II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION
of 22 December 1998
concerning aid granted by Germany to Riedel-de Haën AG

(notified under document number C(1998) 4566)

(Only the German text is authentic)

(Text with EEA relevance)

(1999/671/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Communities, in particular the first paragraph of Article 93(2),

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

Having given notice in accordance with Article 93(2) of the EC Treaty to interested parties to submit their comments, and having regard to those comments,

Whereas:

1. **Procedure**

By letter of 3 April 1996, two private individuals lodged a complaint with the Commission to the effect that Riedel-de Haën AG (hereinafter referred to as 'Riedel-de Haën') [1], Seelze, Germany had received State aid amounting to DEM 8 million (ECU 4 million) for investment in a special-waste incinerator. The complainants provided the Commission with further particulars by letters of 28 April 1996, 24 September 1996, 4 February 1997, 2 March 1997 and 2 February 1998. They alleged that the company intended to incinerate its industrial wastes on its premises after the port authorities of Antwerp and other cities had refused permission on environmental grounds for incineration at sea by the incineration ship *Vesta*. This was confirmed by a press report [2]. According to the complainants, the company maintained that the new plant was a bromine-recovery plant. They knew, however, that there had been such a plant on the company's premises for the previous 25 years.

By letters of 22 April, 28 June and 25 November 1996, the Commission called on Germany to give its views and to supply further information on the aid to Riedel-de Haën so that it could verify what kind of grants were involved and whether they were compatible with the common market. Germany replied by letters of 4 June and 30 September 1996 and 8 January 1997, confirming that the company had received two grants amounting in all to DEM 8 million (ECU 4 million). After Germany had first stated that the aid was granted for a bromine-recovery plant, it subsequently explained that the aid was in fact for a residue-processing plant incorporating a bromine-recovery plant.

By letter of 16 September 1997, the Commission notified Germany of its decision to initiate the procedure under Article 93(2) concerning the grants of aid amounting to DEM 8 million (ECU 4 million). It concluded that one of the grants had not been made under the approved Economy and Environment Scheme (Programme 'Wirtschaft und Umwelt'), while the second grant was not covered by any approved rules and neither of the grants appeared to be compatible with the Community Guidelines on State aid for environmental protection [3]. This was notified to Germany by letter of 2 October

[1] In appropriate contexts, 'Riedel-de Haën' should be understood as referring to Riedel-de Haën GmbH.

[2] 'Waste disposal problems for Riedel', *Landkreis-Zeitung West*, 11 October 1989.

[3] OJ C 72, 10.3.1994, p. 3.

1997. By letters of 7 November 1997 and 19 March 1998, Germany gave its views on those questions and reservations but responded to the Commission's requests for information only in very general terms.

The Commission's Decision was published in the *Official Journal of the European Communities* [1]. In that Decision, it gave other parties concerned notice to submit their comments. By the deadline, 19 January 1998, it had received no comments. On 14 April 1998 solicitors acting for AlliedSignal, Riedel-de Haën's parent company, set out the company's position.

By letter of 24 June 1998 the Commission asked Germany to provide the information necessary for it to decide whether the grants of aid were compatible with the common market. It was made clear that Germany was being given its last chance to provide this information; if they failed to do so, the decision would be taken on the basis of the information at the Commission's disposal.

Following a meeting with Germany and representatives of Riedel-de Haën held in Brussels on 28 July 1998, Germany and Riedel-de Haën responded with a joint letter of 28 August 1998. In that letter they considered the position adopted by Riedel-de Haën in its letter of 14 April 1998. This position was fully taken into consideration by the Commission. The following analysis of Germany's position incorporates the Commission's analysis of Riedel-de Haën's position.

2. **Aid**

Each year Riedel-de Haën generates 1 300 tonnes of liquid waste containing halogenated hydrocarbon compounds. This waste was previously disposed of by specialised businesses in special-waste incinerators. In 1994 the company began constructing a recycling plant so that it could dispose of the liquid waste on site. The plant is not yet operational.

Germany initially assessed the cost of the project at DEM 21,4 million (ECU 10,7 million) but adjusted this to DEM 20,6 million (ECU 10,3 million) by letter of 28 August 1998. This figure incorporates investment, development and other costs as well as operating costs.

The company's investment costs are estimated at DEM 16,3 million (ECU 8,1 million), of which DEM 14,2 million (ECU 7,1 million) were invested by 24 June 1998. The following table provides a breakdown of the various costs: [... [2] [3]] (*). Development and other costs estimated at DEM 1,9 million (ECU 0,9 million), with trial-operation costs amounting to DEM 2,5 million (ECU 1,2 million).

The accuracy of those figures was verified by a firm of accountants.

Riedel-de Haën was granted the following investment aid:

1. a grant of DEM 4 million (ECU 2 million) from the Lower Saxony Economic Assistance Fund (letter of 25 April 1994) as part of the Economy and Environment Scheme, which had been approved;

2. a grant of DEM 4 million (ECU 2 million) from the Federal Foundation for the Environment (letter of 20 May 1994) under a scheme which at the time had not been approved by the Commission.

According to Germany, instalments amounting to DEM 2,9 million (ECU 1,4 million) have been paid over.

3. **Comments of the German authorities**

By letter of 28 August 1998, Germany submitted the comments set out below.

It maintained that the plant was used exclusively for environmental protection purposes.

Moreover, it was alleged that the Economy and Environment Scheme had already been authorised by the Commission and declared to be compatible with the common market. A copy of the Scheme, the Commission's authorisation of it and the notice authorising it published in the *Official Journal of the European Communities* were appended.

The Federal Foundation for the Environment's aid was in principle compatible with the Community Guidelines.

Moreover, the grants could also be considered aid for research and development within the meaning of the Community framework for aid for research and development [4].

In addition, Germany expressed the view that the Commission could not require the aid to be repaid since the company's legitimate expectations must be met.

Germany presented an excerpt from the Commercial Register entry for Riedel-de Haën AG and Riedel-de Haën GmbH, the annual report for 1997 and a list of the company's fixed assets, in particular the plant producing halogenated hydrocarbon, together with a plan of the production site in Seelze.

[1] OJ C 385, 19.12.1997, p. 9.
[2] *
[3] *
(*) Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets and marked with an asterisk.

[4] OJ C 83, 11.4.1986, p. 2.

A table of the project costs and a breakdown of those costs viewed from various standpoints were also presented. The accuracy of the data had been verified by a firm of accountants. To this data was appended a comparison of the costs, contrasting the current supply costs with the costs of supplies in the new plant. A firm of accountants had verified part of the costs forming the basis of those calculations.

Explanations were also provided by Germany regarding the operations of the incineration and recycling plant and the difference between the old and new bromine-recovery plant. A second environmental impact assessment on Riedel-de Haën from 1995 was also provided, together with the report of an expert on the generation of contaminants by the new plant, as well as supplementary materials. A Riedel-de Haën brochure entitled *Recycling plant for bromine residues — verification of environmental compatibility* was also lodged.

A copy of the 17th Federal Emission Protection Order (BimSchV) ([1]) and Technical Instructions (TA) 'Air 86' was appended to the foregoing documents.

In addition, a copy of Riedel-de Haën's application for aid under Council Regulation (EEC) No 1973/92 ([2]) which establishes the LIFE programme, a copy of the Commission's refusal and a copy of the company's letter and reply were presented.

A copy of Riedel-de Haën's applications for aid to the Lower Saxony Economic Assistance Fund and the Federal Foundation for the Environment was also appended.

The results of the environmental impact assessment were also notified.

4. **Assessment**

4.1. *The recipient of the aid*

Riedel-de Haën is a former subsidiary of Hoechst AG and since 4 November 1996 has belonged to the American group Allied-Signal Inc., Morristown, New Jersey.

In 1997 it had an average of 1 256 employees and generated turnover amounting to DEM 409,2 million (ECU 204,6 million) with total assets of DEM 459,1 million (ECU 229,5 million). When measured according to the Commission Recommendation of 3 April 1996 concerning the definition of small and medium-sized enterprises ([3]), Riedel-de Haën is a large enterprise.

The company is located outside the assisted areas in Lower Saxony.

It is a chemical enterprise operating in the following fields: inorganic chemicals, laboratory chemicals, organic chemicals, technical preservation products, electrochemicals, luminescent pigments, photographic dyes, pharmaceuticals and medicinal products.

4.2. *Aid*

The Lower Saxony Economic Assistance Fund and in the Federal Foundation for the Environment are public institutions that finance their grants of aid, including the present grants, from State resources.

By letter of 28 August 1998, Germany called in question the status of the Foundation as a State institution. In response to this, the Commission again brought out the points which were relevant to its decision: the Foundation was set up by a federal law ([4]); its capital, amounting to over DEM 2,5 billion (ECU 102 billion), derived from the privatisation of the former State enterprise Salzgitter AG. Paragraph 2 of the Law states that the Foundation's object is to provide financial support for environmental projects, particularly when they are implemented by SMEs. Under Paragraph 5(2) of the Law, the Foundation's board members are appointed by the Federal Government and they decide, *inter alia*, what assistance will be granted. In granting aid, the Foundation does not have a generally applicable and automatic procedure on the basis of objective criteria and in actual fact it is the German authorities who, with the assistance of the board, take the decision according to their discretion. Lastly, under Paragraph 3 of the Law, the Foundation is audited by the Federal Court of Auditors. Having regard to all those circumstances and to the fact that Article 92(1) applies to 'any aid granted by a Member State or through State resources in any form whatsoever', the Commission concludes that the Foundation's assistance constitutes State aid within the meaning of Article 92(1). In fact, Germany has in the meantime notified the Foundation's amended rules under Article 93(3), which have been authorised by the Commission as State aid compatible with the common market.

In the various sectors of its activities Riedel-de Haën competes with chemical enterprises in other Member States. Its products feature in intra-Community trade. In 1997 it generated 52 % of its turnover on foreign markets, 67 % of that being in Europe. The aid lowers its investment costs considerably, giving it an advantage over competitors from other Member States who do not receive such investment aid and is liable to prejudice their competitive position.

Regarding bromine recovery, Riedel-de Haën may well be in competition with other businesses that operate this kind of plant. In a study presented by Germany ([5]), it was estimated that at least 10 bromine-recovery plants were needed in western Europe. The grants of aid give Riedel-de Haen an advantage over businesses in other Member States that also have that kind of plant but no aid and are liable to affect their competitive position adversely.

([1]) The 17th Order for the implementation of the Federal Law on emission protection for incinerators for waste and similar combustible materials.
([2]) OJ L 206, 22.7.1992, p. 1.
([3]) OJ L 107, 30.4.1996, p. 4.
([4]) Law of 18 July 1990 on the establishment of the Federal Foundation for the Environment, BGBI. 1, p. 1448.
([5]) 'Study of the transferability of the plant developed by Riedel-de Haën AG., Seelze for the recovery of residues', by Professor Hesse, Hanover, 9 September 1993.

Both grants of aid are thus liable to distort trade between Member States and therefore constitute State aid within the meaning of Article 92(1).

4.3. *Obligation of notification*

Aid from the Lower Saxony Economic Assistance Fund

On 1 December 1993 Riedel-de Haën applied to the Lower Saxony Economic Assistance Fund for financial support. By letter of 25 April 1994 the Fund made a grant under the Economy and Environment Scheme of DEM 4 million (ECU 2 million) towards project costs amounting to DEM 21,4 million (ECU 10,7 million). It was intended that the investment should be completed on 31 December 1996. According to Germany, at this time funding amounting only to DEM 8,2 million (ECU 4,1 million) had been expended on the project, of which DEM 6,5 million (ECU 3,2 million) was accounted for by investment costs. Under the aid contract, Riedel-de Haën therefore should not have received the full amount of the DEM 4 million (ECU 2 million).

In its Decision initiating the procedure under Article 93(2), the Commission has already expressed its finding that the Fund's grant was not made on the terms fixed in the Economy and Environment Scheme that the Commission authorised on 13 September 1991 for the period 1991 to 1994. Under the Scheme, the Fund was entitled to provide aid for investments for environmental projects. The thrust is clearly on development and demonstration projects which involve 'ecological added value for the Community'. Under point 2 of the Scheme 'only expenditure which basically exceeds existing legal requirements may be regarded as eligible for assistance'.

In spite of being requested to do so by the Commission, Germany has not indicated which part of the investment manifestly exceeds the legal requirements [1]. It is thus unclear whether parts of the project were eligible within the meaning of the Scheme and, if so, which parts. It is clear that the Fund has not acted in accordance with point 2 of the Scheme. At the meeting held in Brussels held on 28 July, the German delegation furthermore confirmed that no special investment was required in order to exceed existing legal requirements.

Regarding the comments sent by Germany by letter of 28 August 1998, the Commission sees no reason to review its examination of the Scheme and refers Germany to the Decision it has already adopted. The fact is that a review of that examination would merely confirm that Decision.

[1] In this connexion, see also Part 4.5 of this Decision

The Economy and Environment Scheme for Lower Saxony thus provided no grounds for the Fund to grant Riedel-de Haën the aid in question. The grant must therefore be considered an individual grant of aid and as such should have been notified by Germany under Article 93(3). The aid was therefore granted unlawfully.

Aid from the Federal Foundation for the Environment

On 10 September 1993 Riedel-de Haën applied to the Foundation for financial support. Since the Foundation, in its examination, proceeded on the basis of an application of 10 September 1993 it may be that the company altered its application to a subsequent date. By letter of 20 May 1994 the Foundation granted aid amounting to DEM 4 million (ECU 2 million).

The Commission has already found in its Decision initiating the procedure under Article 93(2) that the aid does not come under an authorised scheme. Germany has not disputed this view. It follows that Germany has failed to comply with its duty of notification under Article 93(3) for this aid, too. The aid was therefore granted unlawfully.

The Commission further points out that the Foundation made the grant of aid conditional on the company's providing from its own funds DEM 15,7 million (ECU 7,6 million) of the probable costs of the project amounting in all to DEM 19,7 million (ECU 9,8 million). The aid granted by the Fund reduces the burden on the company in so far as the condition has not been fulfilled.

4.4. *Exemptions*

The aid specified in Article 92(1) is incompatible with the common market. Article 92(2) and (3) sets out the conditions to be met if aid is to be considered compatible with the common market.

The Commission has examined whether the grants of aid amounting to DEM 8 million (ECU 4 million) qualify under the latter provisions for exemption from the general prohibition on aid.

Article 92(2) does not apply since the assistance does not constitute aid having a social character, granted to individual consumers, aid to make good the damage caused by natural disasters, or aid granted to the economy of certain areas of Germany affected by the division of Germany.

Article 92(3)(a) and the exemptions for regions in Article 92(3)(c) are not applicable since the company is not located in an assisted area.

Moreover, there are no grounds for granting an exemption under Article 92(3)(b) since, in the Commission's opinion, the project does not meet the criteria normally applicable for it to be treated as an important project of common European interest and the aid is not intended to remedy a serious disturbance in the economy of a Member State.

Likewise, there is no question of exemption under Article 92(3)(d) since the aid is not intended to promote culture or conserve heritage.

The only provisions that might be applicable are the first part of Article 92(3)(c), under which aid to facilitate the development of certain economic activities can be exempted where it does not adversely affect trading conditions to an extent contrary to the common interest.

4.5. *Compatibility with the Community Guidelines*

Germany maintains that the aid is to be considered investment made for environmental protection. The conditions on which investment can be considered aid for environmental protection such as is compatible with the common market are laid down in Community Guidelines.

The current Community Guidelines were published on 10 March 1994. Since both grants of aid were made after that date, namely on 25 April and 20 May 1994, the Commission considered them in the light of the current Community Guidelines.

Germany argues that the plant is not for production purposes but is exclusively intended for environmental protection. Moreover, the company is not under an obligation to construct a residue-processing plant. Consequently, they conclude that it was permissible to grant the total project costs — namely investment costs including development and other costs — as aid for environmental protection.

The Commission cannot share this standpoint. In its view, the new plant does indeed involve the production process. Riedel-de Haën's production creates hazardous liquid wastes that it is under an obligation to dispose of; disposal can thus be considered part of the production process. The new plant enables the waste to be disposed of on-site and is thus part of the production process. Moreover, the bromine-recovery plant, which forms a significant part of the processing plant, recovers major quantities of bromine that can be directly returned to the production process.

Under point 3.2.1 of the Community Guidelines, aid for investment can be granted for investment in land, buildings, plant and equipment. Under those provisions only the investment costs of DEM 16,3 million (ECU 8,1 million) might possibly be considered aid for environmental protection, but not the development and other costs or the costs of trial operations. Moreover, point 3.2.1 states unequivocally that 'the eligible costs must be strictly confined to the extra investment costs necessary to meet environmental objectives. General investment costs not attributable to environmental protection must be excluded'. It was therefore necessary for Germany to establish which part of the investment costs were attributable to environmental protection.

Proceeding on those principles, the Commission has concluded that the following aid could be considered aid for environmental protection:

1. investment to help firms adapt to new mandatory standards or to promote quicker compliance with those standards;

2. investment to support measures that lower emissions and significantly exceed mandatory standards;

3. investments that, notwithstanding the absence of mandatory standards, are adopted on the basis of agreements whereby companies intensify their efforts to reduce environmental pollution, notwithstanding the absence of a statutory obligation or before such an obligation comes into effect.

Investment aid to help firms adapt to new mandatory standards

With regard to the first category, the Community Guidelines provide in point 3.2.3.A that, 'in keeping with the "polluter pays" principle, no aid should normally be given towards the cost of complying with mandatory standards in new plant'.

The Commission points out that the residue-processing plant forms a new investment, not the replacement of existing plant. Furthermore, Riedel-de Haën was already operating a bromine-recovery plant. According to Germany's information, this plant had been decommissioned as early as 1985 and, from a technical standpoint, was significantly inferior to the new plant integrated into the residue-processing plant. Consequently, the Commission does not consider the new plant as a replacement for the existing plant.

It thus follows that the entire residue-processing plant undoubtedly constitutes new plant for the purposes of the Community Guidelines. It is therefore impossible to authorise the aid as investment to adapt to new mandatory standards since this is contrary to the 'polluter pays' principle.

Investment aid to firms going significantly beyond mandatory standards

Germany maintains that the aid constitutes an incentive to improve on mandatory standards. However, the Commission, in its position of 28 August 1998, concluded that Germany granted the aid only partly for this objective.

The general emissions standards for projects of this nature are laid down in the 17th Federal Emission Protection Order. The Order requires the *Land* authorities to adopt decisions laying down the applicable environmental standards, taking into account the characteristics of each individual project. In the present case the Government of the *Land* of Lower Saxony fixed the mandatory standards in a decision of 15 March 1991 applicable to Riedel-de Haën's site and confirmed them in its decision of 11 August 1996 granting the authorisation.

The requirements laid down by the *Land* Government of Hannover in its decision go beyond the requirements of the Order. While the decision fixes mean values for emissions in terms of half hourly readings, the emission mean values in the Order are only fixed for daily readings. Germany therefore considers that the company is improving on the requirements laid down in mandatory standards.

The Commission does not share this view. Since the decision requires the company to comply with mean values, those values are obviously the mandatory standards. The only part of the investments eligible for aid is that part relating to the measures going beyond the mandatory standards in the decision.

The Commission therefore requested Germany to state whether a significant reduction in emissions below the prescribed mean values was linked to increased costs and, if so, how much. However, Germany has failed to indicate which part of the investment served to improve on the standards, either those fixed in the decision or in the Order. In fact, at the meeting in Brussels on 28 July 1998 the German delegation confirmed that no special investments were needed to comply with the values specified in the decision that improved on the values in the Order.

Consequently, the Commission cannot authorise the assistance as investment aid to encourage firms to improve on mandatory standards since Germany has failed to establish that there are any investment costs eligible for aid.

Aid in the absence of mandatory environmental standards

By letter of 28 August 1998, Germany maintained that the aid had been granted for environmental protection in fields in which there were no mandatory standards.

They claimed that the company had hitherto disposed of its residues in a special-waste incinerator. Recycling the residues instead of incinerating them would generate significantly lower levels of gaseous and solid wastes. Regarding hazardous wastes, the Order prescribed threshold values for concentrations only but not for the relevant quantities. Consequently, the investment would result in an appreciable improvement in environmental performance in a field in which there are no mandatory standards.

Under point 3.2.3.C of the Community Guidelines, in fields in which there are no mandatory standards or other legal obligations on firms to protect the environment, firms undertaking investment that will significantly improve on their environmental performance or match that of firms in other Member States in which mandatory standards apply may be granted aid subject to the same condition of proportionality as for going beyond existing standards, as indicated in point 3.2.3.B of the Guidelines.

Under point 3.2.3.B of the Community Guidelines, the level of aid actually granted for exceeding standards must be in proportion to the improvement of the environment that is achieved and to the investment necessary for achieving the improvement. It follows that aid cannot be granted if, in comparison to the plant that would in any case have been installed, an improvement in the environment does not occur or the investment is made on commercial grounds and not in order to achieve an improvement in environmental conditions.

In order words, the essential purpose of this part of the Community Guidelines is to allow State aid for the purpose of encouraging a firm to carry out supplementary investment to secure an improvement in environmental performance. For this, both positive financial incentives, i.e. aid, and disincentives, i.e. taxes and levies, are considered appropriate (Community Guidelines, point 1.2). The ultimate objective of investment incentives in this sphere is to facilitate a gradual improvement in the quality of the environment (Community Guidelines, point 1.5.1). The Community Guidelines are not intended to allow the grant of State aid for a general investment which a company would in any case have made on business grounds. It is laid down in point 3.2.1 of the Community Guidelines that the eligible costs must be strictly confined to the extra investment costs necessary to meet environmental objectives.

On the basis of the objectives fixed in point 3.2.3.C of the Community Guidelines, the Commission concludes that in the case of a new plant a firm's comparable, non-equivalent activities cannot form the basis for assessing aid for environmental protection; nor can a firm's processes that are least harmful to the environment while only just above the statutory minimum. That would be directly contrary to the objective of the Community Guidelines. Instead, the environmental impact of a particular plant must be compared with the impact of a similar and comparable plant which the firm would in all likelihood have contemplated on economic considerations.

Applying those principles, the Commission concludes that a comparison between disposal in a residue-processing plant and an incinerator is only justified if the company would have made the investment on environmental grounds, not on economic considerations. It is only on those conditions that the aid forms an incentive for environmental protection, not a general incentive for investment. However, in the Commission's view there is sufficient evidence for an economic objective for this investment.

As has been mentioned above, the company is under an obligation to dispose of its noxious liquid waste. According to Germany, the liquid waste must be incinerated since final disposal is impossible. Incineration can be carried out in local special-waste incinerators. Because of their high bromine content, the residues can only be incinerated in small quantities as supplements to other wastes.

In future incinerator operators might possibly refuse to dispose of such wastes because waste with a high bromine content leads to significant deterioration in the plant. It can therefore be assumed that the disposal costs of waste with a high bromine content will rise appreciably in the near future. The new plant would mean that the company was not dependent upon the price policy of the operator of the special-waste incinerator and would be able to avoid dependence by having the company dispose of its liquid waste itself.

In addition the recovery plant will enable Riedel-de Haën to recycle significant quantities of substances each year including 330 tonnes of bromine, 440 tonnes of potassium chloride and 160 tonnes of potassium fluoride and to use them again directly in the manufacturing process. This could allow the company to reduce its production costs appreciably.

Lastly, the company will save the costs of transporting its liquid waste from its site to the special-waste incinerator. According to Germany, considerable costs are involved.

The Commission cannot agree with Germany's view that the advantages for the environment provided by the plant are that disposal of the residues in the special-waste incinerator is cheaper than processing in special plant. Germany has merely provided the Commission with an imprecise calculation to the effect that additional costs of [...] * per year would be incurred. The conclusive nature of this calculation and its accuracy have not been established, however, nor have they have been confirmed by the firm of accountants in its verification, which merely stated that the accuracy of the costs of disposal of the residues in 1996 and 1997 had been duly established.

Moreover, Riedel-de Haën would be the only German company with a bromine-recovery plant. According to a report lodged by Germany, the company would be able to dispose of bromine residues for small and medium-sized enterprises. The view taken in the report was that 'if the project were carried out, it would be highly interesting to many businesses'. The new plant is designed to process [...] * tonnes of residues per year. Germany has established that in 1996 and 1997 only [...] * tonnes of liquid wastes could be disposed of. The company could therefore acquire new business, with additional income and economies of scale.

Those considerations establish clearly that Riedel-de Haën, in investing in the recycling plant, was motivated by economic, not environmental, considerations. A comparison of the quantities of harmful residues from such plant with those of an incinerator is thus inappropriate.

Proceeding on the basis of the abovementioned considerations, the Commission must thus verify whether Riedel-de Haën intended, on environmental grounds, to make specified investments in the residue-processing plant, which increased the investment costs, while it must be assumed, in view of the plant's environmental impact, that the company would in any event have installed it on purely economic grounds.

According to the expert report submitted by Germany, gaseous and solid wastes are reduced because, in the incineration process, 11 % by volume of oxygen concentration in dry waste gases occurs while in a residue-processing plant the oxygen concentration is usually 3 % by volume. Riedel-de Haën's plant operates with an oxygen concentration of 3 % by volume. The amount of waste gases generated by this plant is in fact an operational characteristic and thus does not produce any improvement over other plant of this kind.

The Commission points out that Germany has tried to argue that these are necessary costs for an appreciable improvement in environmental terms in a field where there are no mandatory standards. It has, however, failed to prove that, by opting to invest in a residue-processing plant, the investment was made exclusively or mainly for the purposes of environmental protection.

The Commission is consequently unable to regard this support as investment aid for environmental protection in fields where there are no mandatory standards, since Germany has failed to prove the existence of eligible investment costs.

Operating aid

Under point 3.4 of the Community Guidelines, in accordance with long-standing policy, the Commission does not normally approve operating aid which relieves firms of costs resulting from the pollution or nuisance they cause. However, the Commission may make an exception to this principle in certain well-defined circumstances. In the field of waste management, the public financing of the additional costs of selective collection, recovery and treatment of waste for the benefit of businesses as well as consumers may involve State aid. Under point 1.5.3 of the Community Guidelines, such plant can be operated by semi-public bodies whose service costs are met by consumers. Taking account of all the circumstances of the case, on the basis of the existing information and in view of the nature of the procedure and on the basis of the preceding analysis, the Commission considers that the aid at issue in this procedure could not have been granted on the basis of point 3.4 of the Community Guidelines.

4.6. *Other considerations*

By letter of 19 March 1993, Riedel-de Haën asked the Commission for aid under the LIFE programme. According to Germany, the programme was not in fact financed by the Commission because funding was lacking but the company assumed that the Commission had recognised the project's innovatory characteristics.

However, the Commission certainly did not recognise this as an innovatory project and accordingly, by letter of 30 July 1996, refused the application while in fact adding that if the plan were amended there would be a prospect of Community assistance in the succeeding year.

Germany also took the view that the aid for R&D could be exempted. However, the Commission considers that there is no justification for this aid. It refers to the brochure produced by Riedel-de Haën *Recycling plant for bromine residues — verification of environmental compatibility*, according to which the technology in question had been developed as early as 1989 by a US engineering firm. Nevertheless, State aid was granted on 25 April and 20 May 1994. Moreover, Germany has failed to demonstrate that there are any costs that could be considered eligible for research and development aid under the Community Guidelines.

5. **Conclusions**

It is clear that both grants of aid are at odds with the applicable Community Guidelines on State aid for environmental protection and therefore, in relation to the environmental-protection criterion, are not compatible with the common market.

The project must be considered a general investment project. Riedel-de Haën is a large enterprise located outside an assisted area. However, investment aid for such a firm cannot be exempted under Article 93(3)(c).

These grants of aid, which are not covered by exempting provisions, adversely affect trading conditions to an extent contrary to the common interest. Moreover, they would give Riedel-de Haën an unjustified advantage over its competitors that do not receive assistance.

The aid is not compatible with the common market since it was unlawfully granted for the purposes of Article 93(3) and does not fulfil the conditions for the exempting provisions in Article 92(2) and (3).

The grants of aid must therefore be terminated and repaid, in accordance with the terms set out by the European Court of Justice in its judgment in Case C-301/87 [1]. Repayments to be effected must make good the distortion of competition resulting from the grant of the aid, notwithstanding any formal restructuring carried out within the group. If for any reason the repayment cannot be made by Riedel-de Haën AG or its successor, the aid must be recovered from the group's subsidiaries continuing the business and/or exploiting the productive assets acquired by Riedel-de Haën through the aid, namely Riedel-de Haën GmbH.

The repayment must be made in accordance with the procedures and rules of German law, in particular those concerning interest on the State's outstanding claims, to the effect that interest is payable from the time when the unlawful aid was granted. This measure is necessary in order to restore the original situation by making good all financial advantages received by the assisted enterprise from the point when the aid was unlawfully paid,

HAS ADOPTED THIS DECISION:

Article 1

The aid of DEM 4 million from the Lower Saxony Economic Assistance Fund and the aid of DEM 4 million from the Federal Foundation for the Environment have been granted unlawfully to Riedel-de Haën AG, Seelze, and are not compatible with the common market.

Article 2

Germany shall take the necessary measures to recover the aid paid to Riedel-de Haën AG or its successor. If this proves impossible, Germany shall take the necessary measures to recover the aid specified in Article 1 from Riedel-de Haën GmbH.

The aid shall be recovered in accordance with the procedures and rules of German law. Interest shall be payable on the sums recovered from the time when they were granted until actual repayment is made. The rate shall be that used by the Commission during the period in question to calculate the net grant equivalent of regional aid.

Article 3

Germany shall inform the Commission, within two months 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, 22 December 1998.

For the Commission

Karel VAN MIERT

Member of the Commission

[1] [1990] ECR I-307, paragraph 22.