

Official Journal

of the European Communities

ISSN 0378-6978

L 386

Volume 37

31 December 1994

English edition

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II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 12 October 1994

concerning the grant of State aid by France to the Bull group in the form of a non-notified capital increase

(C33/93 (ex NN 32/93))

(Only the French text is authentic)

(Text with EEA relevance)

(94/1073/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 93 (2) thereof,

Having regard to the Agreement establishing the European Economic Area and, in particular, Article 62 (1) (a) thereof and Protocol 27 thereto,

Having given notice in accordance with Article 93 of the Treaty to interested parties to submit their comments and having regard to those comments,

Whereas:

I

Groupe Bull ('Bull') is a manufacturer of diversified computing products having its head office based in France. In addition to its manufacturing operations Bull also provides software and maintenance services to its clients.

At present the majority of Bull's share capital is held either directly or indirectly, through France Télécom, by

the French State. A minority participation in the group's share capital is owned by the private sector represented by NEC and IBM.

The Commission has taken several recent decisions concerning Bull: the first, in 1992, being a final decision pursuant to Article 93 (2) of the Treaty ⁽¹⁾, which considered capital injections amounting to FF 4 billion to contain aid but that this aid was compatible with the common market. This decision also assessed aid of FF 2,68 billion, granted for research and development, and found it to be similarly compatible. It should be noted that this decision is currently subject to appeal, as concerns the capital injections, at the Court of Justice of the European Communities ⁽²⁾. Subsequent decisions have been taken in connection with the present programme of recapitalization: in 1993 the Commission initiated the Article 93 (2) procedure ⁽³⁾ in connection with an advance on a future capital injection, amounting to FF 2,5 billion. Then, in January 1994, the procedure was extended ⁽⁴⁾ to include a further capital increase amounting to FF 8,6 billion of which FF 5,5 billion was paid in December 1993.

⁽¹⁾ OJ No C 244, 23. 9. 1992, p. 2.

⁽²⁾ Case C-367/92.

⁽³⁾ OJ No C 346, 24. 12. 1993, p. 4.

⁽⁴⁾ OJ No C 80, 17. 3. 1994, p. 4.

II

Bull remains one of the larger traditional, broad-based computer companies, manufacturing proprietary systems, involved with open systems and distributing micro-computers, being ranked number 13 in the world according to the Datamation 100 Survey published in June 1993. However, it has been equally affected by the falling turnover and poor results as have been seen by other major, traditional, broad-based manufacturers in the industry.

The adverse financial and commercial position of these companies is reflected by the fact that the computer sector is going through a phase of accelerated technical and commercial development thereby necessitating restructuring. Prices are falling dramatically, consumption and production are slowing and the market is becoming fragmented into many segments. Downsizing and the standardization of products have intensified competition and reduced margins. Many of the major, traditional manufacturers have suffered losses during 1992, and are trying to shift their activities from manufacturing to software and services, being areas that still display high growth rates.

However, it should be noted that extensive changes have taken place in the realm of information technology in recent years. Companies have invested large sums to design products that will, in due course, have an effect on many sectors. This trend is partly explained by technological progress as much as by the demise of the former borders between telecommunications and electronic data processing (EDP). New applications like inter-active video games and teleshopping symbolize the emerging multi-media world which is based on a wide range of technologies and where computers are sold as consumer products. Products that were formerly available only to large companies are now accessible by smaller industrial users and, importantly, a large market of private consumers has developed.

The various information technologies are converging and EDP is moving towards a standardization of product resulting in mass produced standard systems. However, the value added by the hardware producers is decreasing due to strong pressure from components suppliers; therefore, added value lies increasingly in software and services. To react to the erosion of their core business manufacturers have tried to cut costs and to diversify and it is only now, with certain companies, that this solution is working.

III

Following press reports, in February 1993, relating to an advance on a future capital injection amounting to FF 2,5 billion for Bull, the Commission addressed a request for information to the French authorities. This request was followed by a series of letters, between the French authorities and the Commission, which resulted in the Commission establishing that no restructuring plan had been adopted by Bull's majority shareholders on which to base their investment in the form of an advance on a future capital injection.

Accordingly, given that the Commission concluded that illegal aid was present in the transaction and that no grounds, given the absence of a final, approved restructuring plan, could be found for its compatibility with the Treaty, the Commission decided to initiate the Article 93 (2) procedure on 6 October 1993. This decision was forwarded to the French authorities by letter dated 16 November 1993 and published in the *Official Journal of the European Communities* (1). Subsequently, in a letter dated 6 December 1993 the French authorities informed the Commission that the French State, together with France Télécom, had decided to invest, in addition to the advance of FF 2,5 billion, a further FF 8,6 billion in Bull. Furthermore, it was stated that part of this amount would be paid immediately to Bull thereby infringing the procedural requirements of Article 93 (3); this measure must therefore be classified as illegal.

Accordingly, on 26 January 1994 the Commission adopted two further decisions concerning Bull. The first decision extended the Article 93 (2) procedure in respect of the capital increase of FF 8,6 billion: this decision was forwarded to the French authorities by letter dated 8 February and published in the *Official Journal of the European Communities* (2).

The second decision ordered the French authorities to refrain from granting further aid to Bull, and specifically FF 2,5 billion which was believed to be outstanding for payment from the amount of FF 8,6 billion. This decision was sent to the French authorities by letter dated 8 February 1994 and was published in the *Official Journal of the European Communities* as Decision 94/220/EC (3).

The French authorities responded to the second decision in a letter dated 25 February confirming that they would not proceed with further payments until the Commission had reached a decision thereon.

In a letter dated 8 March 1994 the French authorities responded to the questions raised by the Commission in the opening and extension of the Article 93 (2) procedure submitting, in addition, a final restructuring plan. The

(1) See footnote 3, p.1.

(2) See footnote 4, p. 1.

(3) OJ No L 107, 28. 4. 1994, p. 61.

Commission raised a series of questions on these documents in May 1994 to which the French authorities replied in June 1994. A meeting was held in July between the Commission and the French authorities and Bull where several further issues and questions were raised. An answer to the Commission's questions was received in August.

During July 1994 the Commission appointed an independent consultant to assess Bull's restructuring plan: this work was carried out during August and September and a final report issued in mid September. This report was submitted to the French authorities by letter dated 20 September 1994 who confirmed that they had no comments to make on the report on 21 September 1994.

IV

Within the framework of the Article 93 (2) procedure comments were submitted by the UK Government to both the opening and the extension of the procedure. These comments were submitted to the French authorities by letters dated 14 March and 26 May 1994. A response dated 28 March 1994 was received to the letter dated 14 March 1994; no reply was sent in respect of the second letter.

In principle the UK Government supported the Commission's position and considered that the aid should not be used to fund acquisitions or be granted to a company operating in a market in overcapacity. The French authorities responded stating that they did not share the UK Government's analysis of the capital injection or market and, specifically, that Bull's acquisition of Packard Bell was part of a strategy to improve its micro-computer business.

V

Article 92 (1) of the EC Treaty and Article 61 (1) of the EEA Agreement state that 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 the Member States and the Contracting Parties be incompatible with the common market and the Agreement. In addition, in assessing whether a capital injection constitutes aid, it must be assessed whether or not the State's action is in accordance with that of a market economy investor.

In order to improve transparency and to assist in ascertaining whether the behaviour of the State is akin to that of a market economy investor (an approach adopted

by the Court of Justice on a number of occasions) ⁽¹⁾, the Commission has adopted two communications: one dated 17 September 1984 concerning public authorities' holdings in company capital ⁽²⁾ and another in 1993 covering public undertakings in the manufacturing sector ⁽³⁾. This guidance requires a consideration of whether, in general terms:

- the enterprise's financial position is sound,
- the participation of any private shareholder takes place in proportion to its shareholding and whether such a shareholding is economically significant,
- the structure and volume of the company's debts can allow a normal return (in dividends or capital gains) in a reasonable time from the injected capital,
- the enterprise is able to raise similar funding on the capital markets given the enterprise's cash flow, and
- the present value of expected future cash flows from the intended project exceed the new outlay,

to ascertain whether or not a capital injection includes an aid element.

However, in order to make these assessments it is necessary, at the outset, to determine the date on which the decision was made to undertake the investment. The advance on a future capital injection of FF 2,5 billion was paid to Bull during February 1993 and the decision to invest a further FF 8,6 billion was taken by the French authorities in December 1993. Therefore, it is necessary to consider Bull's financial position at these points in time to assess whether a market economy investor would have made the same decision as the French State.

At the end of 1992, being the latest point at which historic financial information would have been available before the decision to invest was taken, Bull had experienced three years of falling sales, having seen its consolidated turnover reduced from FF 35 billion in 1990 to FF 30 billion in 1992, being a fall of some 14 %. Furthermore, operating losses (i. e. revenues less all costs except net financial charges) had been incurred in each of the years 1990, 1991 and 1992 and, similarly, Bull's net result (both before and after restructuring provisions) had been negative during this period, the group having earned its last net profit in 1988. It should also be noted that Bull has not paid dividends since its acquisition by the State and given the level of losses, it cannot be supposed that an increase in the value of the company's shares has taken place.

⁽¹⁾ For example Joined Cases C-296 and C-318/82, *Netherlands and Leeuwarder Papierwarenfabriek BV v. Commission* [1985] ECR, p. 809; Case C-323/82, *SA Intermills v. Commission* [1984] ECR, p. 3809; Case C-234/84, *Belgium v. Commission* [1986] ECR, p. 2263 (Meura).

⁽²⁾ Bulletin EC No 9-84.

⁽³⁾ OJ No C 307, 13. 11. 1993, p. 3.

Bull's cash flow generated by its operations was not sufficient to meet its investment needs during the period 1990 to 1992; consequently, for this period Bull had to resort to capital injections to meet its financing requirements and to reduce the high level of borrowings reached in 1990. Whilst the Commission did not consider Bull's capital injection of 1990 it has to be recalled that the majority of the capital injected in 1991 and 1992 came from the State and was considered to be State aid.

By way of comparison IBM, which was profitable in 1990, incurred a net loss in both 1991 and 1992. However IBM generated a cash surplus from operations sufficient to cover investment needs in both 1990 and 1992 and only had to resort to borrowings for this purpose in 1991. Similarly DEC, which was profitable in 1990, but was loss making in 1991 and 1992, generated a sufficient cash surplus from operations in both 1990 and 1991 to cover investment needs but had to raise other finance for this purpose in 1992.

Bull's debts at the end of 1992, after allowing for the above capital injections, whilst lower than in the previous two years, still amounted to over FF 10 billion being some 27 times shareholders' funds (i. e. share capital and retained results). Similarly, Bull's financial charges were some 5 % of turnover in 1992 and were not covered by operating profits, showing that the group had failed to earn sufficient profits to cover interest costs on borrowings. This had also been the situation in both 1991 and 1990.

As regards the subsequent decision to invest FF 8,6 billion the French authorities would have had available Bull's results for the six months to 30 June 1993 and a good indication of the results for the year to 31 December 1993.

The half year results to June 1993 show a fall in sales (when compared to the first half of both 1991 and 1992); an operating loss 50 % higher than that for the first six months of 1992 had been incurred and the net loss was higher than that of the previous corresponding period. In addition, interest charges were not covered by operating profits, due to the loss being incurred and debts, despite the advance on a capital injection, were not significantly reduced because of the continued level of losses.

Similarly, by considering Bull's financial statements for the year ended 31 December 1993 it is apparent that sales had fallen further from 1992 levels and that an operating loss had been incurred, being higher than in both 1991 and 1992. Again financial charges were not covered by operating profits (due to the loss) and whilst

indebtedness was reduced to some FF 4,5 billion this was made possible by the capital injections paid during 1993 amounting to FF 6,1 billion.

Given the recent financial performance of Bull, its falling sales, operating losses and high level of indebtedness it is not believed that its financial position was sound at the date of the investment decisions. Moreover, considering the structure and volume of Bull's debts it is not believed, taking due account of historic and future performance, that an adequate return could be expected, at the date of investment, from the injected capital in a reasonable time. Finally, it is not considered that Bull, on the basis of its cash flow, would have been able to raise similar amounts of funding on the capital markets.

The communication of 17 September 1984 concerning public authorities' holdings in company capital states that State aid is not present in a capital injection when both the public and private shareholders contribute in proportion to their shareholdings; however the private investor's shareholding must have economic significance.

Prior to the payment of the advance of FF 2,5 billion, the NEC and IBM shareholdings in Bull totalled 10,1 % of the share capital. Neither company was invited by the French Government to participate in making the advance to Bull but both were informed that they could take part in a subsequent capital increase.

As regards the capital increase of December 1993 it should be noted that IBM did not participate, thereby seeing its stake in Bull diluted from 5,68 % to 2,1 % — a reduction of 63 %. On the other hand NEC maintained its shareholding of 4,4 % by investing FF 379 million. Accordingly, it is necessary to consider whether this shareholding is 'economically significant' and to consider the monetary value of the shareholding which may be seen from the point of view of either NEC or Bull.

This capital injection by NEC represents some 3 % of the total current injections and NEC's total investment in Bull, since becoming a shareholder, accounts for some 4 % of the total capital injections made to the group. Whilst these amounts are significant in themselves, the relative amounts are small in comparison to the total. Similarly, the amounts are small for NEC: at its 1992 financial year and NEC had financial asset investments of

FF 14 billion; during its 1992 financial year NEC invested FF 12 billion in fixed and financial assets. It would not therefore appear that FF 379 million was a significant investment for NEC to make.

In addition it must not be forgotten that NEC has a broader interest than other market economy investors in continuing to invest in Bull being the access such an investment brings to the French and European markets especially that of public procurement.

Therefore it is not considered that NEC's investment in Bull is economically significant and therefore this investment does not detract from the aid nature of the State's capital injections.

Finally, it is necessary to consider a net present value analysis of the capital injections. This analysis is based on the financial projections provided by the French authorities for Bull for 1994 and 1995; a period considered, by the French State, to be sufficient to judge Bull's financial viability.

Before proceeding with any analysis based on value or discounted value it is to be noted that at 31 December 1992 Bull had total shareholders' funds (including the advance of FF 2,5 billion) amounting to FF 375 million. At the end of the restructuring process and after the further injections by the State of FF 8,6 billion, Bull has projected total shareholders' funds of FF [...] (1) billion, i. e. an erosion of some FF [...] billion, being most of the second capital injection.

By taking account of Bull's value at 31 December 1992, its net cash flows in 1993, 1994 and 1995 the capital injections during this period and the value of Bull at 31 December 1995, it would appear that the internal rate of return generated by these financial flows is insufficient to convince a market economy investor operating in normal conditions to undertake such a transaction.

Therefore, on the basis of these tests it is apparent that both the advance and the capital injection, made, or to be made, by the French State and France Télécom for the benefit of Bull contain aid within the meaning of Articles 92 (1) of the EC Treaty and 61 (1) of the EEA Agreement.

The French authorities argue that the capital injections do not contain aid to Bull because:

- of the three options available to the State shareholder, namely liquidation, sale or recovery measures, the

latter option would most probably protect the value of the State's investment,

- the actions of the minority shareholders supported the State's decision, and
- the action of the State was comparable to that of shareholders of other large information technology groups in difficulty.

The French authorities claim that the cost of either liquidating or the net cost to the State of liquidation, after disposing of Bull's viable business segments, would exceed the amount of the capital injection. Therefore, as the amount of the capital injection was lower than both these amounts, injecting funds to permit restructuring was the correct economic decision.

A shareholder in a company, limited by shares, is responsible, normally in law and always in economics, to the amount of his subscribed share capital. Consequently in a liquidation the shareholders' exposure is limited to this amount. In arriving at a liquidation value for Bull the French authorities have assumed that the French State, as shareholder, will be accountable for the total of Bull's debts both as shown on the balance sheet and as contracted to off-balance sheet. This approach is mixing the State's roles of owner/shareholder and as a body responsible for social policy.

From an economic standpoint and as supported by the Court of Justice in its judgment of 14 September 1994 (2), it is clear that the State's involvement is limited to its share capital and in the words of the Advocate-General 'if the company's liabilities exceed its assets, its creditors would not have been able to call upon the Patrimonio del Estado (the State) to make good the difference'.

As the French authorities have calculated that the sale of Bull's viable parts would exceed the legal cost of redundancies, and the immediate cost of running Bull down, it is considered that it is erroneous to include the whole of Bull's other liabilities (especially as none are covered by State guarantees) in calculating a liquidation cost and to compare this to the cost, by way of a capital injection, of a restructuring. Such an analysis would not be carried out by a market economy investor who would simply compare the diminution of value that would be incurred by losing the share capital in a liquidation with the cost of restructuring. Therefore, it is considered that this analysis may be discounted.

Furthermore, it is considered that even if a responsibility exceeding the nominal shareholders' liability is imposed by national courts, as is claimed by the French authorities in this case, then the fact that Bull was not restructured or liquidated at an earlier point in time is contrary to the

(1) [...] indicates business secrets.

(2) Joined Cases C-278/92, C-279/92 and C-280/92, Imepiel and Intelhorce, paragraph 22, not yet published.

behaviour of a market economy investor. Such an investor would have taken appropriate action once it became clear that liabilities were arising that put his limited liability in doubt. Therefore if national law establishes such an unlimited guarantee, governments must take account of this fact and act as market economy investors in their investment decisions. The Commission's position in such cases has been clearly established in Decisions 92/329/EEC ⁽¹⁾ and 94/259/ECSC ⁽²⁾, and in its communication in the EFIM case ⁽³⁾.

The actions of Bull's minority shareholders have already been dismissed above: it is, however, to be reiterated that it is not considered that the shareholding of NEC is economically significant and that the continuing investment was motivated by market access reasons; moreover, it should be remembered that IBM did not participate in the transaction.

The fact that Bull has raised debt funding in 1992 and 1993 does not detract from this analysis. As no details of either the lender, the length of the loans or the applicable interest rate is given it is not possible to conclude that these transactions indicate that aid is not being granted to Bull.

Turning to consider the actions of the shareholders of companies in a position similar to Bull, the French authorities make reference to Siemens (SNI), Olivetti and AT&T and point out that, in the case of SNI, its parent company has supported it financially despite a recurring high level of losses. Furthermore, as regards Olivetti funds have been raised on the stock exchange and that DEC has participated in this increase. Finally, as concerns AT&T it is stated that AT&T has continued to support its information technology business even going as far as acquiring the loss making NCR.

Several points require further consideration. As regards SNI the capital injected by Siemens in 1990 at current exchange rates, amounts to some FF [...] billion: Bull has received over FF 15 billion to restructure since 1991. Whilst Siemens has lent a further FF [...] billion to SNI to restructure, this money, as a loan, can be recovered. Moreover, it must be remembered that SNI is a larger company, in terms of turnover, than Bull, and therefore may cost proportionately more to restructure. In addition, as SNI does not make publicly available its full financial results, it is not possible to ascertain to what extent SNI's losses may be due to restructuring costs.

Furthermore, the behaviour of Siemens with respect to SNI is based on an industrial rationale as SNI forms a complementary part of a larger electrical, electronic and consumer goods conglomerate.

SNI accounted for only some 16 % of Siemens' turnover in 1991 with the greatest segment of sales (33 %) coming from industry, automation and transport. Due to the group's diversified structure, which also includes electrical components, energy and medical divisions, there is an economic rationale in having a computer company within the group. The fact that SNI can draw on Siemens' components division and then sell products to the captive automation and components division supports the argument that SNI is retained for strategic reasons.

Similarly, Olivetti has raised some FF 1 billion by way of a rights issue, again a far smaller amount than that given to Bull and Olivetti raised this sum on the back of a more successful trading performance than Bull. In addition despite the participation of DEC in this original transaction it should be noted that DEC is currently in the process of withdrawing from Olivetti.

Finally, as regards AT&T, whilst it has supported its own information technology business, and that of NCR, it would not appear that it has called upon its shareholders for funding but instead has relied on internally generated monies to undertake the restructuring of the group.

Therefore, the actions of the French State in respect of Bull can be distinguished from these cases on three grounds: first, the size of external capital injections (if any at all) in these cases must be contrasted with that of Bull. Secondly, in the case of SNI and AT&T, at least, the fact of industrial synergy must not be omitted, something which is lacking in the case of Bull. Thirdly, AT&T and Olivetti have generated operating profits in recent years to fund their restructuring themselves which Bull has been unable to do.

Furthermore, it must also not be forgotten that a number of computer companies, being competitors of Bull, for example IBM, whilst loss making have restructured without the help of their shareholders. These companies have, in general, only incurred net losses as the result of restructuring provisions: they were profitable at the operating level.

Finally it should be noted that the French authorities have submitted a net present value analysis which shows

⁽¹⁾ OJ No L 183, 3. 7. 1992, p. 30.

⁽²⁾ OJ No L 112, 3. 5. 1994, p. 64.

⁽³⁾ OJ No C 75, 17. 3. 1993, p. 2.

that an internal rate of return of some [...] % is generated on the capital injections. This calculation is erroneous for the following reasons:

- the calculation ignores the recapitalization by France Télécom. As a public undertaking this company's capital injection should be taken into account,
- in determining the cash flow, the analysis assumes that the State has to meet the whole of Bull's liabilities on liquidation. As discussed above, on economic grounds, this is inappropriate.

Therefore, its is considered that this calculation may be discounted.

In summary the arguments advanced by the French authorities do not point to the conclusion that the French State and France Télécom have acted as market economy investors in their recapitalization of Bull. Therefore, as concluded above, the capital injections amounting, in total, to FF 11,1 billion by the French State and France Télécom are considered to contain aid within the meaning of Articles 92 (1) of the EC Treaty and 61 (1) of

the EEA Agreement. However it also became apparent during this analysis that the payment of the advance on a future capital injection appeared to be an intention of the French Government to grant rescue aid whilst the capital injection, on the other hand, was in the nature of restructuring aid.

VI

Bull operates in several distinct areas being those of proprietary computers (GCOS 7 and GCOS 8), open systems and business software (Unix), personal computers (ZDS), systems integration and services.

In 1993 and 1992 Bull's sales of equipment amounted to FF 15 billion and FF 16 billion respectively and its rental and service income to FF 13 billion and FF 14 billion respectively. This sales revenue may be analysed as follows:

	1993		1992	
	FF billion	%	FF billion	%
Western Europe	20	71	22	73
North America	6	21	6	20
Rest of the world	2	8	2	7
	28	100	30	100

It is understood that some 50 % of Bull's sales in western Europe take place in France.

of Articles 92 (1) of the EC Treaty and 61 (1) of the EEA Agreement.

Data for the size of the European market in 1992 (as set out in the Commission's Panorama of Industry 1994) indicate that the total market size was some FF 260 billion. Alternatively for the EEA as a whole (for 1993) the Yearbook of World Electronics Data indicates a market of some FF 375 billion for EDP equipment; finally, the 1993 IDC Worldwide Black Book indicates a western European market size of FF 660 billion for 1992 and FF 718 billion for 1993.

Bull, with sales of some FF 20 billion in western Europe, of which some FF 10 billion are exported from France, is therefore involved in trade between the Member States and the Contracting Parties. Consequently any aid to Bull would be capable of distorting trade within the meaning

VII

Whilst Articles 92 (1) of the EC Treaty and 61 (1) of the EEA Agreement lay down the general incompatibility of State aid, certain derogations from this general incompatibility are contained in Articles 92 (2) and (3) and 61 (2) and (3) respectively. In this case the aid does not have a regional dimension as none of the French mainland can benefit from a derogation pursuant to Articles 92 (1) (a) or 61 (3) (a) respectively. Similarly, the aid does not have any regional specificities and, as it is believed that none of Bull's continuing, major plants are located in regions falling under the regional derogation of Articles 92 (3) (c) and 61 (3) (c) respectively the aid cannot benefit from this derogation.

Therefore, the Commission believes that the aid can only be considered for the derogation provided for in Articles 92 (3) (c) and 61 (3) (c) respectively being aid to facilitate the development of certain economic activities, where such aid does not affect trading conditions to an extent contrary to the common interest.

The Commission has recently adopted revised guidance (Community guidelines on State aid for rescuing and restructuring firms in difficulty (Notice to the Member States)) concerning the circumstances under which it may be prepared to permit State aid to allow undertakings to restructure both physically and financially.

Restructuring usually involves one or more of the following elements: the reorganization and rationalization of the firm's activities on to a more efficient basis typically involving the withdrawal from activities that are no longer viable or are already loss-making, the restructuring of those existing activities that can again be made competitive and, possibly, the development of or diversification to new viable activities. Financial restructuring usually has to accompany the physical restructuring. Restructuring plans take account of, *inter alia*, the circumstances giving rise to the firm's difficulties, market supply and demand for the relevant products as well as their expected development and the specific strengths and weaknesses of the firm. They allow an orderly transition of the firm to a new structure that gives it viable long-term prospects, producing an adequate return on the injected capital, and will enable it to operate on the strength of its own resources without requiring further State assistance.

It is considered that aid for restructuring may contribute to the development of economic activities without adversely affecting trade against the Community interest if certain conditions are fulfilled.

In this context it should be noted that the Commission has recognized in the White Paper on Growth, competitiveness and employment that with an imminent information society and with the emergence of information highways, it is in the Community's and the EEA's interests to meet new challenges in these areas. This is because the first economies which successfully complete this change will hold significant competitive advantages. Therefore, whilst Bull does not operate specifically in telecommunications, aid to establish a viable and competitive information technology industry, as long as any competitor operating in the EEA is not unduly disadvantaged by the aid, could be said to facilitate economic development from the standpoint of the Community.

It must not be forgotten that both the advance and the capital injection are linked to a restructuring plan (*le plan de restructuration*) which has been approved by Bull's majority shareholders and which was submitted to the Commission in March 1994. The French authorities stress that this plan has for its objectives the rectification of Bull's financial results within two years and the restoration of its viability, which should permit its privatization as soon as possible.

(a) *Restoration of viability*

Whilst the goal of any restructuring plan is to restore the undertaking's long-term viability and health within a reasonable time scale, it is also necessary to ensure that the aid related thereto is in proportion to the restructuring costs and its benefits and that the proposed restructuring plan is implemented in full.

Bull's restructuring plan provides for the restructuring of the group into seven operating divisions segregated by business type; the restructuring of these operations and specifically the micro-computer and open systems and software businesses; reductions in the labour force; the closing of factories and the sale of certain activities. The main thrust of the plan is to reduce Bull's cost structure by a reduction in the number of employees, by the rationalization of its factories, and their capacity, and by the sale of marginal operations.

The cost of these actions was estimated at FF [...] billion of which FF [...] billion are met by the current recapitalization, the balance having already been provided in accordance with the 1992 restructuring (*plan de mutation*). The balance of the recapitalization will be employed in reducing Bull's third-party indebtedness. It is estimated that these measures would improve Bull's operating margin by FF [...] billion in 1995.

Whilst these restructuring measures themselves generate cumulative cost reductions of FF [...] billion during the period 1992 to 1995, of which FF [...] billion relate to distribution and administration costs, FF [...] billion to research and development charges and FF [...] billion to gross margin improvements, it is also necessary to add the continuing improvements due to the 1992 *plan de mutation*. The 1992 plan adds further savings, resulting from the reduction in the number of employees, of FF [...] billion together with other variable cost reductions amounting to a further saving of FF [...] billion.

Consequently, the total cost reduction foreseen for 1995, in comparison to 1992, amounts to FF [...] billion.

However this saving must be reduced because of the effects of inflation, lower external financing for research and development programmes and the reduced capitalization of software development expenses. Therefore the net saving is forecast to amount to FF [...] billion. This improvement is, however, attenuated by the fact that sales values are expected to decrease and, with them, gross margin.

Bull's sales, in total, are forecast to fall from FF 30 billion in 1992 to FF [...] billion in 1995, a reduction of [...] %. However, within this total hardware sales will reduce by [...] % during this period whilst software, maintenance and service revenues by [...] %. In terms of gross margin an overall fall of [...] % is predicted, this has to be split between hardware, where an overall reduction of [...] % is incurred and software, maintenance and services where a fall of [...] % is foreseen. As the result of the expected increased competitiveness of the market Bull's gross margin is forecast to be [...] % in both 1994 and 1995 whereas in 1992 a margin of 37 % was achieved. The negative effect of the reduction in turnover and gross margin amounts to FF [...] billion thereby reducing the impact, at an operating level, on the profit and loss account to FF [...] billion.

These measures are forecast to return all operating divisions to a profit, except for [...], for which further measures are anticipated, and which will still break-even, by the end of 1995. The net result will be improved by the impact of the debt reduction, reducing financial charges by FF [...] billion, and because of the fact that Bull will not have to make further restructuring provisions.

In addition the Commission has considered the debt/equity ratio for Bull during the restructuring period. From a level of 27 at the end of 1992 this ratio was 4 at the end of 1993 (after the capital injections that are classified as aid above) and is forecast to improve to [...] at the end of 1995.

Consequently, at the end of its restructuring process Bull is expected to be profitable at both the operating and net result levels but with a reduced operating capacity. However, little flexibility is permitted by these forecasts to allow for unforeseen events.

The rationalization of Bull's factories has resulted in the closure of Villeneuve d'Ascq in France and [...] in the United States: these actions will lead to some [...] job

losses of which half will be in France. In total Bull foresees some [...] redundancies during the period 1993 to 1995 being some [...] % of the workforce at 31 December 1992. In addition a further [...] jobs will be lost at Bull's partners and through natural wastage. About 40 % of these cuts will be in administration with the balance of the cuts being shared equally between research and development, manufacturing and services.

Bull's greatest loss-making division, ZDS, is addressed specifically by the restructuring plan which has led to Bull ceasing the final assembly of micro-computers and has given rise to the partnership arrangement with Packard Bell. Under this agreement Packard Bell will complete the final assembly of desk-top computers and all lap-top computers will be sourced from Asian suppliers. The advantages of the partnership are twofold. First, given Packard Bell's distribution network, ZDS and Packard Bell have increased their chance to reach a critical mass in order to compete in a market where a high sales volume is crucial for success but they need further size in order to succeed fully. Secondly, only with a high sales volume can the amount of gross profit be generated (given that gross margins are low and compressed because of competition) to finance the necessary research and development to continue product innovation.

It is apparent that ZDS has considerably reduced its losses as the result of these measures; however, it is also considered that ZDS has not yet reached a critical mass to compete successfully, in the long term, with major competitors. Therefore, it is important that the forthcoming privatization of Bull ensures that, if ZDS is retained, suitable synergies are built up between the purchaser and ZDS.

Bull has also experienced serious problems in its [...] business. In addition to the original restructuring plan, a second wave of restructuring (as identified in the independent consultants' report referred to above) has started in August 1994 and it is important, if this division is to be returned to financial health, that this process is continued in accordance with an accelerated procedure.

It is possible to ascertain the impact of the restructuring plan to date by an examination of Bull's financial performance for the six-month period to 30 June 1994; for example salary costs in the first six months of 1994 when compared to the previous year have fallen by FF 259 million and non-salarial variable costs have been reduced by FF 623 million.

The results of the first six months to 30 June 1994 are set out in the summary below; these results are shown before further restructuring reserves (amounting to FF 700 million) in 1994. No such reserve took place in the first six months of 1993.

	Six months to 30 June 1993 (FF million)	Six months to 30 June 1994 (FF million)	Year to 31 December 1995 (FF million)
Sales	12 478	13 847	[...]
Gross margin	4 127	4 105	[...]
Research and development	1 252	1 006	[...]
Administration	4 083	3 532	[...]
Operating margin	(1 208)	(433)	[...]
Financial costs, etc.	772	409	[...]
Net result	(1 980)	(843)	[...]

Consequently it can be seen that despite a growth in sales, which if repeated in the second six months of the year would lead to Bull exceeding its 1994 forecast, the gross margin has deteriorated as predicted. Notwithstanding this a reduction in administration costs has resulted in an improvement in the operating margin. These figures are believed to be indicative of the success of Bull's restructuring.

The independent consultants' report has also concluded that Bull's restructuring plan will return the group to viability in its current diversified form. However, it is also apparent from the report that, in order to achieve the necessary size and to return to long-term sustainable viability, Bull's privatization is a necessary condition in order to enable the group, through a private industrial partnership, to attain the necessary increase in scale, to refocus its strategy and to give customers and personnel confidence in its future.

In fact the consultants conclude that privatization in the very short term is the key to Bull's turnaround because it would:

- send clear signals that Bull wished to survive to its employees, clients and partners,
- end strategic uncertainties,
- reinforce some business units,
- allow for continued turnaround and cost reduction.

The consultants conclude that if Bull wishes to remain a broad-based computer group, both manufacturing goods and providing services, privatization is necessary and should take place before 31 December 1995. Only if this occurs can Bull, in such a format, be returned to long-term viability.

The Commission shares the consultants' views that Bull has the need of a strong industrial partner to support its [...] and [...] divisions and thereby remain a broad-based computer group. However, the Commission also recognizes the effect of Article 222 of the EC Treaty and Article 125 of the EEA Agreement whereby the rules governing the system of property ownership cannot be prejudiced and, therefore, the Commission appreciates that it cannot request or oblige the privatization of Bull. However it is also apparent that the French Government itself wishes to privatize the group and has made this fact known to the Commission.

In this respect it should be noted that the French Government has already included Bull on its list of privatization candidates in its Law No 93-923 concerning privatization; in addition, it should be noted that the current restructuring has been geared to the privatization of the group and that legal and procedural steps have been taken to enable the privatization to proceed.

The French authorities have confirmed, in a letter dated 6 October 1994, that such a privatization, reducing the State's direct or indirect shareholding (including voting power) to below 50 % of Bull's capital is a priority and will be carried out as soon as possible. Furthermore, the French authorities have stated, in both the restructuring

plan and in a meeting on 26 September 1994, that this is the last payment to be made to Bull.

The Commission concurs with the report of the consultant and considers that in order for Bull to be viable, in its current form, a major industrial partner must be found before 31 December 1995. However it must be noted that should the maintenance of Bull in its current form not be required, or should a major industrial partner not be found by this date, then the independent consultants have identified a second scenario which may arise.

This second scenario assumes that Bull becomes a 'downstream' operator i.e. concentrating on services close to the customer. In this case both [...] and [...] would be sold, together with marginal manufacturing operations, but such an option would also entail drastically reduced overheads. In such a case, if Bull was reduced to the level of a service company partnership is not necessarily believed to be crucial for long-term viability. However such a development would affect the Commission's view of the case.

Therefore on the basis that Bull continues to be a broad-based computer producer, which will rapidly find an industrial partner, the Commission considers that Bull will be returned to sustainable financial viability on the basis of its 1993 restructuring plan together with the additional measures put in motion in August 1994.

(b) *Common interest*

A further condition of aid for restructuring is that measures must be taken to offset, as far as possible, adverse effects on competitors.

The Commission has come to the conclusion that whilst most major computer companies operating in the EEA are suffering from financial difficulties these problems are caused by rapid change in the industry and not by excess production capacity. However, it must not be forgotten that Bull derives a major part of its revenues from services, which is an expanding market, and that any aid may effect competing providers of similar services.

Even if there is no structural excess production capacity, the Commission must be satisfied that the aid will not enable the beneficiary to increase production capacity except in so far as is essential for restoring viability,

without thereby unduly distorting competition. To ensure such is the case the Commission may impose any necessary obligations or conditions on the beneficiary.

As a consequence of closing factories and reducing personnel, Bull will reduce its industrial capacity (in terms of hours) from [...] billion in 1992 to [...] billion in 1995: utilization will increase from [...] % to [...] % during the same period.

During this period Bull foresees a reduction in the value of total hardware sales despite increases in the sales value derived from Unix systems and micro-computers. In addition, in value terms, software and maintenance sales will be reduced during the same period whilst services increase by 14 %. However, the reduction in software and maintenance is greater than these increases, leading to an overall reduction in non-manufacturing sales by value.

The French Government has provided estimated market data extracted from the 1993 IDC Worldwide Black Book. This shows that the world market, in value terms, will increase during 1994 and 1995 and that, during the same period, Bull's share of the world market will fall. Similarly, in the western European market, Bull's share is forecast to fall 3,9 % in 1993 to [...] % in 1995 with a market growth of 5 % per annum.

In addition, it should be noted that Bull is engaged in the process of disposing of several peripheral activities, namely [...]. The disposal of these operations would limit further the distortive effect of Bull's aid.

Finally, the Commission has considered whether the aid is in proportion to the restructuring costs and its benefits. As stated above the aid is used both to finance Bull's restructuring and to repay its debts.

As regards the financing of the restructuring, the pay-back period arising from the improved results of Bull is satisfactory. This means that the cost of any rationalization is covered by resulting cost savings in a relatively short time. However, this analysis does not detract from the overall aid nature of the recapitalization. As regards the write-off of debts, it would appear that Bull's level of indebtedness at the end of its restructuring is comparable to that of its main competitors. However, its financial charges will still be at a level which could place Bull at risk. Consequently it would appear that the amount of the aid does not exceed what is strictly necessary.

On 19 September 1994, it was announced that Bull was to dispose of certain of its North American operations to Wang for an amount of \$ 135 million in cash and bonds and \$ 25 million in Wang shares. This money will be used by Bull to settle outstanding obligations in respect of pension funds and property leases in the United States of America and, therefore, it can be said that Bull has used its own resources, albeit to a limited extent, to finance its restructuring.

However, it would also appear that the aid contained in both the advance and the capital increase paid to Bull in 1993 of FF 8,6 billion has, in the main (some FF 7 billion) been used to extinguish the group's accumulated losses. As stated in the restructuring guidelines if aid is used to extinguish accumulated losses the tax credits relating thereto should be eliminated and not retained to be offset against future profits or sold or transferred to third parties. Therefore, such tax credits should be extinguished in order to prevent the group receiving aid a second time.

In the light of the above it is considered that the aid contained in both the advance on a capital injection and in the capital injection itself facilitate the economic development of the computer industry in the Community and the EEA. This aid does not distort trade to an extent contrary to the common interest.

VIII

In the light of the above the aid contained in the advance of FF 2,5 billion and the capital injection of FF 5,5 billion, paid in February and December 1993 respectively, and the amount of aid of FF 3,1 billion still to be granted, may benefit from the exemption provided for in Article 92 (3) (c) of the EC Treaty and Article 61 (3) (c) of the EEA Agreement, provided certain commitments are fulfilled,

HAS ADOPTED THIS DECISION:

Article 1

The aid contained in the advance granted to Bull in February 1993, amounting to FF 2,5 billion, in the capital injection of December 1993, amounting to FF 5,5 billion and to be granted to Bull in 1994, amounting to FF 3,1 billion, is compatible with the common market

and the EEA Agreement in accordance with Article 92 (3) (c) of the EC Treaty and Article 61 (3) (c) of the EEA Agreement, provided that the French authorities respect the following commitments:

- (a) that the various measures, including the sale of [...], set out in the restructuring plan (*le plan de restructuration*), is completed in accordance with the timetable therein;
- (b) that the restructuring of the [...] division as proposed in August 1994 and as detailed [...] is carried out;
- (c) that the aid is used only for the purposes set out in the plan;
- (d) that the Commission is informed of the progress being made in respect of both these restructuring plans, by means of reports setting out the situation of the restructuring and the use to which the aid is put at the 31 December 1994 and at the 30 June and 31 December 1995. These reports are to be submitted by the end of the month following these dates;
- (e) that further aid is not paid to Bull except in conformity with Community law;
- (f) that in the framework of the envisaged privatization, an industrial partner will acquire a significant amount of the shares of Bull or, should this partnership not be achieved, Bull will dispose of all its activities in [...] within a period that would guarantee the return to long-term viability of the group;
- (g) that the Commission is informed of the details of the envisaged privatization process (at (f)), in advance of its being put into operation.

Article 2

The carry forward of any losses must be effected in conformity with paragraph 3.2.2 (iii) of the Community guidelines on State aid for rescuing and restructuring firms in difficulty.

Article 3

France shall inform the Commission within two months of the date of notification of this Decision of the measures taken to comply with Articles 1 and 2.

Article 4

This Decision is addressed to the French Republic.

Done at Brussels, 12 October 1994.

For the Commission

Karel VAN MIERT

Member of the Commission

COMMISSION DECISION

of 5 December 1994

on the German authorities' proposal to award aid to Textilwerke Deggendorf GmbH,
Thüringen

(Only the German text is authentic)

(Text with EEA relevance)

(94/1074/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 93 (2) thereof,

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

Having, in accordance with the abovementioned Articles, given notice to the parties concerned to submit their comments to it,

Whereas:

I

By letter dated 4 December 1992, pursuant to Article 93 (3) of the Treaty and the 1991/92 code on aid to the synthetic fibres industry as in force on that date ⁽¹⁾, the German Government notified the Commission of a proposal to award aid to Textilwerke Deggendorf GmbH (TDG), in support of investments totalling DM 112 000 000 (ECU 58 million) in buildings at TDG's newly-acquired plant in Leinefelde, Thüringen, and equipment for spinning polyamide and polyester staple fibres into single yarn containing at least 85 % by weight of staple fibres of nylon or other polyamides. The single yarn would then be sold to carpet manufacturers, etc.

The proposed aid comprises a grant of DM 23 460 000 (ECU 12,15 million) under the Joint Task Scheme for the improvement of the regional economic structure, an investment tax allowance of DM 6 696 000 (ECU 3,45 million) under the Investment Tax Law and an interest subsidy on a loan of DM 14 652 000 (ECU 7,60 million) from the Kreditanstalt für Wiederaufbau.

The Commission decided on 24 March 1993 to open the procedure provided under Article 93 (2) of the Treaty in respect of this proposed aid.

In taking this decision, the Commission considered that on the information provided by the German Government, it was not clear if any aspects of the investment that would be supported by the proposed aid were within the scope of the code on aid to the synthetic fibres industry or the Community framework for aids to the textile industry. Given the uncertainty, the proposed aid to TDG appeared likely to distort competition and to affect trade among Member States and, therefore, to be incompatible with the common market.

The Commission also noted that the proposed aid would be likely to be of indirect benefit to TDG, as the owner of the plant at Leinefelde. By Decision 86/509/EEC ⁽²⁾, the Commission decided that aid, comprising a grant of DM 6 120 000 and an interest rate subsidy on a loan of DM 11 000 000, awarded by the German authorities to TDG between 1981 and 1983 was illegal and incompatible with the common market, and required the aid to be recovered by the German Government. Until the aid was recovered, TDG's competitiveness would continue to be artificially enhanced. For this reason, in Decision 91/391/EEC ⁽³⁾ and Decision 92/330/EEC ⁽⁴⁾, on two proposals by the German authorities to award aid to TDG, the Commission decided in each case that the aid was compatible with the common market but required the German authorities to suspend payment of the aid until they had recovered the aid that was the subject of Decision 86/509/EEC. The German Government has appealed to the European Court of Justice for the annulment of Decision 91/391/EEC, and TDG has appealed against that Decision and Decision 92/330/EEC, so that neither is yet final in law.

⁽²⁾ OJ No L 300, 24. 10. 1986, p. 34.

⁽³⁾ OJ No L 215, 2. 8. 1991, p. 16.

⁽⁴⁾ OJ No L 183, 3. 7. 1992, p. 36.

⁽¹⁾ OJ No C 179, 16. 7. 1992, p. 3.

In opening the Article 93 (2) procedure on the German authorities' latest proposal to award aid to TDG, the Commission stated that, even if it were eventually to decide that this aid was compatible with the common market, the German Government would be required to suspend payment of part of the aid until the earlier, illegal and incompatible aid was recovered; payment of the remainder of the aid would be authorized. The amount of aid whose payment would be suspended would be the balance of the total amount of aid to be recovered by the German Government in accordance with Decision 86/509/EEC, less the total amount of aid authorized by Decisions 91/391/EEC and 92/330/EEC but whose payment was suspended pending recovery of the earlier aid.

By letter dated 7 April 1993, the Commission informed the German Government that it had opened the procedure provided for in Article 93 (2) in respect of the proposal to award aid to TDG. Other Member States and interested parties were informed by publication of the letter in the *Official Journal of the European Communities* ⁽¹⁾.

II

The German Government submitted the following comments by letters dated 7 June 1993, 7 December 1993 and 23 June 1994, and at a meeting with the Commission on 7 July 1993.

The proposed aid in support of investments in the plant at Leinefelde would not have any effect on the production of synthetic fibres by TDG; the staple fibre required would be supplied by third parties and not by TDG which produced only polyester and polyamide industrial and textile filament yarn. Synthetic fibres had never been produced at the Leinefelde plant. Furthermore, as a result of the proposed aid and TDG's acquisition of the Leinefelde plant, the plant's annual textile spinning capacity would be reduced from 23 000 tonnes to 7 000 tonnes. The German Government also noted that Leinefelde Textilwerke GmbH, a textile producer also located in Thüringen, did not have any business relationship with TDG's Leinefelde plant.

The investment would create 70 new jobs in the first year of the investment, 80 additional jobs in the second year and a further 50 jobs in the third year, giving a total permanent workforce of 200, of which 60 % would be women. Between 1 January 1991 and 31 December 1992, the total number of people employed in the textile sector in the Land Thüringen had fallen from 25 540 to 3 739, a reduction of approximately 85 %. Therefore, given that the current level of unemployment in

Leinefelde was more than 42 %, the creation of 200 jobs would be of significant benefit to the region.

The German Government stated that, in its opinion, the Commission did not have the power to take into account the fact that illegal and incompatible aid awarded to TDG had not yet been recovered in accordance with Decision 86/509/EEC. Under the EC Treaty, the Commission could only decide if aid was or was not compatible with the common market and could not require a Member State to suspend payment pending compliance with an earlier decision, especially in cases such as this where action to recover the aid concerned was in progress in the national courts — TDG were arguing that the requirement to recover the aid was incompatible with the principle of protection of legitimate expectations. The German Government also noted that it had expressed similar views in its action seeking annulment of Decision 91/391/EEC.

III

In commenting under the Article 93 (2) procedure, the International Rayon & Synthetic Fibres Committee (CIRFS), the Apparel, Knitwear & Textiles Alliance (AKTA) and the United Kingdom Government supported the Commission's decision to open the Article 93 (2) procedure on the latest proposal to award aid to TDG, and expressed concern that the illegal and incompatible aid awarded to TDG between 1981 and 1983 had not been recovered. AKTA suggested that, if the Commission decided that the proposed aid was compatible with the common market, it should suspend payment of any new aid pending compliance with Decision 86/509/EEC. CIRFS shared this view and suggested that the Commission should require the German Government to charge interest on the amount of aid to be recovered from TDG.

The comments submitted under the procedure were sent to the German Government.

IV

The Article 93 (2) procedure was opened in respect of a proposal to award aid to TDG in three different forms ⁽²⁾, with a total net subsidy-equivalent of 17,88 %:

- a grant of DM 23 460 000 DM under the Joint Task scheme for the improvement of the regional economic structure, for which the 22nd framework programme was recently authorized by the Commission ⁽³⁾ (net subsidy-equivalent of 13,64 %),

⁽¹⁾ OJ No C 172, 23. 6. 1993, p. 2.

⁽²⁾ Due to an administrative error, the figures shown in the notice of the opening of the Article 93 (2) procedure were incorrect.

⁽³⁾ OJ No C 74, 12. 3. 1994, p. 5.

- an investment tax allowance of up to 6 696 000 under the Investment Tax Law authorized by the Commission ⁽¹⁾ (net subsidy-equivalent of 3,89 %);
- a 1,38 % interest rate subsidy on a 10-year loan of DM 14 652 000 DM from the Kreditanstalt für Wiederaufbau at 7,75 % with a two-year grace period (net subsidy-equivalent of 0,35 %).

The proposed aid constitutes aid within the meaning of Article 92 (1) of the EC Treaty and Article 61 (1) of the EEA Agreement as it would allow the company to carry out the investment without having to bear the full cost.

The proposed aid was properly notified to the Commission in accordance with Article 93 (3) of the EC Treaty and the 1991/92 code on aid to the synthetic fibres industry.

The Commission was thus able to formulate its views and assess the proposed aid.

By favouring TDG, the aid in question would strengthen its position compared with its competitors, which have to adapt to change without aid or with aid authorized as compatible with the common market and the functioning of the EEA Agreement. Therefore, the aid distorts competition and affects trade within the meaning of Article 92 (1) of the EC Treaty and Article 61 of the EEA Agreement.

There is trade in spun single yarn containing at least 85 % by weight of staple fibres of nylon or other polyamide between Member States and within the EEA (approximately 19 000 tonnes in 1992, the most recent year for which data is available) and, consequently, competition between European producers and their products. Accordingly, by favouring TDG, the aid in question has strengthened its position compared with other producers that have to adapt to change without aid or with aid authorized as compatible with the common market and, since 1 January 1994, the functioning of the EEA Agreement. Therefore the aid distorts competition and affects trade within the meaning of Article 92 (1) of the EC Treaty and Article 61 of the EEA Agreement.

The German Government did not provide any detailed arguments in support of its view that Article 92 (2) (c) should be applied to the proposed aid. Therefore, in the absence of such arguments, there does not seem to be sufficient evidence that the specific measures in question are required to compensate for economic disadvantages caused by the division of Germany over and above the aid schemes authorized by the Commission pursuant to

Article 92 (3). Therefore, Article 92 (2) (c) does not apply.

The exception provided for in Article 92 (3) (a) relates to aid intended to promote the economic development of certain areas. The Land Thüringen is among the regions eligible for support under Objective 1 of the Structural Funds and, in view of the socio-economic situation (per capita GDP/PPS is considerably lower than 75 % of the Community average), is classed as a region eligible for regional aid by virtue of Article 92 (3) (a).

However, the sectoral effects of regional aid to the synthetic fibres and textiles industries have to be controlled even for the most underdeveloped areas of the Community.

Since 1977, the conditions under which aid may be awarded to the synthetic fibres industry have been prescribed by a code whose terms and scope are periodically revised, most recently in 1992 ⁽²⁾. In this case, the proposed aid to TDG, a synthetic fibres producer, has to be assessed in the light of the current code which has been in force since 31 December 1992.

The current code requires the notification of any proposal to award aid, in whatever form, to synthetic fibres producers by way of support for such activities. It sets out the criteria to be applied when the Commission scrutinizes proposals to award aid for investments by enterprises falling within the scope of the code; among other matters, the code specifies that there should be a significant reduction in the production capacity of a prospective recipient of investment aid, and specifies that undertakings should finance from internal resources any investments in expanding or maintaining capacity that they consider necessary to adapt their production to market trends and technological developments.

In the current case, there would not be any link between the proposed investment to be supported by the proposed aid and the production of synthetic fibres by TDG. Therefore, the proposed aid does not fall within the scope of the code on aid to the synthetic fibres industry.

The conditions under which aid may be awarded to the textiles industry are set out in the Community framework on aids to the textiles industry. As the proposed aid would support investment in textile spinning capacity, it must be assessed in the light of the framework which states, among other matters, that specific national aid to create additional capacity in those sectors of the textile and clothing industry where there is structural excess

⁽¹⁾ OJ No C 71, 13. 3. 1993, p. 4.

⁽²⁾ OJ No C 346, 30. 12. 1992, p. 2.

capacity or persistent stagnation of the market must be avoided, and that aid cannot be authorized where it would lead to an increase in capacity. In the current case, the proposed aid would lead to a reduction in the textile spinning capacity of the Leinefelde plant. Therefore, the proposed aid conforms with the Community framework on aids to the textile industry.

Accordingly, the proposed aid is compatible with the common market by virtue of Article 92 (3) (a) of the EC Treaty, to the extent that it is awarded in conformity with the relevant aid regimes. It is also compatible with the functioning of the EEA Agreement.

V

However, as the Court of Justice has upheld, for example in its judgment of 3 December 1991⁽¹⁾, when the Commission considers the compatibility of a State aid with the common market and the functioning of the EEA Agreement, it must take all the relevant factors into account including, where relevant, the circumstances already considered in a prior decision and the obligations that decision may have imposed on a Member State.

Therefore, in its assessment of the proposed aid to TDG, the Commission must take account of Decision 86/509/EEC, against which there has been no appeal to the Court and which has become final in law. Moreover, the Commission must also take account of Decisions 91/391/EEC and 92/330/EEC; the German Government has appealed to the Court for annulment of Decision 91/391/EEC, and TDG has appealed against both Decisions, so that neither is yet final in law.

Although the German Government has taken legal action in the national courts to recover the illegal and incompatible aid awarded to TDG between 1981 and 1983, as required by Decision 86/509/EEC, this aid has not yet been recovered. By the Commission's calculation, the total amount to be recovered as at 30 June 1994, not taking account of interest payments in respect of the delay in recovering the interest subsidy, is DM 11 601 000 DM. TDG's competitiveness will continue to be enhanced artificially, adversely affecting trade within the EEA to an extent contrary to the common interest, until the German Government recovers the earlier, illegal and incompatible aid.

For this reason, although the proposed aid in the current case is compatible with the common market and the

functioning of the EEA Agreement, it should not be paid in full until the German Government has recovered the aid referred to in Decision 86/509/EEC. This situation has arisen as a direct result of the negligent behaviour of the German Government and TDG which have acted in breach of Article 93 (3) of the EC Treaty.

In its letter dated 7 April 1993, the Commission referred to the double distortion of competition resulting from the failure to recover the aid referred to in Decision 86/509/EEC. The German Government's view that the Commission may not take into account the earlier decisions concerning TDG cannot be accepted, and is not consistent with the Court's judgment referred to above and other similar judgments.

Therefore, taking account of Decisions 86/509/EEC, 91/391/EEC and 92/330/EEC in respect of earlier proposals to award further aid to TDG, the German Government should be required to suspend payment of part of the aid until the earlier, illegal and incompatible aid has been recovered as required by Decision 86/509/EEC, while payment of the remainder of the aid should be authorized. Suspension of payment of part of the proposed aid is even more necessary because the Commission does not have any other means of coercion at its disposal to accelerate or enforce compliance with its Decision 86/509/EEC.

The Commission has calculated the amount of aid whose payment should be suspended to be DM 5 160 700 (ECU 2,65 million). This is the balance of the total amount of aid to be recovered by the German Government in accordance with Decision 86/509/EEC, calculated by the Commission as amounting to DM 11 601 000 on 30 June 1994, less the total amount of aid authorized by Decisions 91/391/EEC and 92/330/EEC but whose payment was suspended pending recovery of the earlier aid, calculated by the Commission as amounting to DM 6 005 300 and DM 435 000 DM respectively.

In view of all these considerations, the whole of the aid that the German Government proposes to award TDG is compatible with the common market by virtue of Article 92 (3) (a) of the EC Treaty and is compatible with the functioning of the EEA Agreement. However, payment of part of the aid, totalling DM 5 160 700, must be suspended until the German Government has recovered the illegal and incompatible aid awarded to TDG between 1981 and 1983, as required by Decision 86/509/EEC.

The requirement that the German Government suspend payment of part of the proposed aid referred to in this Decision does not conflict with the terms of the suspension of the aid referred to in Decisions 91/391/EEC and 92/330/EEC. First, the aim of the requirement to

⁽¹⁾ Case C-261/89, Italy v. Commission, [1991] ECR I-4437.

suspend payment in each Decision has the same purpose — in effect to persuade the German Government and TDG to comply with Decision 86/509/EEC and bring about the recovery of the illegal and incompatible aid paid to TDG between 1981 and 1983. Secondly, the requirement to suspend payment in each Decision will simultaneously cease to have effect when the aid has been recovered. Thirdly, the total amount of aid suspended by virtue of this Decision and Decisions 91/391/EEC and 92/330/EEC is equivalent to the total amount of aid to be recovered by the German Government in accordance with Decision 86/509/EEC,

HAS ADOPTED THIS DECISION:

Article 1

The aid that the German authorities propose to award Textilwerke Deggendorf GmbH, comprising a grant of DM 23 460 000 under the Joint Task scheme for the improvement of the regional economic structure, an investment tax allowance of up to DM 6 696 000 under the Investment Tax Law and an interest rate subsidy on a 10-year loan of DM 14 652 000 from the Kreditanstalt für Wiederaufbau with a two-year grace period and at 7,75 %, is compatible with the common market within the meaning of Article 92 (3) (a) of the EC Treaty and is compatible with the functioning of the EEA Agreement.

Article 2

The German authorities shall suspend payment of part of the aid referred to in Article 1, totalling DM 5 160 700, until they have recovered the illegal and incompatible aid awarded to Textilwerke Deggendorf GmbH between 1981 and 1983 referred to in Article 1 of Decision 86/509/EEC.

Article 3

The German Government shall inform the Commission within two months of the date of notification of this Decision of the measures taken to comply with it.

Article 4

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 5 December 1994.

For the Commission

Karel VAN MIERT

Member of the Commission

COMMISSION DECISION

of 21 December 1994

concerning aid to be granted by Germany to the steel company EKO Stahl GmbH,
Eisenhüttenstadt

(Only the German text is authentic)

(Text with EEA relevance)

(94/1075/ECSC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Coal and Steel Community, and in particular the first and second paragraphs of Article 95 thereof,

After consulting the Consultative Committee and with the unanimous assent of the Council,

Whereas:

I

In April 1994, the Commission authorized aid of up to DM 813 million pursuant to Article 95 of the ECSC Treaty, notified by Germany in November 1993, to support the restructuring and privatization of EKO Stahl AG under a plan designed in cooperation with the Italian Riva group. In May 1994 the Riva group withdrew from the privatization contract.

II

In October 1994, Germany notified the Commission of a new plan to restructure and partly privatize EKO Stahl GmbH.

The company, situated in the Land of Brandenburg, in the territory of the former German Democratic Republic, had been founded after the Second World War as a 'Kombinat' under the socialist economic system then prevailing in that territory. After German unification in 1990 it became a public company (Aktiengesellschaft). The corporate form of EKO Stahl Aktiengesellschaft was changed into Gesellschaft mit beschränkter Haftung (GmbH, private limited company) in June 1994. The only shareholder is the Treuhandanstalt (hereinafter referred to as 'the THA'), a public entity acting as a holding company for the former State-held companies of the former German Democratic Republic.

The notification of the aid linked to the restructuring plan, submitted on 10 October 1994 and revised on 13, 19 and 20 October 1994, provides for the purchase of 60 % of the shares by the Belgian steel company Cockerill Sambre SA, through a holding created for this

purpose, by 1 January 1995. The purchaser may buy the remaining 40 % of the shares at any time and will be under contractual obligation to take over the remaining shares after 31 December 1999 on demand from the THA. The purchase price will be established by an independent expert on the basis of the earning capacity value but will not exceed DM 40 million.

The decision to sell the majority of shares to Cockerill Sambre SA was taken after a general and unconditional bidding procedure which was closed in September 1994. After an in-depth examination of the six bids received, the THA concluded that Cockerill Sambre SA had made the best offer. Germany submitted the comparison of the offers prepared by the THA and some additional information concerning the evaluation of the different proposals.

The restructuring concept envisages the installation of a new blast furnace with a capacity of 1,5 million t/y, the modernization of the sintering and cold-rolling facilities and the power station without changing their current capacities, some repairs in the sintering and crude steel facilities and the installation of a new hot-wide-strip mill with a capacity of 1,5 million t/y to close the existing technological gap in the production flow which has been covered so far by expensive hiring of hot-rolling capacity elsewhere. The capacity of this mill will be limited to 900 kt/y during a period of five years after the last closure or the last payment of aid to investment under the restructuring plan. Some of the existing blast furnaces will be dismantled after the new furnace becomes fully operational. The pig iron capacity will thereby be limited to 1,9 million t/y.

The proposed investments, totalling DM 1 300 million, amount to DM 282 million for the new blast furnace, DM 27 million for the sintering facilities, DM 671 million for the hot-wide-strip mill, DM 308 million for the cold-rolling mill and DM 12 million for the power station. The investment of DM 1 100 million will have to be carried out after 1 January 1995. DM 200 million had already been spent by the end of 1994 for the modernization of the cold-rolling facilities.

The THA will cover DM 275 million of the investments and the expenses of DM 39 million for repairs. It will

further grant a guarantee to cover a DM 60 million investment loan from a consortium of banks. EKO Stahl GmbH/Cockerill Sambre SA will have to cover DM 440 million of the total investments to be carried out after 1 January 1995. It will have to pay back the DM 60 million investment loan covered by a guarantee of the THA and an investment loan of DM 140 million granted by a consortium of banks without such State guarantees. These loans have been used for the modernization of the cold-rolling facilities carried out before privatization. DM 385 million of the investments would be covered by investment aid under general regional investment aid schemes.

The THA would write off shareholders' loans of DM 362,6 million to cover partly the losses accumulated until privatization. Remaining loans amounting to DM 90 million will be granted as shareholders' loans of the THA on the basis of a new contract on market terms. To cover future losses until the completion of the restructuring, the THA would contribute a maximum of DM 220 million. This amount will be made available to the company at the date of privatization and may be used to cover annual losses of up to DM 100 million but not more than DM 220 million in total during the period 1995 to the end of 1997. Losses connected with the payment of the purchase price for the hot-rolling mill in Hennigsdorf (see below) will not be taken into account for the limitation of the annual losses. Interest received before using the down payment in line with the contractual provisions must be paid to the THA.

The plan envisages employment reductions of some 650 persons from 2 850 in September 1994 to 2 200 in 1999, i.e. a reduction of 22,8 %. The total employment reduction since end of 1989 (11 510 workers) amounts to 9 310 workers, i.e. a reduction of 80,8 %.

Germany notified the Commission of the intention of EKO Stahl GmbH to purchase, for a purchase price of DM 20 million, a medium section mill with a capacity of 320 kt/y belonging to HES Hennigsdorfer Elektrostahlwerke GmbH (Hennigsdorf/Brandenburg) and to close it down before the end of 1994. Furthermore, Germany informed the Commission that Walzwerk Burg GmbH (Burg/Sachsen-Anhalt) will close down a special steel plate mill with a capacity of 41 kt/y before the end of 1994. This additional capacity reduction is offered to reduce the distortive effect of the aid linked to the restructuring plan for EKO Stahl GmbH.

The Commission, in its assessment of the restructuring plan, identified total aid of DM 900,62 million involved

that is incompatible with the ECSC Treaty and Commission Decision No 3855/91/ECSC ⁽¹⁾ (Steel Aids Code, hereinafter referred to as 'the SAC'). DM 385 million of aid may be deemed compatible with the orderly functioning of the common market pursuant to the third indent of Article 5 of the SAC, which allows investment aid under general regional aid schemes to be granted to the steel undertakings in the territory of the former German Democratic Republic, provided that the aid is accompanied by a reduction in the overall capacity in that territory. This aid will be dealt with separately.

III

The restructuring plan drafted by the purchaser and the THA is designed to secure the viability of EKO Stahl GmbH by the end of 1997. The present plan is based on the preparedness of an investor, experienced in the steel sector, to risk a considerable amount of own capital. An independent consultant, charged by the Commission and Germany to evaluate the prospects of EKO Stahl GmbH, has clearly stated that the company could reach long-term viability only by the creation of its own hot-rolling capacities. The investor, chosen after an open and unconditional bidding procedure, has demonstrated his willingness to assume the risk for the company's future viability without further aid than that covered by the restructuring plan.

IV

The extremely difficult Community steel market situation has endangered the sector in several Member States, including Germany. The aim of providing EKO Stahl GmbH with a sound and economically viable structure contributes towards the achievement of the objectives of the ECSC Treaty, in particular Articles 2 and 3. The Commission considers that the public financial assistance measures proposed by Germany are necessary to achieve these aims. The Commission therefore finds itself faced with a situation not specifically provided for in the Treaty. In these exceptional circumstances recourse must be had to the first paragraph of Article 95 of the Treaty, so as to enable the Community to pursue the objectives set out in Articles 2 and 3 thereof.

At the same time, however, it is essential to ensure that the aid approved is limited to what is absolutely necessary and that it does not adversely affect trading conditions within the Community to an extent contrary to the common interest, particularly given the current difficulties on the Community steel market. It is therefore important that there should be adequate counterpart measures, commensurate with the amount of aid being exceptionally approved, so that a major contribution is

⁽¹⁾ OJ No L 362, 31. 12. 1991, p. 57.

made to the structural adjustment required in the sector.

V

The restructuring plan provides for the creation of a new hot-wide-strip mill with a capacity of 1,5 million t/y, limited to a capacity of 900 kt/y during a period of five years, while no reduction of hot-rolled finished products at EKO Stahl GmbH itself is possible. The new hot-rolling facilities are considered to be necessary for the long-term viability of the company, because the existing gap in the production flow causes an uneconomic competitive disadvantage.

However, account should be taken of the fact that the conditions applied during the steel restructuring round in the Community during the first half of the 1980s and in favour of the Spanish and Portuguese steel industry after the accession of those countries to the Community did allow for global territorial capacity reductions as counterpart for the aid proposed.

Compared to the steel industry in both the Community of 10 and in Spain and Portugal, the steel sector in the former German Democratic Republic, which at the time of entry was grouped in one single State holding, was, due to the structural shortcomings of the planned economy system at its entry into the Community, in a particularly uncompetitive situation. In view of the first-time character of the restructuring of the steel industry in the five new German Länder, it is only fair to allow for a similar accounting of global territorial capacity reduction in this case.

Including the initial increase in hot-rolling capacity of 900 kt/y in Eisenhüttenstadt as part of the proposed restructuring plan, the committed capacity reduction to be carried out in Hennigsdorf and Burg and taking into account the minimum overall capacity reductions in the former German Democratic Republic necessary to balance regional aid pursuant to Article 5 of the SAC for East German steel undertakings in general and aid in favour of Sächsische Edelstahlwerke GmbH Freital, the remaining capacity reduction available to balance aid in favour of EKO Stahl on the basis of the aforementioned considerations would be in the order of 503 kt/y.

This net global capacity reduction in hot-rolled finished products constitutes a reasonable contribution to reduce the distortive effect of the aid involved. However, in order to ensure that the capacity creation would have the minimum possible impact on the depressed steel market in the Community, it is necessary to impose a number of conditions. The production of the new mill is to be built up to reach its initial capacity of 900 kt/y only after three years starting at the beginning of 1995. The capacity of

the new mill shall be retained at 900 kt/y for a period of at least five years following the date of the last closure, or, if later, following the last payment of investment aid under the present plan. It shall be limited at 1,5 million t/y for another five-year period. During the first five-year period the hot-rolled coils produced by the new mill shall be used exclusively for further processing in the company's cold-rolling facilities.

It is essential that the global closure offered by Germany is definitive and irreversible so that the capacity concerned no longer depresses the Community steel market. The closed installations must therefore be scrapped or sold for use outside Europe.

VI

It is not only necessary to ensure during the whole restructuring period that the aid approved enables the company to return to viability by the end of 1997, the aid must also be kept to the amount strictly necessary. In that context, it must also be ensured that the company does not, as a result of the financial restructuring measures, obtain an unfair advantage over other companies in the sector by being provided at the outset with net financial charges below 3,5 % of annual turnover, which is the current average for Community steel companies. It is also necessary to require that the company is not allowed to claim or be granted tax reduction or relief on past or future losses covered by aid. Furthermore, any additional loans must be on normal commercial conditions and no preferential treatment accorded to any fresh public debts incurred. Investment aid shall be granted only up to the actual individual investment costs necessary to carry out the restructuring plan as it has been submitted to the Commission. If the investment to carry out the restructuring plan as it has been submitted to the Commission. If the investment costs are lower than initially estimated, the investment aid must be reduced accordingly.

VII

The implementation of this Decision requires strict monitoring by the Commission during the whole restructuring period and up to the end of 1999.

In order to carry out this monitoring effectively, the Commission will require the full and close collaboration of Germany, on whom clear and strict reporting obligations will be imposed.

In particular the following elements will require close attention:

- compliance with the obligation to close hot-rolling capacity in Hennigsdorf and Burg,

- compliance with the obligations concerning the capacity limitation of the new hot-rolling facilities of EKO Stahl and the use of the products produced at those installations,
- progress towards economic viability,
- the granting of aid under the present restructuring plan and the source, terms and conditions of any further financing,
- the investments carried out,
- reductions in the workforce,
- production and the effects on the market,
- financial performance.

The Commission will submit six-monthly reports to the Council to keep it informed of developments.

It is also necessary to ensure that the aid is not used for the purpose of unfair competition practices. In addition, the Commission may require on-the-spot checks made in accordance with the Article 47 of the ECSC Treaty, in order to verify the information provided and in particular compliance with the conditions attached to the authorization of the aid. In that context, should a Member State make a complaint to the Commission that State aid is enabling the company to underprice, the Commission will initiate an investigation, in particular pursuant to Article 60 of the ECSC Treaty.

Furthermore, should the Commission, on the basis of the information provided, find that the conditions laid down in its decisions pursuant to Article 95 have not been met, it may require the suspension of payments of aid or the recovery of aid already paid. In the event of a Member State's failing to comply with that decision Article 88 of the ECSC Treaty will apply.

The Commission may, if necessary, decide that all reports should be on a quarterly basis. It may also decide to mandate an independent consultant, with the agreement of Germany, to assist it in its monitoring task.

The Commission will, by exercising all its powers, ensure that the aided company fulfils the conditions of this Decision, including the necessary progress towards viability and its other obligations resulting from the application of the ECSC Treaty. Should the monitoring reports indicate substantial deviations from the financial data on which the viability assessment has been made, the Commission may require appropriate measures to be taken to reinforce the restructuring measures.

VIII

A decision pursuant to Article 95 of the ECSC Treaty to authorize State aid is extraordinary in character given the

provisions of point (c) of Article 4. In view of all the above, the Commission can exceptionally authorize the aid proposed in this case subject to compliance with the conditions and requirements it lays down. However, the aid approved, which is intended to restore the company to viability by the end of 1997, should be regarded as final. Should a return to viability not be achieved by that date, Germany shall not request any further derogation pursuant to Article 95 for the company,

HAS ADOPTED THIS DECISION:

Article 1

1. The following maximum amounts of aid which Germany plans to grant to EKO Stahl GmbH may be regarded as compatible with the orderly functioning of the common market provided that the conditions and requirements of Articles 2 to 6 are met:

- compensation for losses accumulated since 1 July 1990 until the privatization of the company of DM 362,6 million,
- compensation for future losses during the restructuring phase until the end of 1997 of DM 220 million,
- investment aid (beyond that which may already be deemed compatible with the common market according to the third indent of Article 5 of Decision No 3855/91/ECSC) of DM 275 million,
- contribution to cover the cost of repairs of DM 39 million,
- a guarantee granted by the Treuhandanstalt covering a DM 60 million investment loan granted by a consortium of private and public banks, representing an aid element of DM 4,02 million.

2. The compensation for future losses shall be limited to DM 100 million per year and shall not exceed DM 220 million for the period between 1995 and 1997. The purchase price to be paid by EKO Stahl GmbH for the purchase of the hot-rolling mill in Hennigsdorf shall not be taken into account for the limitation of the annual losses to be covered.

3. The guarantee of the Treuhandanstalt covering a DM 60 million investment loan, granted by a consortium of banks on market terms, shall be limited to three years and subject to the payment of a six-monthly premium of 0,25 %.

4. Germany shall ensure that the total aid granted pursuant to Article 95 of the ECSC Treaty and Decision

No 3855/91/ECSC for the total EKO Stahl GmbH restructuring plan under no circumstances exceeds an overall intensity of 70 % and that the investment aid is being allocated precisely to the individual investment costs.

5. The aid has been calculated so as to enable the company to return to viability by the end of 1997. In the case that such viability is not attained by that date, Germany shall not request any further derogation pursuant to Article 95 of the ECSC Treaty for this company.

6. The aid shall not be used for the purpose of unfair competition practices.

7. Without prejudice to the aid measures under the restructuring plan referred to in paragraphs 1 to 6, any loans to the company must be on normal commercial terms, and the beneficiary company must not receive debt holidays or friendly treatment of debts to the State. Liabilities in the form of loans which have been provided or guaranteed by the Treuhandanstalt, shall remain an integral element of the cost of EKO Stahl GmbH for its new owner and shall not be reduced or eliminated other than in accordance with German laws or regulations generally applicable to privately-owned companies situated in Germany.

Article 2

Production at the new hot-wide-strip mill is to be built up to reach a capacity of 900 kt/y only after three years starting at the beginning of 1995.

The capacity limitation at 900 kt/y shall be retained throughout a period of five years following the date of the last closure, or, if later, following the last payment of aid to investment under the current restructuring plan.

Upon the expiry of the aforementioned five-year period another five-year period will start to run, during which the production capacity for hot-wide-strip at EKO Stahl GmbH shall be limited to 1,5 million t/y.

During the first five-year period of capacity limitation Germany shall ensure that the hot-rolled steel capacity to be established at EKO Stahl GmbH will be utilized by the present and future owners exclusively for further processing in EKO Stahl's cold-rolling facilities.

Germany shall ensure that the aid approved pursuant to this Decision is not used to increase the present steel production capacities of EKO Stahl GmbH beyond the planned installation of hot-wide-strip mill bottlenecked at 900 kt/y. There shall be no increase in capacity remaining under the aided restructuring plan, other than resulting from productivity improvements, for a period of five years starting from the date of the last closure, or of the last payment of investment aid under the current restructuring plan, whichever is the later.

Article 3

1. The following definitive closures of production facilities shall be carried out:

- the medium section strip mill No 450 at HES Hennigsdorfer Elektrostahlwerke GmbH, Hennigsdorf/Brandenburg, with a capacity of 320 kt/y shall be closed down by 31 January 1995 at the latest. The closure must be definitive and irreversible,
- the special steel plates mill at Walzwerk Burg GmbH, Burg/Sachsen-Anhalt, with a capacity of 41 kt/y shall be closed down by 31 January 1995 at the latest. The closure must be definitive and irreversible,
- the definitive and irreversible reduction in hot-rolling capacity in the former German Democratic Republic between 1 July 1990 and 31 December 1996, excluding the capacity closures in Hennigsdorf and Burg, excluding the closures needed to reduce the distortive effect of aid approved for Sächsische Edelstahlwerke GmbH, Freital/Sachsen pursuant to Article 95 of the ECSC Treaty and taking into account the new capacity provided for under the restructuring plan for EKO Stahl GmbH, shall amount to at least 10 % of the initial capacity in hot-rolled finished products in the territory of the former German Democratic Republic on 1 July 1990, needed to balance derogations pursuant to Article 5 of Decision No 3855/91/ECSC.

2. The finality of the closures shall be ensured either by the demolition of the installations concerned or by their disposal by sale outside Europe.

Article 4

The approval of the aid set out in Article 1 is, in addition, subject to the following conditions:

1. the level of net financial charges of EKO Stahl GmbH shall be at least 3,5 % of annual turnover, at the date of its 60 % privatization;
2. the company or its legal successor shall not claim or be granted tax reduction or relief on the basis of past losses accumulated until privatization and of future losses when these are being covered by State aid;
3. the beneficiary company shall carry out all the restructuring measures laid down in the restructuring

plan as it has been submitted to the Commission, in accordance with the timetable contained therein.

Article 5

1. Germany shall cooperate fully with the following arrangements for monitoring this Decision:

(a) Germany shall supply the Commission twice a year, and not later than 15 March and 15 September respectively, with reports containing full information in accordance with the Annex, on the beneficiary company and its restructuring. The first report shall reach the Commission by 15 March 1995 and the last report by 15 September 2000 unless the Commission decides otherwise;

(b) the reports shall contain full information to enable the Commission to monitor the restructuring process and the creation and use of capacity and show sufficient financial data to allow the Commission to assess whether its conditions are fulfilled. The reports shall at least contain full information in accordance with the Annex, which the Commission reserves the right to modify in line with its experiences during the monitoring process. It is up to Germany to oblige the beneficiary company to disclose all relevant data which may, under other circumstances, be considered confidential.

2. The Commission shall, on the basis of these reports, draw up half-yearly reports which are to be submitted to the Council not later than 1 May and 1 November respectively, in order to allow discussion in the Council if appropriate. If the beneficiary company envisages investments creating or extending capacity the Commission shall inform the Council on the basis of a report presenting the financing arrangements and demonstrating the absence of State aid.

Article 6

1. The Commission may at any time decide that the reports referred to in point (a) of Article 5 (1) shall be on a quarterly basis if it deems such necessary to fulfil its monitoring tasks. The Commission may, at any time, decide to mandate an independent consultant, selected with the agreement of Germany, to evaluate the monitoring results, to undertake any research necessary and to report to the Council.

2. The Commission may have any necessary checks made in the aided company in accordance with Article 47 of the ECSC Treaty in order to verify the accuracy of the

information given in the reports referred to in point (a) of Article 5 (1) and in particular compliance with the conditions laid down in this Decision. In the case that a Member State makes a complaint that State aid is enabling the aided company to under-price, the Commission shall initiate an investigation, in particular pursuant to Article 60 of the ECSC Treaty.

3. In assessing the reports referred to in point (a) of Article 5 (1), the Commission shall ensure that the requirements of Article 1 (7), in particular, are being respected.

Article 7

1. Without prejudice to any penalties it may impose by virtue of the ECSC Treaty, the Commission may, at any time, require the suspension of payments of aid or the recovery of aid already paid if, on the basis of the information received, it finds that the conditions laid down in this Decision are not being met. If Germany were to fail to fulfil its obligations under any such decision, Article 88 of the ECSC Treaty shall apply.

2. If the Commission establishes, on the basis of the reports referred to in point (a) of Article 5 (1), that substantial deviations from the financial data, on which the viability assessment has been made, have occurred, it may require Germany to take appropriate measures to reinforce the restructuring measures of the aided company.

Article 8

Commission Decision No 94/256/ECSC ⁽¹⁾ is rescinded.

Article 9

This decision is addressed to the Federal Republic of Germany.

Done at Brussels, 21 December 1994.

For the Commission

Karel VAN MIERT

Member of the Commission

⁽¹⁾ OJ No L 112, 3. 5. 1994, p. 45.

COMMISSION DECISION

of 30 November 1994

amending Decision 92/491/EEC on the clearance of the accounts presented by Italy in respect of the expenditure for 1989 of the EAGGF, Guarantee Section

(Only the Italian text is authentic)

(94/1076/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 729/70 of 21 April 1970 on the financing of the common agricultural policy ⁽¹⁾, as last amended by Regulation (EEC) No 2048/88 ⁽²⁾, and in particular Article 5 (2) thereof,

After consulting the Fund Committee,

Whereas, by Commission Decision 92/491/EEC ⁽³⁾, as amended by Decision 93/524/EEC ⁽⁴⁾, an amount relating to the additional levy totalling Lit 174 266 472 000 for Italy, which should have been paid in the milk and milk products sector, was disallowed; whereas the said amount was charged to Italy under the Decision in question; whereas the information available to the Commission at the time did not enable it to calculate exactly the aforementioned disallowed sum; whereas it reserved the option of amending the disallowed sum under a subsequent clearance of accounts decision;

Whereas, in their joint conclusions of 21 October 1994, the Commission and the Council agreed that the proceedings pending before the European Court of Justice relating to that clearance decision should be withdrawn; whereas the Commission will revise those clearance decisions for 1989 which the Court of Justice has been asked to annul in such a way that the financial correction for the State concerned will be based on the guaranteed quantity allocated at the time and on the most reliable statistical data; whereas the additional costs to be borne by Italy resulting from the increase in the financial correction for 1989 should be recovered in four equal annual instalments from 1995 until the end of 1998;

Whereas the amount of the correction thus established is unlikely to change, with the result that that correction becomes definitive;

Whereas the Annex to Decision 92/491/EEC should therefore be amended in respect of Italy,

HAS ADOPTED THIS DECISION

Article 1

The part of the Annex to Decision 92/491/EEC relating to Italy is replaced by the Annex hereto.

Article 2

The amount of Lit 426 342 873 600 payable by Italia shall be taken into account as part of the expenditure referred to in Article 3 of Commission Regulation (EEC) No 2776/88 ⁽⁵⁾ in accordance with the following timetable:

— first fortnight	of	October	1995:	Lit
106 585 718 350,				
— first fortnight	of	October	1996:	Lit
106 585 718 350,				
— first fortnight	of	October	1997:	Lit
106 585 718 350,				
— first fortnight	of	October	1998:	Lit
106 585 718 350.				

Article 3

This Decision is addressed to the Italian Republic.

Done at Brussels, 30 November 1994.

For the Commission

René STEICHEN

Member of the Commission

⁽¹⁾ OJ No L 94, 28. 4. 1970, p. 13.

⁽²⁾ OJ No L 185, 15. 7. 1988, p. 1.

⁽³⁾ OJ No L 298, 14. 10. 1992, p. 23.

⁽⁴⁾ OJ No L 252, 9. 10. 1993, p. 27.

⁽⁵⁾ OJ No L 249, 8. 9. 1988, p. 9.

ANNEX

ITALY

EAGGF Guarantee Section expenditure — Financial year: 1989	Italian lira
1. Expenditure recognized	
(a) Expenditure declared by the Member State in respect of the present clearance	7 217 999 852 752
(b) Expenditure declared during the preceding year but excluded from that clearance	183 369 315 937
(c) Expenditure declared, excluded from the present clearance	-103 600 591 415
(d) Expenditure declared, coming under the present clearance (a + b + c)	7 297 768 577 274
(e) Expenditure disallowed	-674 972 080 225
(f) Financial consequences of previous years	-23 174 707 514
(g) Total expenditure recognized (d + e + f)	6 599 621 789 535
2. Expenditure charged	
(a) Expenditure charged in respect of the present year	7 176 317 112 762
(b) Expenditure charged in respect of the preceding year, but excluded from that clearance	183 369 315 937
(c) Expenditure charged in respect of the present year, but excluded from the present clearance	103 600 591 415
(d) Total expenditure charged, coming under the present clearance	7 256 085 837 284
3. Expenditure chargeable to or payable to the Member State following clearance of the accounts (2d-1g)	656 464 047 749

COMMISSION DECISION

of 30 November 1994

amending Decision 93/659/EC on the clearance of the accounts presented by Greece, Spain and Italy in respect of the expenditure for 1990 of the EAGGF, Guarantee Section

(Only the Spanish, Greek and Italian texts are authentic)

(94/1077/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 729/70 of 21 April 1970 on the financing of the common agricultural policy ⁽¹⁾, as last amended by Regulation (EEC) No 2048/88 ⁽²⁾, and in particular Article 5 ⁽²⁾ thereof,

After consulting the Fund Committee,

Whereas, by Commission Decision 93/659/EC ⁽³⁾, amounts relating to the additional levy totalling Dr 369 593 980, Pta 29 492 159 232 and Lit 526 309 029 147 for Greece, Spain and Italy respectively, which should have been paid in the milk and milk products sector, were disallowed; whereas the said amounts were charged to Greece, Spain and Italy under the Decision in question; whereas the information available to the Commission at the time did not enable it to calculate exactly the aforementioned disallowed sums; whereas it reserved the option of amending the disallowed sums under a subsequent clearance of accounts decision;

Whereas, in their joint conclusions of 21 October 1994, the Commission and the Council agreed that the proceedings pending before the European Court of Justice relating to that clearance decision should be withdrawn; whereas the Commission will revise those clearance decisions for 1990 which the Court of Justice has been asked to annul in such a way that the financial corrections for the States concerned will be based on the guaranteed quantities allocated at the time and on the most reliable statistical data; whereas the additional costs to be borne by the States affected by the increase in the financial corrections for 1990 should be recovered in four equal annual instalments from 1995 until the end of 1998;

Whereas the amounts of the corrections thus established are unlikely to change, with the result that those corrections become definitive;

Whereas the Annex to Decision 93/659/EC should therefore be amended in respect of Greece, Spain and Italy,

HAS ADOPTED THIS DECISION:

Article 1

The parts of the Annex to Decision 93/659/EC relating to Greece, Spain and Italy are replaced by the Annex hereto.

Article 2

The amounts of Dr 452 309 736 payable by Greece, Pta 28 191 034 558 payable by Spain and Lit 403 466 188 800 payable by Italy shall be taken into account as part of the expenditure referred to in Article 3 of Commission Regulation (EEC) No 2776/88 ⁽⁴⁾ in accordance with the following timetable:

First fortnight of October	Greece	Spain	Italy
1995	113 077 434	7 047 758 640	100 866 547 200
1996	113 077 434	7 047 758 640	100 866 547 200
1997	113 077 434	7 047 758 639	100 866 547 200
1998	113 077 434	7 047 758 639	100 866 547 200

Article 3

This Decision is addressed to the Hellenic Republic, the Kingdom of Spain and the Italian Republic.

Done at Brussels, 30 November 1994.

For the Commission

René STEICHEN

Member of the Commission

⁽¹⁾ OJ No L 94, 28. 4. 1970, p. 13.

⁽²⁾ OJ No L 185, 15. 7. 1988, p. 1.

⁽³⁾ OJ No L 301, 8. 12. 1993, p. 13.

⁽⁴⁾ OJ No L 249, 8. 9. 1988, p. 9.

ANNEX

'GREECE

EAGGF Guarantee Section expenditure — Financial year: 1990	Greek drachmas
1. Expenditure recognized	
(a) Expenditure declared by the Member State in respect of the present clearance	375 713 512 722
(b) Expenditure declared during the preceding year but excluded from that clearance	106 070 896 520
(c) Expenditure declared, excluded from the present clearance	-343 019 260
(d) Expenditure declared, coming under the present clearance (a + b + c)	481 441 389 982
(e) Expenditure disallowed	-5 520 386 836
(f) Total expenditure recognized (d + e)	475 921 003 146
2. Expenditure charged	
(a) Expenditure charged in respect of the present year	376 000 997 503
(b) Expenditure charged in respect of the preceding year, but excluded from that clearance	106 070 896 520
(c) Expenditure charged in respect of the present year, but excluded from the present clearance	-343 019 260
(d) Total expenditure charged, coming under the present clearance	481 728 874 763
3. Expenditure chargeable to or payable to the Member State following clearance of the accounts (2d-1f)	5 807 871 617

‘SPAIN

EAGGF Guarantee Section expenditure — Financial year: 1990	Spanish pesetas
1. Expenditure recognized	
(a) Expenditure declared by the Member State in respect of the present clearance	277 982 315 185
(b) Expenditure declared during the preceding year but excluded from that clearance	1 766 026 057
(c) Expenditure declared, excluded from the present clearance	0
(d) Expenditure declared, coming under the present clearance (a + b + c)	279 748 341 242
(e) Expenditure disallowed	-57 415 104 531
(f) Total expenditure recognized (d + e)	222 333 236 711
2. Expenditure charged	
(a) Expenditure charged in respect of the present year	277 910 254 332
(b) Expenditure charged in respect of the preceding year, but excluded from that clearance	1 766 026 057
(c) Expenditure charged in respect of the present year, but excluded from the present clearance	0
(d) Total expenditure charged, coming under the present clearance	279 676 280 389
3. Expenditure chargeable to or payable to the Member State following clearance of the accounts (2d–1f)	57 343 043 678

ITALY

EAGGF Guarantee Section expenditure — Financial year: 1990	Italian lira
1. Expenditure recognized	
(a) Expenditure declared by the Member State in respect of the present clearance	6 370 613 428 380
(b) Expenditure declared during the preceding year but excluded from that clearance	103 600 591 415
(c) Expenditure declared, excluded from the present clearance	0
(d) Expenditure declared, coming under the present clearance (a + b + c)	6 474 214 019 795
(e) Expenditure disallowed	-989 595 404 341
(f) Total expenditure recognized (d + e)	5 484 618 615 454
2. Expenditure charged	
(a) Expenditure charged in respect of the present year	6 394 446 710 610
(b) Expenditure charged in respect of the preceding year, but excluded from that clearance	103 600 591 415
(c) Expenditure charged in respect of the present year, but excluded from the present clearance	0
(d) Total expenditure charged, coming under the present clearance	6 498 047 302 025
3. Expenditure chargeable to or payable to the Member State following clearance of the accounts (2d-1f)	1 013 428 686 571