorporated into TI. After the sale of the phosphate division to TI, there will be two independent companies operating on CWP's site, with TI being active in the phosphate business and CWP in phosphoric acid production. Contrary to the opinion of CFB, CWP had never supplied any thermal phosphoric acid to TI. Moreover, CWP was the sole beneficiary of the aid.

VI. **COMMENTS FROM GERMANY**

(89) In its response to the initiation of the formal investigation procedure, Germany submitted information on the amendments to the restructuring plan, as described in recitals 42 to 44. It also provided information on all financial measures taken by the public authorities and made available to the company during privatisation and throughout the restructuring period, as described in recitals 17 to 34. The details on the private contribution to the restructuring given in recitals 50 to 57 and the company's management reports for the period 1994 to 2000 and market data were also submitted. As regards the comments from third parties, Germany refers to CWP's reaction, which was reported by letter of 8 October 2002.

(90) In its response to the information injunction, Germany provided information on the compatibility of existing aid measures with the schemes under which they had purportedly been awarded. It also indicated that the process should be divided between the phosphates business, which it regards as having been successfully restructured, and the remaining business areas of CWP, mainly the production of phosphoric acid via the extraction installation, which would be successful once TI had paid the outstanding amount of the price.

VII. **ASSESSMENT**

A. **Introduction**

(91) Some of the measures to be assessed were already examined in the previous decision annulled by the Court of First Instance; a number of them had been notified at the initial stage of the project in accordance with Article 93(3) of the EC Treaty (now Article 88(3)), while others had been implemented before the Commission decision. Yet others were not examined in the annulled decision or were prolonged or extended after that decision.

(92) In examining each measure, the Commission will look at the situation prevailing at the time of the first decision as far as the notified measures are concerned and at the situation when the financial support measures were taken as far as the non-notified measures are concerned. However, it will have to give an overall assessment of the restructuring, taking into account all the relevant developments in the factual situation up to the time when the last measures were taken.

B. **The relevant undertaking**

(93) Following the information injunction, Germany provided extensive information on the shareholder structure of CWP. It transpires that in 2002 CWP, together with the Vopelius Group, including Mr Vopelius, who holds 75,2 % of the capital, employed a workforce of 100, possessed assets totalling EUR 25,81 million (DEM 50,48 million) and had a turnover of EUR 22,36 million (DEM 43,73 million). Accordingly, the thresholds specified in the Commission recommendation 96/280/EC of 3 April 1996 concerning the definition of small and medium-sized enterprises ([15]) are not exceeded.

(94) As regards the BVT group, which holds the remaining 24,8 % of the shares, Germany states that it should be regarded as an institutional investor since it provides only risk capital and does not exert control over the operations of CWP. Consequently, CWP can be regarded as an SME. CWP also ranked as an SME in the years preceding 1997 (first year for which full data are available).

(95) The Commission notes that, on the basis of the information available, no financial measures deriving from State resources were made available to CWP after the agreement with TI in February 2001. It has also taken note of an expert report drafted by AnChem Consult and submitted by Germany. According to that report, the agreement was concluded following an open and transparent procedure giving to all undertakings active on the relevant market in Europe the possibility to submit bids; the bid submitted by TI was selected as the economically most viable and best bid and the price paid corresponded to the market price. The Commission considers, therefore, that TI has not been a direct or an indirect beneficiary of the State aid for CWP.

C. **Existing aid**

(96) A number of measures allegedly constitute existing aid and need not be reassessed by the Commission. The compatibility of these measures with the schemes under which they were allegedly granted should though be examined.

(97) Measures 1, 2 and 3: As the company had some 70 employees at the time of privatisation, Germany regards any aid granted within this context as being covered by THA scheme N 768/94 ([16]). The Commission acknowledges that the company had fewer than 250 employees at the time of privatisation. These measures do not, therefore, need to be notified to the Commission and are to be regarded as constituting existing aid.

(98) Measure 1a: As the granting of the guarantee is covered by the THA scheme, the possibility of converting this guarantee into a loan or grant had been envisaged from the outset because the company was already in difficulties. This is consistently acknowledged in the three THA schemes that constitute the legal basis for the granting of the guarantee. The decision on THA scheme E 15/92 explicitly states that loans and guarantees provided by the THA are increasingly likely to be converted into grants ([17]). Conversion of the guarantee into a loan and grant was already covered by the THA scheme and cannot therefore be classified as new aid.

([15]) OJ L 107, 30.4.1996, p. 4.

([16]) Point 3.1 of THA scheme N 768/94 states that privatisations of companies must be notified to the Commission only if the company has more than 250 workers at the time of privatisation (SG(95) D/1062 of 1.2.1995).

([17]) SG(92) D/17613 of 8.12.1992.

(99) Measures 9 and 10: After the initiation of the formal investigation procedure, Germany stated for the first time that these guarantees had been granted under a scheme approved by the Commission for the rescue and restructuring of firms in difficulty ([18]). The Commission notes that all the conditions laid down for the granting of guarantees have been met in the present case. It has to be emphasised that the scheme was adopted before the entry into force of the Community guidelines and that these guidelines did not require the Member States to bring their existing schemes into line with the new rules (see point 2.5 of the Community guidelines). In addition, the Commission did not review the scheme at issue after the adoption of the Community guidelines. This explains why Measures 9 and 10 comply with the rescue and restructuring scheme but are not in accordance with the Community guidelines. The measures in question can thus be regarded as existing aid which need not be reassessed.

(100) Measure 11: Investment grants amounting to EUR 1,94 million (DEM 3,8 million) were granted on the basis of an aid scheme approved by the Commission as regional investment aid ([19]). In its response to the information injunction, Germany stated that it would ensure that the rules on cumulation were complied with in respect of regional aid granted to CWP and that the maximum regional aid ceiling for SMEs was respected. The Commission thus regards the measure as existing aid. In addition, the aid measure was not taken into consideration when the formal investigation procedure was initiated.

(101) Measure 12: Investment allowances amounting to EUR 0,36 million (DEM 0,7 million) were granted on the basis of aid schemes approved by the Commission as regional investment aid. In its response to the information injunction, Germany stated that it would ensure that the rules on cumulation were complied with in respect of regional aid granted to CWP and that the maximum regional aid ceiling for SMEs was respected. The Commission thus regards the measure as existing aid. In addition, the aid measure was not taken into consideration when the formal investigation procedure was initiated.

(102) Accordingly, the Commission considers that on the basis of the information provided, Measures 1 (including 1a), 2 and 3 as well as Measures 9, 10, 11 and 12 constitute existing aid which need not be reassessed by the Commission. Their amount will nevertheless be taken into account in assessing the proportionality of the overall aid.

([18]) N 413/91, Guarantee rules of the Land of Saxony-Anhalt (SG(91) D/15633 of 8.8.1991).

([19]) 26th General Plan of the joint Federal Government/*Länder* scheme for improving regional economic structures, N 123/97 (SG(97) D/7104 of 18.8.1997 and SG(98) D/7191 of 18.8.1998).

D. **Other State aid within the meaning of Article 87(1) of the EC Treaty**

(103) According to Article 87(1) of the EC Treaty, any aid which distorts or threatens to distort competition by favouring certain undertakings is incompatible with the common market in so far as it affects trade between Member States. The financial measures in favour of CWP have conferred advantages on CWP that a company in difficulty would not have obtained on the market. It should be recalled here that CWP was on the verge of insolvency in 1997 and that no private investor was willing at that time to provide CWP with the financial means it needed. As CWP's products are also traded and as its competitors are present in other Member States, the measures threaten to distort competition and affect trade between Member States.

(104) The measures are financed through State resources and granted by the THA/BvS and the *Land* of Saxony-Anhalt. The THA was set up as a public-law entity with the task of privatising State-owned firms in the former German Democratic Republic and was under the direct supervision of the German Ministry of Finance. The BvS is the successor to the THA and likewise a public-law entity. The measures are thus imputable to the State. They constitute State aid within the meaning of Article 87(1) of the EC Treaty and have to be assessed accordingly.

(105) Measures 4, 5, 6, 7 and 8: These Measures, i.e. the waiver of the purchase price and the accumulated interest, the investment grant as well as the two 20 % BvS guarantees, were granted outside the scope of any aid scheme and thus constitute ad hoc aid and have to be assessed accordingly. This is not contested by Germany.

(106) Measures 7a/8a: In Germany's view, the prolongation of the guarantees and their subsequent conversion into loans and grants do not rank as new aid. However, this would be relevant only if Measures 7 and 8 constituted existing aid, which is not the case. Since Measures 7 and 8 are to be regarded as ad hoc measures, Measures 7a and 8a are, as part of Measures 7 and 8, included in the assessment of compatibility.

(107) The guarantees under Measure 7 (including Measure 7a) and under Measure 8 (including Measure 8a) enabled CWP to obtain loans on better financial terms than those normally available on the financial markets. The Commission considers that the aid element of the guarantees under Measures 7 and 8 is the difference between the interest rate that CWP would have had to pay for a loan on market terms, i.e. without a guarantee, and the interest rate at which the guaranteed loan was actually provided. As CWP was in severe financial difficulties at the time the guarantees were granted and the loans made available, the aid element could be as high as 100 % of the guarantees as nobody would have granted the loans without any guarantee. According to the Commission notice on the method for setting the reference and discount rates ([20]), the Commission establishes reference rates which are supposed to reflect the average level of interest rates charged on medium- and long-term loans backed by normal security. The notice also points out that this reference rate is a floor rate which may be increased in situations involving a particular risk, e.g. an undertaking in difficulty. In such cases, the premium may amount to 400 basis points or more. And so, in the present case, the Commission considers that, without the guarantees, CWP would have had to pay an interest rate at least equal to the reference interest rate plus 400 basis points. The aid element of each guarantee thus consists in the difference between the reference interest rate plus 400 basis points and the interest rate at which the guaranteed loan was provided.

(108) A similar reasoning applies to the conversion of the guarantees into loans by the BvS. The Commission considers that the loans were granted at an interest rate below the interest rate that CWP would have been able to obtain on the market. The aid element of the BvS loans under Measures 7 (including Measure 7a) and Measure 8 (including Measure 8a) thus consists in the difference between the interest rate that CWP would have been able to obtain for such a loan on the market and the interest rate at which the loans were provided by the BvS. The Commission takes the view that CWP would have had to pay an interest rate at least equal to the reference interest rate plus 400 basis points. The aid element of each loan is thus the difference between the reference rate plus 400 basis points and the interest rate at which the loan was actually granted.

E. **Compatibility**

(109) Measures 4, 5, 6, 7 (including 7a) and 8 (including 8a) are to be assessed by the Commission as ad hoc aid. Article 87(2) and (3) of the EC Treaty provides for derogations from the general prohibition on aid in Article 87(1).

([20]) OJ C 273, 9.9.1997, p. 3.

(110) The derogations in Article 87(2) of the EC Treaty do not apply in the present case because the aid measures neither have a social character and are granted to individual consumers, nor do they make good the damage caused by natural disasters or exceptional occurrences, nor is the aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany. Germany has not invoked any of these derogations.

(111) Further derogations are laid down in Article 87(3)(a) and (c) of the EC Treaty. As the primary objective of the aid is not regional development but the restoration of the long-term viability of an undertaking in difficulty, only restructuring aid could be authorized in the present case. Restructuring aid is covered above all by the derogation in Article 87(3)(c) of the Treaty.

(112) For its assessment of rescue and restructuring aid, the Commission issued the Community guidelines ([21]), which are applicable in this case ([22]). The conditions for the application of the Community guidelines are examined below.

(113) The Commission considers that no other grounds for compatibility, and in particular none of the other Community guidelines or frameworks such as those for research and development, environmental protection, small and medium-sized enterprises, employment, training or risk capital, could apply.

Eligibility of the company

(114) According to point 2.1 of the Community guidelines, the financial weakness of firms that receive help for restructuring is due to poor past performance and dim future prospects. The typical symptoms are deteriorating profitability or increasing size of losses, diminishing turnover, growing inventories, excess capacity, declining cash flow, increasing debt, rising interest charges and low net asset value.

(115) At the time the aid was granted, CWP registered increasing losses and was faced with severe liquidity problems as described in detail above. The Commission thus considers that CWP ranked as a company in difficulty at the time.

([21]) See footnote 14.

([22]) Point 7.5 of the 1999 guidelines states that 'the Commission will examine the compatibility with the common market of any rescuing and restructuring aid granted without its authorisation (…) on the basis of the Guidelines in force at the time the aid is granted (…)' (OJ C 288, 9.10.1999, p. 2).

Restoration of viability

(116) The *sine qua non* of all restructuring plans is that they must restore the long-term viability of the company within a reasonable time scale and on the basis of realistic assumptions as to its future operating conditions. Consequently, restructuring aid must be linked to a viable restructuring plan. The restructuring plan usually involves the reorganisation and rationalisation of the business activities on a more efficient basis. Among other things, it takes into account the circumstances giving rise to the difficulties.

(117) It is to be noted that, in the case of CWP, a first restructuring had been undertaken following privatisation but it failed. A second restructuring based on the two documents referred to in recitals 40 and 41 was undertaken in 1997. Although there are differences between them, clearly the strategy was to introduce the wet process and for this the extraction installation was essential so that MGA could be used as the raw material and the dependence on high-cost elemental phosphorus reduced. In addition, the quality of the main end product, i.e. phosphates, was to be enhanced. The two aims are linked: CWP could produce phosphates economically with a more readily available and cheaper raw material only by using the wet process. In order to determine whether the 1996 strategy was viable, the measures for introducing the wet process need to be assessed.

(118) As the expert report submitted by Prayon-Rupel demonstrates, the new production process cannot be introduced by way of minor adjustments to the existing installations. The wet process requires installations altogether different from those used for the thermal process and necessitates, among other things, pre- and post-treatment of the product including defluorination, concentration and decolourisation. However, the 1996 strategy did not provide for any of these steps. Pre-treatment was introduced in December 1997, when the project was already operational, after tests in the laboratory had shown it to be necessary. Such tests should have been conducted before the project started and should have served as a basis for calculating the overall costs. The DLM study on the feasibility of the installation dated November 1997 also mentions the necessary pre-treatment of wet phosphoric acid during the wet process. It should, however, have been drawn up before the restructuring plan was established and should have been used as a basis for determining the costs and financing of the restructuring. Post-treatment was introduced only in early 1999, although CWP claims that it turned out to be necessary only because its supplier could no longer provide the appropriate quality of acid. However, the Commission cannot share this view: the contract between CWP and its supplier was dated July 1998, whereas the project was conceived in 1996. Hence, already in 1996 it should have been clear that a post-treatment phase was necessary, particularly in order to obtain high-purity products for the food industry, as CWP intended. Pre- and post-treatment of the products also require larger installations, as CWP realised in 1999. This again should have been anticipated from the outset.

(119) Moreover, the 1996 documents constituting the restructuring plan did not contain an adequate solution for the highly toxic raffinate. They do not mention it at all. Nor does the 1997 notification. The 1997 DLM study states that phosphates derived from raffinate (which contains phosphoric acid) have too high a metallic content and that it should be established what an acceptable proportion would be. In other words, it identifies a problem and a possible approach to resolving it but does not provide a solution. Subsequently, CWP probably hoped to be able to sell the raffinate but discovered that there was no demand for it, and this contributed to the acute financial crisis in 2000. It should have been clear already at the conception phase of the plan in 1996 that a solution had to be found for the toxic raffinate. If the solution were to sell it, then an appropriate market study should have been conducted in order to establish whether this was feasible. However, the 1996 and 1997 documents did not even mention the problem.

(120) As a consequence of the inadequate planning of the necessary steps to achieve the objective, the costs of the entire investment programme and, in particular, of the extraction installation were clearly understated. Germany, however, does not share this view and presented a study by DLM on the costs of the extraction installation. The four-page study, which is based on theoretical calculations that need be checked by conducting practical tests, is simply a list of the costs of producing phosphoric acid by means of the wet process. No estimate is given of the costs of building the installation itself. This study does not then alter the view that the costs of the investment programme and, in particular, of the extraction installation were not carefully planned when the restructuring strategy was decided on. This view has been confirmed subsequently as the costs were seriously understated. The extraction installation was supposed to cost EUR 3,07 million (DEM 6 million) in 1996 but the cost had risen to EUR 7,72 million (DEM 15,1 million) by 2000/2001, when the work was interrupted owing to a lack of liquidity. The overall investment, which had been put at for EUR 7,67 million in 1996, had risen to EUR 17,93 million by 2000/2001.

(121) The inevitable consequence of the lack of any real planning for the restructuring measures and the investment costs was that the extraction installation was not completed by 1998 and CWP had not restored its long-term viability by 2000 as initially envisaged. By 2000 CWP had not managed to repay any of the loans granted to it, was far from having completed the extraction installation, continued to be dependent on elemental phosphorus and was on the verge of insolvency. It can thus be assumed that the 1996 restructuring strategy failed in 2000.

(122) Germany, however, takes a different view, namely that, when CWP avoided insolvency by selling its phosphate division to TI, it successfully accomplished the restructuring of that division. In addition, it considers that the restructuring of the phosphoric acid division will have been successful once TI pays the outstanding amount of the price because then CWP will complete the innovative extraction installation and become viable once again. In support of this assertion, Germany has submitted a report from Dr Scheibitz dated 25 July 2000. Its conclusion is that the initial strategy was successful and, even if the Commission does not share this view, the changes to the initial strategy have ensured that CWP will be viable.

(123) The Commission does not agree. First, the restructuring of CWP cannot be divided into two divisions (phosphates and phosphoric acid). CWP was a firm which was in difficulty and for which a restructuring strategy was drawn up. Moreover, the restructuring of the two divisions is linked: CWP could produce phosphates efficiently only if it could count on producing phosphoric acid economically. Although CWP increased its product range and potentially even the quality of its phosphates, it never produced them efficiently because it remained dependent on elemental phosphorus. The fact that CWP withdrew from its traditional market by selling its phosphates division in a bid to avoid insolvency cannot be regarded as a successful restructuring but is proof of the failure of the original plan. It should also be noted that the restructuring has not yet ended. The extraction installation, which should have been completed by 1998, i.e. before the 'sale' of the phosphates division to TI, is still not operational and the installations for the production of thermal phosphoric acid have been closed down. The Commission cannot regard these as changes to the initial restructuring strategy: what is clear is that the initial strategy failed completely in 2000 and that CWP is now in a quite different position.

(124) The Commission cannot agree with Germany either that the modified strategy would increase CWP's chances of survival. It notes that the report from Dr Scheibitz, which Germany presented in order to demonstrate the technical feasibility of the extraction installation, points to two main problems. First, if the problem with the raffinate is not solved, the installation cannot become operational. Second, CWP obviously did not incorporate in its planning a pilot phase that could show clearly whether there were any problems with the installation. As could have been envisaged, shortly after this report CWP was once again on the verge of insolvency. On the basis of the information available, the problem with the raffinate has not been solved. Even if CWP were to complete the installation, further problems could arise in the absence of a pilot phase. Finally, the Commission notes that CWP is not a major player on what is a difficult and highly concentrated market dominated by large firms such as Rhodia, Astaris, Prayon and TI. CWP clearly does not have easy access to financing and suffers from a chronic lack of equity. Even completion of the extraction installation would not by itself ensure the company's survival.

(125) In conclusion, the Commission considers that the 1996 strategy was not carefully planned and presented shortcomings and that costs were understated. Such a strategy could not lead to the restoration of long-term viability. The numerous changes to the plan support this view. It is not surprising, therefore, that CWP found itself on the verge of insolvency at the time when the restructuring should have been successfully completed. In addition, the Commission considers that the 1996 strategy, for which the aid was granted, failed completely in 2000 and that there is no guarantee of CWP's continued survival. Consequently, the conditions laid down in point 3.2.2(i) of the Community guidelines are clearly not met.

Aid in proportion to the restructuring costs and benefits

(126) The amount and intensity of 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. Therefore, aid beneficiaries will normally be expected to make a significant contribution to the restructuring plan from their own resources or from external commercial financing. Moreover, the form in which the aid is granted must be such as to avoid providing the company with surplus cash which would be used for aggressive, market-distorting activities not linked to the restructuring process.

(127) According to the figures submitted by Germany in 1997, the costs of the restructuring should amount to EUR 12,88 million (see Table 4). In its response to the initiation of the investigation procedure, Germany indicated that the overall costs of the restructuring totalled EUR 18,87 million (see Table 5).

(128) As regards the contribution of the beneficiary to the restructuring, the 1997 notification identified two items: financing of investments of EUR 5,11 million (DEM 10 million) and contribution from the shareholders of originally EUR 0,15 million (DEM 0,3 million). As noted in the decision to initiate the formal investigation procedure, the investment obligation was a requirement of the privatisation in 1994, which had been agreed two years before the restructuring started, and not a contribution to the 1996 restructuring. Moreover, under this investment obligation only investments amounting to EUR 5,11 million had to be carried out. And so this obligation cannot be considered as a private investor contribution to the 1996 restructuring.

(129) The State-guaranteed loans cannot be considered as a private investor contribution as claimed by CWP.

(130) In its response to the information injunction, Germany lists a supplier credit from Vopelius as a private investor contribution. It should be noted that this item does not constitute a credit as such but consists in deferral for several weeks of the payment by CWP for raw material supplies from Vopelius. The amount of EUR 2,75 million indicated by Germany as a private investor contribution is an outstanding claim of Vopelius dated January 1998. The outstanding claim fluctuates constantly. It amounted to EUR 0,73 million in January 1997 and then fell to EUR 0,4 million in April 1997 before increasing again until January 1998. This short-term deferral of the payment of liabilities, which is not related to the financing of the restructuring costs, cannot be considered as a private contribution to the restructuring.

(131) The other measures listed by Germany as private investor contribution in its response to the information injunction date from the period after 1998 and so are not related to the granting of the aid in late 1996/early 1997 or to the original restructuring plan.

(132) Therefore, even if the Commission were to take into account the planned restructuring costs as originally notified by Germany (EUR 12,88 million) and to regard as private contributions the company's subscribed capital of EUR 0,29 million and the shareholders' contribution of EUR 0,15 million mentioned in the 1997 notification, the ratio of private contributions to the restructuring costs would amount to 3,4 %, which is manifestly insufficient, even when taking into account the previous practice regarding aid to companies in the *Länder* of eastern Germany.

(133) Consequently, the condition of the aid being proportionate to the restructuring costs and benefits is not fulfilled. The criteria laid down in point 3.2.2(iii) of the Community guidelines are clearly not met.

Full implementation of the restructuring plan

(134) As already mentioned, the 1996 restructuring plan has not been implemented. Consequently, the conditions laid down in point 3.2.2(iv) of the Community guidelines are not met.

F. **Conclusion**

(135) An *ex ante* assessment indicates that the aid, as initially planned and granted, does not fulfil the criteria of the Community guidelines and so cannot be regarded as being compatible with the common market. Moreover, it is to be noted that subsequent events both during the period when further measures were granted and after the granting of the last measures confirm this conclusion: it is clear that the initial strategy for which the aid was granted failed and that the future of the company is highly uncertain.

(136) For this reason, the Commission considers that the aid granted to CWP is incompatible with the common market. In accordance with Article 14 of Council Regulation (EC) No 659/1999 ([23]), where negative decisions are taken in cases of unlawful aid, the Commission has to decide that the Member State concerned must take all necessary measures unless this would be contrary to a general principle of Community law.

([23]) OJ L 83, 27.3.1999, p. 1. Regulation as amended by the 2003 Act of Accession.

(137) In the present case, all the aid measures, including those that were notified initially, have been granted and not authorised by a valid Commission decision. They must, therefore, be considered as unlawful aid. Given that the previous decision was challenged within the prescribed time-limits and annulled by the Court of First Instance, the general principles of Community law, and in particular the principles of legal certainty and protection of legitimate expectations, do not preclude recovery. This is consistent with the relevant case law of the Community Courts ([24]). To conclude otherwise would render ineffective the review conducted by the Community legislator in accordance with Article 220, the first paragraph of Article 230 and Article 233 of the EC Treaty, of the legality of measures adopted by the Community institutions ([25]). To this extent, no distinction can be drawn between the aid measures notified initially and those unlawfully granted since the outset.

(138) Accordingly, the Commission takes the view that Germany should order the beneficiary to repay the aid, including interest, within a period of two months as of the date of this decision. It also deems it necessary that, within a period of two months as of the date of this decision, Germany submit the documents which prove that recovery proceedings have been initiated against the beneficiary of the unlawful aid (such as circulars and recovery orders),

HAS ADOPTED THIS DECISION:

Article 1

The State aid which Germany has implemented for Chemische Werke Piesteritz is incompatible with the common market.

The aid consists of the following measures:

1. Measure 4: The waiver of a purchase price totalling EUR 3 181 769.

2. Measure 5: The waiver of interest accumulated on the purchase price up to the end of 1996 and amounting to EUR 237 239.

3. Measure 6: An investment grant of EUR 1 799 747.

4. Measure 7 (including Measure 7a): A guarantee/loan from the BvS of EUR 644 228. The aid element of the guarantee is calculated as the difference between the reference interest rate plus 400 basis points and the interest rate at which the guaranteed loan was provided. The aid element of the loan is the difference between the reference interest rate plus 400 basis points and the interest rate at which the loan was provided by the BvS.

5. Measure 8 (including Measure 8a): A guarantee/loan from the BvS of EUR 869 196. The aid element of the guarantee is calculated as the difference between the reference interest rate plus 400 basis points and the interest rate at which the guaranteed loan was provided. The aid element of the loan is the difference between the reference interest rate plus 400 basis points and the interest rate at which the loan was provided by the BvS.

Article 2

1. Germany shall take all necessary measures to recover from the beneficiary the aid referred to in Article 1 and unlawfully made available to the beneficiary.

The loan under Measure 7 (including Measure 7a) and the loan under Measure 8 (including Measure 8a) shall be discontinued within two months following notification of this Decision.

2. Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of the Decision. The aid to be recovered shall include interest from the date on which it was at the disposal of the beneficiary until the date of its recovery. Interest shall be calculated in accordance with the provisions of Chapter V of Commission Regulation (EC) No 794/2004 ([26]).

Article 3

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

Germany shall provide this information using the questionnaire attached in the Annex to this Decision. In particular, it shall submit to the Commission all documents proving that recovery proceedings have been initiated against the beneficiary of the unlawful aid.

([24]) Judgment of the Court of Justice of 14 January 1997 in Case C-169/95 *Kingdom of Spain* v *Commission of the European Communities* [1997] ECR I-135, and Judgment of the Court of First Instance of 5 August 2003 in Joined Cases T-116/01 and T-118/01 *P & O European Ferries (Vizcaya), SA v and Diputación Foral de Vizcaya* v *Commission of the European Communities* [2003] ECR II-2957.

([25]) Joined Cases T-116/01 and T-118/01, (already cited, recital 209).

([26]) OJ L 140, 30.4.2004, p. 1.

Article 4

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 2 March 2005.

For the Commission
Neelie KROES
Member of the Commission