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Price: EUR 4

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Acts whose titles are printed in light type are those relating to day-to-day management of agricultural matters, and are generally valid for a limited period.

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IV

(Acts adopted before 1 December 2009 under the EC Treaty, the EU Treaty and the Euratom Treaty)

COMMISSION DECISION

of 10 March 2009

on the State aids C 43/07 (ex N 64/07) and C 44/05 (ex NN 79/05, ex N 439/04) granted by Poland to Huta Stalowa Wola SA

(notified under document C(2009) 1480)

(Only the Polish text is authentic)

(Text with EEA relevance)

(2010/174/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

registered on 8 April 2005, of 7 June 2005, registered on 9 June 2005 and of 2 September 2005, registered on 6 September 2005.

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

(3) In the course of this exchange of information it emerged that some of the notified measures had been implemented in contravention of Article 88(3) of the EC Treaty.

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

(4) By letter of 23 November 2005, the Commission informed Poland that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of those measures.

Having called on interested parties to submit their comments pursuant to the provisions cited above,

(5) The Commission's decision to initiate the Article 88(2) procedure was published in the *Official Journal of the European Union* ⁽¹⁾. The Commission invited interested parties to submit their comments on the measure.

Whereas:

1. PROCEDURE

(1) By letter of 8 October 2004, Poland informed the Commission about measures granted in support of the restructuring of Huta Stalowa Wola SA (hereinafter referred to as 'HSW', 'the beneficiary' or 'the company'), with a view to obtaining legal certainty that they had been granted before accession and were not applicable after accession, and that they did not therefore constitute new aid which could be examined by the Commission under Article 88 of the EC Treaty. In the event that the Commission were to find these measures to be new aid, Poland asked that they be approved as restructuring aid.

(6) Poland submitted its observations by letter of 7 March 2006, registered on 9 March 2006. No comments were received from third parties.

(7) By decision of 20 December 2006 the Commission concluded the formal investigation by declaring restructuring aid in favour of HSW compatible with the common market ('decision of 20 December 2006') ⁽²⁾. The Commission's examination showed that some aid was granted before Poland's accession to the EU (PLN 157 million or EUR 37,2 million ⁽³⁾), and some after accession (PLN 66 million or EUR 15,6 million).

(2) The Commission requested Poland to provide further information by letters of 11 November 2004, 1 March 2005, 27 April 2005 and 26 July 2005, to which Poland replied, respectively, by letters of 31 January 2005, registered on 2 February 2005, of 4 April 2005,

⁽¹⁾ OJ C 34, 10.2.2006, p. 5.

⁽²⁾ OJ L 112, 30.4.2007, p. 67.

⁽³⁾ All amounts provided by the Polish authorities in Polish zloty (PLN) have been converted into euro (EUR) by using the exchange rate of 15 January 2008 of EUR 1 = PLN 4,22.

- (8) The Commission had taken the decision of 20 December 2006 on the basis of a restructuring plan of HSW dated February 2006 (the 'February plan') and submitted by Poland on 9 March 2006. After the decision of 20 December 2006 had been adopted, Poland notified by letter of 2 February 2007 (registered on 4 February 2007) an updated version of the plan dated November 2006 ('November plan'). Poland argued that for internal administrative reasons it had been unable to notify the Commission of the modified plan earlier ⁽⁴⁾.
- (9) The Commission requested additional information about the modifications of the February plan by letters of 29 March 2007 and 21 May 2007. The Polish authorities replied respectively by letters of 30 April 2007, registered on that day, and 5 June 2007, registered on that day. On 7 June 2007 a meeting was held between the Polish authorities, the Commission services and HSW's management. Following the meeting the Commission, by letter of 22 June 2007, requested further information. Poland replied by letter of 13 July 2007, registered on that day.
- (10) On 10 October 2007, the Commission decided to initiate a formal investigation procedure on the basis of Article 88(2) of the EC Treaty owing to doubts as to whether the modified restructuring plan fulfilled all the conditions set out in the Community Guidelines on State aid for rescuing and restructuring firms in difficulty ('the 2004 Guidelines') ⁽⁵⁾. In this decision the Commission also mentioned the possibility of revoking the decision of 20 December 2006 pursuant to Article 9 of Council Regulation (EC) No 659/1999 ⁽⁶⁾.
- (11) The Commission's decision to initiate an investigation procedure under Article 88(2) of the EC Treaty was published in the *Official Journal of the European Union* ⁽⁷⁾. The Commission invited interested parties to submit their comments on the measure.
- (12) After being granted an extension of the deadline for the submission of its comments (requests of 30 October 2007 and 6 December 2007, to which the Commission replied in letters of 20 November 2007 and 19 December 2007 respectively), Poland submitted its comments by letter of 15 January 2008, registered on that day. The Commission has also received comments from 13 third parties, including the beneficiary. Comments were submitted by local authorities: the President of Stalowa Wola city by letter of 11 November 2008, the Starosta Powiatu Stalowa Wola by letter of 14 January 2008 and the Voivod of Podkarpackie Region by letter of 15 January 2008. The following suppliers of HSW submitted comments: Clak Hurtownia Artykołów Przemysłowych H. Adamski, J. Lach T. Knie s.j. by letter of 10 January 2008, Kwadrat Sp. z o.o. by letter of 10 January 2008, Odlewnia Staliwa 'Labedy' Sp. z o.o. by letter of 10 January 2008, Fabryka Maszyn Lubaczow Sp. z o.o. by letter of 11 January 2008 and SigmaKalon Cieszyn SA by letter of 11 January 2008. The following banks cooperating with HSW submitted comments: Bank Pekao SA by letter of 11 January 2008 and BRE Bank S.A. by letter of 14 January 2008. Finally comments were submitted by ENESTA Sp. z o.o. (energy supplier) by letter of 11 January 2008 and by the Social Insurance Fund by letter of 21 January 2008. The beneficiary submitted comments by letter of 14 January 2008.
- (13) The Commission forwarded the comments received from third parties to Poland by letter of 28 January 2008.
- (14) On 9 and 14 April 2008, the Polish authorities sent letters to Commissioner Neelie Kroes, to which the Commissioner replied on 28 April 2008, requesting additional information. Those letters were answered by letters of the Polish authorities dated 4 July 2008, registered on 9 July 2008.
- (15) By letter of 7 November 2008, registered on that day, Poland submitted additional information. On 1 December 2008, the Commission sent a request for information to which Poland replied by letter of 22 December 2008, registered on that day.
- (16) HSW, the beneficiary of the aid and the parent company of the HSW group, is based in Stalowa Wola, which is situated in the Podkarpackie voivodship. This region is eligible for aid under Article 87(3)(a) of the EC Treaty. In February 2006, the group included eight companies in which HSW held at least 51 % of shares (thereby controlling these companies) and 10 in which it held less than 51 %. Companies belonging to the HSW capital group supply each other with materials and services. After the parent company, the companies with the highest share capital in the group are HSW-Zakład Zespołów Napędowych Sp. z o.o. and HSW-Zakład Zespołów Mechanicznych Sp. z o.o. Sales to companies belonging to the capital group account for 20-30 % of HSW's total sales.

2. DESCRIPTION

2.1. The Company

⁽⁴⁾ The new restructuring plan was adopted by HSW's management on 7 November 2006. On 8 December 2006 HSW's supervisory board ratified the plan — at that stage, according to Poland, the plan could be treated as final. It was transmitted to Poland's competition office (OCCP) on 13 December 2006.

⁽⁵⁾ OJ C 244, 1.10.2004, p. 2.

⁽⁶⁾ OJ L 83, 27.3.1999, p. 1.

⁽⁷⁾ OJ C 298, 11.12.2007, p. 10.

- (17) HSW was created in 1937 and initially produced cannon and high alloy steel. Unlike its subsidiary HSW — Zakład Metalurgiczny, it is not a steel producer. In 1991 it became a joint-stock company. The State still owns 76 % of the shares, 9 % belong to employees, and the remaining public and private shareholders hold no more than 5 % each. HSW manufactures construction machinery and military equipment (cannon, howitzers etc.).
- (18) In 2005 HSW had about 2 400 employees, down from 3 173 in 2002.
- (19) One of the subsidiaries of HSW is the distribution company Dressta Sp. z o.o. (hereafter 'Dressta'). Since September 2006, the latter has been fully controlled by HSW. Previously, however, 51 % of the shares of Dressta were owned by Komatsu American International Company USA (hereinafter referred to as KAIC), a competitor of HSW. In 1995 HSW transferred licenses and assets relating to its sales on foreign markets to Dressta for a period of 12 years.

2.2. Difficulties of the Company

- (20) The beneficiary's difficulties began in 2002, when its turnover dropped from PLN 494,9 million (EUR 117,3 million) in 2000 to PLN 352,6 million (EUR 83,5 million), a fall of 29 %. Its exports fell from PLN 505 million (EUR 119,7 million) to PLN 279 million (EUR 66,1 million). The fall in turnover on foreign markets was primarily attributable to the recession and to the fact that Dressta, under the influence of its principal shareholder (a major competitor of HSW), significantly reduced its sales of HSW's products on the North American market.
- (21) In 2002 the beneficiary made an operating loss of PLN 33,9 million (EUR 8,03 million), mostly due to underuse of its production capacity. As most of the company's sales on foreign markets were realised in US dollars and most of its costs incurred in Polish zlotys, the rise in value of the latter currency adversely affected the beneficiary's sales and profitability.
- (22) HSW was heavily indebted. Its debt in the period 2000-2002 averaged PLN 169,1 million (EUR 40,1 million).
- (23) The company was also operating at a loss. The loss on sales rose from PLN 6,4 million (EUR 1,52 million) in 2000 to PLN 33,9 million (EUR 8,03 million) in 2002.

- (24) The HSW group made net losses of PLN 137,7 million (EUR 32,6 million) in 2002 and PLN 123,9 million (EUR 29,4 million) in 2003.

2.3. The restructuring

- (25) In 2002 the beneficiary sought to address these difficulties by drawing up a restructuring plan for the period 2003-07. This plan was amended in February 2006 ('February Plan'). The Commission delivered its decision of 20 December 2006 on the basis of that plan. The plan was updated in November 2007 ('November Plan'), as a result of which the Commission decided to reinstate the procedure.

2.3.1. February plan

- (26) One of the principal measures included in the February plan was the modification of the organisational structure of the beneficiary. The main idea of HSW's restructuring process was to separate that part of the company directly involved in production from the assets to be restructured. An independent company, HSW-Trading Sp. z o.o. (hereafter 'HSW-Trading'), was therefore created by HSW's majority shareholder — the State Treasury. The State Treasury gave HSW-Trading a capital injection of PLN 40 million (EUR 9,48 million), which was notified by Poland among the measures granted to HSW (item 16 in Table 2 below).
- (27) While HSW-Trading was responsible for production and sales of industrial machinery, logistics, quality management and the supply of materials for the production of machinery, HSW retained research and development activities, the financing of productive assets, strategic marketing, sales of spare parts, repairs, and production and sales of military equipment. HSW was also responsible for the organisational restructuring. For the purpose of exercising its activities, HSW-Trading leased assets directly related to production from HSW. The necessary workforce was also temporarily transferred to HSW-Trading.
- (28) This division was to last from 2004 to 2006, i.e. throughout the restructuring of HSW. HSW-Trading was to merge with HSW again at the end of 2006.
- (29) The February plan provided for a major restructuring of employment. On completion of restructuring in 2007 HSW would employ 2 100 workers, down from 3 173 employees at the end of 2002.

- (30) In order to enable the beneficiary to reach new markets, the organisation of the distribution network for construction machinery and spare parts on the world market was also to be restructured.
- (31) The restructuring of HSW was also to include the sale of subsidiaries and the privatisation of departments operating in the service sector. By 2006 HSW had sold HSW — Zakład Kuźnia Matrycowa Sp. z o.o for PLN 38 million (EUR 9,0 million) and HSW — Zakład Metalurgiczny (HSW-Walcownia Blach Sp. z o.o. and HSW-Huta Stali Jakosciowych). HSW generated a revenue of PLN 112,2 million (EUR 26,6 million) from this privatisation. The sale of two subsidiaries, HSW — Zakład Sprężynownia and HSW — Tlenownia, was to be finalised in 2006.
- (32) The restructuring of assets involved reducing production capacity from 1 500 construction machines a year to 1 200 a year. HSW's assets were considered to exceed its needs. As HSW planned to focus on the production of construction machinery, a significant share of its assets were to be sold. The assets sold between January 2003 and December 2005 generated revenue of PLN 52,1 million (EUR 12,3 million), which far exceeded the forecast PLN 10,3 million (EUR 2,4 million). The following assets were sold: some 248,4 ha of land (including approximately 153 ha of woodland); 76 000 m² of real estate and 94 items of machinery and equipment.
- (33) The overall restructuring costs, including restructuring costs before accession, totalled PLN 450,3 million (EUR 106,7 million) and consisted mainly of the restructuring of civil-law liabilities (PLN 95,6 million and PLN 113,2 million respectively), the cost of organising the supply and distribution system (PLN 151,2 million), the cost of ensuring continuity of supply (PLN 40,0 million) and modernisation (PLN 30,5 million).
- 2.3.2. *November plan*
- (34) By letter of 2 February 2007 Poland informed the Commission of changes made to the restructuring plan in November 2006. Poland feels that these changes will not alter the amount of State aid and are in line with point 52 of the 2004 Guidelines.
- (35) The principal change to the February plan concerned the financing of restructuring: rather than HSW reimbursing two loans granted to it before accession in 2003 and 2004 by the State-owned Industrial Development Agency (hereafter 'the ARP') and the interest on these loans⁽⁸⁾, the ARP would swap the nominal value of the debt for equity and so become a shareholder of HSW. Other changes concern postponements of organisational restructuring.
- (36) According to Poland, the debt-to-equity swap will allow HSW to gather the resources needed to function properly on the market and for future necessary investments. Poland has indicated that out of PLN 96,2 million (the original two loans totalling PLN 75 million plus PLN 21,2 million in accrued interest)⁽⁹⁾:
- PLN [0-50] (*) million will be used for modernisation of equipment and for additional investments, which according to Poland, are necessary for the restoration of viability,
 - PLN [0-50] million is necessary for the additional costs related to the postponed merger between HSW and HSW-Trading, which has increased the employment restructuring costs,
 - PLN [50-100] million will be used to finance additional accumulation of stock, the increase in receivables due to the extension of payment deadlines for invoices to customers and the shortening of deadlines for payments to suppliers,
 - PLN [0-10] million will be used to finance additional commercial credits.
- (37) Poland claims that HSW needs additional cash-flow (the above-mentioned PLN [0-100] million) because the market for construction machinery has become more competitive: HSW's competitors are giving their clients longer invoice payment deadlines and agreeing shorter deadlines for paying their suppliers.
- (38) The overall restructuring costs of the November plan, including restructuring costs prior to accession, total PLN 456,9 million (EUR 108,3 million) and are composed of the items summarised in Table 1:
- (8) I.e. the interest accrued on the loans so far and the interest to be accrued in the future until the original date set for the repayment of the loans.
- (9) The amount of interest is lower by PLN 1,7 million than presented in the opening decision. Poland explained that since the debt-to-equity swap was implemented slightly later than the date originally planned, HSW repaid a higher amount of interest due and the part remaining to be repaid is hence smaller.
- (*) Information covered by professional secrecy.

Table 1

Summary of the restructuring costs as envisaged in the November Plan

(in PLN thousands)	
Restructuring measure	Costs
Restructuring of civil-law liabilities	95 648
Restructuring of public-law liabilities	113 213
Organisation of the supply and distribution system	158 741
Continuity of supply of material, spare parts and components	40 000
Product restructuring	1 666
Asset restructuring	871
Employment restructuring	4 199
Organisational restructuring	2 013
Modernisation of production capacity	30 524
Total	456 878

3. DECISION TO INITIATE THE PROCEDURE UNDER ARTICLE 88(2) OF THE EC TREATY

(39) On 23 November 2005 the Commission decided to initiate a formal investigation procedure. By decision of 20 December 2006, the Commission authorised the restructuring aid for HSW on the basis of the company's restructuring plan of February 2006. On 10 October 2007 the Commission decided to initiate a formal investigation procedure following the notification of the November plan, which included additional support for HSW. In this decision the Commission envisaged the possibility of revoking the decision of 20 December 2006, as that decision was based on incorrect information.

3.1. Decision of 23 November 2005 initiating the investigation procedure

(40) In its decision of 23 November 2005, the Commission considered that aid measures totalling PLN 145,8 million had been granted to HSW before Poland's accession to the EU; measures totalling PLN 27,9 million had been granted after accession without the Commission's approval and measures totalling PLN 43,4 million had not yet been granted and thus constituted new State aid.

(41) The Commission decided to initiate a formal investigation procedure on two grounds.

(42) First, the Commission doubted whether the restructuring aid was compatible with the common market.

(43) In this respect, the Commission doubted whether the restructuring plan was capable of restoring the long-term viability of the beneficiary, since it seemed to focus on debt-servicing and covering operating costs.

(44) The Commission also had doubts about the implementation of sufficient compensatory measures. While Poland claimed that HSW planned to reduce production capacity by 20 %, the plan provided for an increase in the use of production capacity from 27,7 % in 2002 to 66 % in 2007. The Commission had doubts about the net effect of this operation.

(45) The Commission also doubted whether the aid was limited to the minimum necessary and whether the beneficiary's own contribution was significant, as Poland had not drawn a clear distinction between what it considered an own contribution to restructuring and what was financing from State aid.

(46) The Commission also doubted whether the 'one time, last time' principle was respected, as a subsidiary of HSW, HSW-Zakład Zespołów Mechanicznych, had received restructuring aid for 2003-07 before Poland had joined the European Union. It was therefore necessary to demonstrate that this aid had had no spillover effects on the parent company, HSW. Poland was also asked to assure the Commission that the restructuring aid to HSW, if allowed, would have no spillover effects on HSW — Zakład Zespołów Mechanicznych.

- (47) The second ground for initiating the formal investigation procedure was that the Commission doubted whether there was sufficient separation between subsidised special military production (cannon) and civil production of construction machinery. Poland had assured the Commission in letters of 7 June 2005 and 2 September 2005 that cross-subsidisation was excluded, and the Commission noted that the ratio of aid for military production to total aid was small compared to the ratio of military production to total production. The Commission nevertheless requested more detailed explanations on the separation of accounts.

3.2. Decision of 10 October 2007 re-initiating the investigation procedure

- (48) The Commission initiated the formal investigation procedure on four grounds.
- (49) First, the Commission had doubts as to whether the November plan was capable of restoring the long-term viability of HSW, as it seemed that the company was in need of additional cash-flow.
- (50) Second, the Commission had doubts as to whether the aid was limited to the minimum necessary, as the use of surplus cash-flow generated by the debt-to-equity swap had not been sufficiently explained by the Polish authorities.
- (51) Third, the Commission wondered whether the aid amount would not increase as a consequence of the swap.
- (52) Finally, in addition to its doubts about the increase in the aid amount, the Commission doubted whether the effect of the aid granted to HSW remained unchanged and did not therefore unduly distort competition. In other words, the Commission had doubts as to whether the compensatory measures were sufficient, since, according to point 40 of the 2004 Guidelines, compensatory measures must be in proportion to the distortive effects of the aid.
- (53) The Commission decided to re-initiate the investigation procedure with a view to possibly revoking the decision of 20 December 2006.

4. COMMENTS OF THIRD PARTIES

- (54) The Commission had received no comments from third parties as regards the formal investigation procedure initiated on 23 November 2005.

- (55) In response to the reopening of the formal investigation procedure, the Commission received comments from 13 third parties including the beneficiary. The comments received stressed confidence in the success of the restructuring of HSW (public and private creditors, HSW's suppliers) and emphasised the company's importance for the entire region (the beneficiary and the local granting authorities).

5. COMMENTS FROM POLAND

5.1. Comments on the decision of 23 November 2005

- (56) First, the Polish authorities commented on the Commission's assessment of which measures had been granted before accession and which constituted unlawful or new aid. The Polish authorities maintained that aid granted on the basis of the amended Act of 30 October 2002 on State aid for enterprises of special significance for the labour market (see Table 3 below) had not been granted before accession, contesting the view taken by the Commission in the decision initiating the formal investigation procedure. The Polish authorities repeated their earlier submission that the decisive moment for granting State aid under this Act occurs when the beneficiary's public creditors give their consent (the 'administrative commitments'), not when the President of the ARP takes a restructuring decision. Since the public creditors of HSW whose receivables were restructured had given their consent vis-à-vis HSW prior to accession, the Polish authorities argue that this aid was granted before accession and the Commission is not therefore competent to assess its compatibility with the common market.
- (57) Second, the Polish authorities identified two modifications to the aid as originally notified by letter of 8 October 2004. The first and most important modification was that part of the planned State aid (a total of PLN 43,5 million) had been partially withdrawn and replaced by two measures, which were claimed not to constitute State aid. The second modification was factual in nature, namely specifying the amounts of aid under three measures granted to HSW before accession. Tables 2 to 5 list all the measures granted and to be granted to HSW over the restructuring period, as corrected in the light of the Polish authorities' clarifications.

- (58) The Polish authorities also claimed that the planned deferral and payment in instalments of public-law liabilities of PLN 22,1 million (EUR 5,2 million) (item 28 in Table 4) should be treated as a *de minimis* measure. The methodology used by the Polish authority

to calculate the aid amount compares the interest rate applied to the deferral with the Commission reference rate. The Polish authorities concluded that a measure is free of aid whenever the applied interest rate is higher than the reference rate. This, according to the Polish authorities, is the case of the deferral of liabilities to the Social Insurance Fund, which amount to PLN 16,4 million (item 29 in Table 4).

(59) Third, regarding the viability of the company, the Polish authorities claimed that the organisational restructuring had proved successful, as HSW had regained control of Dressta and would therefore be able to expand on the profitable North American market.

(60) With regard to the requirement to limit distortions of competition, the Polish authorities maintained that the reduction in capacity from 1 500 to 1 200 machines was a valid compensatory measure. Moreover, they also considered the sale of HSW's subsidiaries to be a compensatory measure.

(61) As regards the limitation of the aid to the minimum necessary, the Polish authorities provided a series of details on the amounts they considered to be an own contribution.

(62) To conclude, the Polish authorities claim in their observations that no State aid has been granted after accession or is planned. In the event that the Commission were to conclude otherwise, they provide additional elements to support the conclusion that the State aid is compatible with the common market.

(63) With regard to the Commission's doubts concerning separation between the military and civil production of HSW, the Polish authorities assured the Commission that the current system of cost accounting allowed for a clear separation of the costs of these two activities.

5.2. Comments on the decision of 10 October 2007

(64) The Polish authorities began by re-explaining why the changes in the restructuring plan had been notified so late, putting the blame on lengthy internal procedures.

(65) Second, Poland emphasised that the scope of the investigation procedure initiated should encompass only the change to the restructuring plan on the basis of point 52

of the 2004 Guidelines and argued that the Commission should not take steps under Article 9 of Regulation (EC) No 659/1999 to revoke the decision of 20 December 2006. Poland invoked the principle of legal certainty in this respect.

(66) Third, Poland argued that the debt-to-equity swap did not increase the overall aid amount approved.

(67) Fourth, the Polish authorities claimed that the aid equivalent of the ARP loans which had been approved by the Commission in its decision of 20 December 2006 was too high, having been equated to the nominal value of those loans (even though Poland admitted that that it had not previously questioned this approach). Hence, even if the Commission were to decide that the debt-to-equity swap would increase the aid by the amount of the ARP loans, the aid amount should not exceed the nominal value of the loans already approved in the decision of 20 December 2006.

(68) The Polish authorities explained that the company had paid PLN 22,9 million in interest on the ARP loans prior to the swap. The remaining interest that HSW would have to pay if there were no debt-to-equity swap would therefore amount to PLN 21,2 million.

(69) Furthermore, Poland claimed that the debt-to-equity swap met the market-economy creditor test and did not constitute State aid within the meaning of Article 87(1) of the EC Treaty. Poland claimed that the ARP had taken into account the fact that HSW was becoming profitable and had assumed that the value of the acquired shares would increase in time.

(70) In the remaining part of their submission, the Polish authorities argued that even if the Commission were to conclude that the restructuring plan had been modified significantly, the overall new restructuring package should be deemed compatible with the 2004 Guidelines and the modification should be approved pursuant to point 52 thereof.

(71) Poland emphasised that the restructuring was, save for a few minor changes, being implemented in accordance with the February plan and that the criteria of viability, own contribution and avoidance of undue distortions of competition were respected.

5.2.1. Restoration of viability

(72) First, regarding the restoration of long-term viability, the Polish authorities stressed that the company had increased its production and focused on the more profitable sale of heavy machinery (in particular large bulldozers and pipelayers). The company had doubled efficiency in terms of revenue per employee (from PLN 111 000 per employee in 2002 to PLN 222 000 per employee in 2007).

(73) Moreover, despite its exposure to exchange-rate risks HSW had achieved higher profitability indicators than envisaged in the February plan.

(74) Moreover, all liquidity and solvency indicators were higher than originally forecast. Poland also emphasised that the company was now taking advantage of private financing, proving that the market believed in the viability and solvency of the company.

(75) Lastly, Poland stressed the fact that HSW had become more efficient in reducing exposure to exchange-rate risks, as it now sought to purchase materials in the same currency as that in which its sales were recorded in the accounts.

5.2.2. Own contribution to the restructuring

(76) Second, Poland claimed that the restructuring costs had risen to PLN 469,1 million⁽¹⁰⁾, mainly owing to delays in organisational restructuring. However, as the company had managed to sell additional assets since the decision of 20 December 2006 was taken, its own contribution to the restructuring remained above 50 % (at 53,9 %).

(77) According to the Polish authorities, the own contribution consisted of revenue from the sale of fixed assets amounting to PLN 61,4 million, revenue from the sale of subsidiaries amounting to PLN 126,4 million, debt purchases on the market amounting to PLN 61,6 million and cancellation of civil-law liabilities amounting to PLN 3,5 million.

5.2.3. Avoidance of undue distortion of competition

(78) Third, Poland claimed that the amount of aid had not increased, so there was no need for more extensive compensatory measures under point 52(b) of the 2004 Guidelines. Poland believes that the additional cash-flow generated by the debt-to-equity swap is being used by the company solely to maintain its position on the market.

According to the Polish authorities, the company cannot even achieve a leading position on the domestic market, occupying [...] and [...] place depending on the product sold⁽¹¹⁾. According to Poland, the company's share of the world market does not exceed [0-5] %.

(79) In addition, Poland stressed the importance of the company for the entire region.

(80) The Polish government gave the Commission assurances concerning the planned privatisation, giving the end of 2009 as the target date for completion of the privatisation procedure.

6. THE AID MEASURES

(81) The granting authorities are the Treasury, the Ministry of Science and Information Technology, the tax authorities, local authorities, the Social Insurance Fund (ZUS), the State Fund for the Rehabilitation of the Disabled (PFRON), Treasury offices and the Industrial Development Agency (the ARP).

(82) Poland claims that some of the measures granted for HSW were connected with the protection of essential interests of national security. These measures totalled approximately PLN 19 million (EUR 4,5 million), granted before and after Poland's accession to the European Union. Invoking Article 296 of the EC Treaty, Poland claims that the provisions of the EC Treaty do not preclude Member States from taking measures they consider necessary to protect the essential interests of their security.

(83) The most significant measures granted before accession to the non-military part of HSW were two loans by the ARP, which together amounted to PLN 75 million (EUR 17,8 million). Another important measure is the capital injection by the State Treasury of PLN 40 million (EUR 9,5 million) for the subsidiary HSW — Trading Sp. z o.o.

(84) PLN 27,9 million (EUR 6,6 million) in the form of a debt write-off was granted on the basis of the amended Act of 30 October 2002 on State aid for enterprises of special significance for the labour market (see Table 3 below). Restructuring under this legislation was supervised by the President of the ARP and based on a restructuring decision within the meaning of Articles 10(1)(4) and 19 of this Act (hereafter 'the restructuring decision'). Such a restructuring decision, approving a restructuring plan of HSW in the form it took at that time and allowing restructuring of public-law liabilities, was issued on 29 April 2005 and amended on 17 June 2005.

⁽¹⁰⁾ Compared to PLN 450 million as indicated in the February restructuring plan and PLN 456,9 million in the November plan.

⁽¹¹⁾ Poland refers to data provided by the consultancy Off Highway Research.

(85) The principal change in the November plan consisted of allowing the debt-to-equity swap: rather than HSW reimbursing two loans granted to it before accession in 2003 and 2004 by the ARP (see Table 2, items 8 and 15) and the interest on these loans, the ARP decided to swap the nominal value of the debt for equity (items 30 and 31 in Table 4). As a result HSW, rather than having to reimburse PLN 97,1 million (the original two loans totalling PLN 75 million plus PLN 22,1 million in non-

reimbursed interest), issued shares worth PLN 75 million which were acquired by the ARP (according to Poland the swap was implemented on 2 July 2007).

(86) The different State aid measures for HSW notified to the Commission and corrected in the light of additional information provided by Poland are presented in the following Tables.

Table 2

Aid granted before 30 April 2004

(in PLN thousands)

No	Stated date of agreement or decision	Granting authority	Form of aid	Nominal amount	Aid amount
1.	2003-12-12	Treasury Office in Stalowa Wola	Write-off of VAT for September 2002	1 047,5	1 047,5
2.	2003-9-15	Treasury Office in Stalowa Wola	Arrangement of instalment payments of VAT for December 2002	4 769,8	155,0
3.	2003-9-15	Treasury Office in Stalowa Wola	Arrangement of instalment payments of VAT for March 2003	1 771,8	52,2
4.	2003-9-15	Treasury Office in Stalowa Wola	Arrangement of instalment payments of VAT for May 2003	2 175,2	77,4
5.	2003-9-15	Treasury Office in Stalowa Wola	Arrangement of instalment payments of PIT for March 2003	623,3	16,0
6.	2003-9-15	Treasury Office in Stalowa Wola	Arrangement of instalment payments of PIT for May 2003	463,4	5,0
7.	2003-2-4	Social Insurance Institution (ZUS). Rzeszów Branch	Arrangement of instalment payments of contributions for June - October 2002	6 252,1	1 211,6
8.	2003-8-28 (*)	Industrial Development Agency (ARP)	Loan	40 000,0	40 000,0
9.	2003-9-15	Treasury Office in Stalowa Wola	Arrangement of instalment payments of VAT for June 2002	696,9	77,1
10.	2003-9-15	Treasury Office in Stalowa Wola	Deferral of payment date of PIT instalment for July 2002	183,9	15,3
11.	2003-9-15	Treasury Office in Stalowa Wola	Change of payment dates of PIT instalments for August 2002	211,5	26,8
12.	2003-12-2	Treasury Office in Stalowa Wola	Arrangement of instalment payments of VAT for August 2002	655,5	49,3

(in PLN thousands)

No	Stated date of agreement or decision	Granting authority	Form of aid	Nominal amount	Aid amount
13.	2003-9-5	District Office in Nisko	Instalment scheme of payments for perpetual usufruct	172,7	8,0
14.	2003-3-21	District Office in Nisko	Instalment scheme of payments for perpetual usufruct	20,5	0,3
15.	2004-4-30 (**)	Industrial Development Agency (ARP)	Loan	35 000,0	35 000,0
16.	2004-4-30	Ministry of the Treasury	Increase of initial capital	40 000,0	40 000,0
17.	2003-11-7	Ministry of Science and Information Technologies	Subsidy	637,0	465,0
18.	2003-5-20	District Office in Stalowa Wola	Refund of expenditure	3,3	2,4
19.	2003-5-20	District Office in Stalowa Wola	Refund of expenditure	3,3	2,4
20.	2002-12-6	Podkarpackie Treasury Office	Write-off of VAT debt	1 210	1 210
21.	2002-12-6	Stalowa Wola City Council	Write-off of real-estate tax debt	496,8	496,8
22.	2002-12-11	Social Insurance Institution (ZUS). Rzeszów Branch	Write-off of unpaid contributions and interest	11 088,1	11 088,1
Total I				147 482,6	131 006,2

(*) This measure was the subject of the debt-to-equity swap implemented in July 2007 and will therefore also be considered in Table 4.

(**) Ibidem.

Table 3

Aid granted after 30 April 2004 on the basis of the amended Act of 30 October 2002 on State aid for enterprises of special significance for the labour market

(in PLN thousands)

No	Date of transfer of assets and liabilities to the Operator	Type of restructured claims	Nominal amount	Aid amount
23.	2005-6-20	Restructuring of VAT and PIT claims	10 696,6	Aid amount not specified by the Polish authorities
24.	2005-6-20	Restructuring of claims in respect of environmental charges and interest	5 826,5	Idem
25.	2005-6-20	Restructuring of claims in respect of social insurance (ZUS) contributions, including interest and extension charges	7 333,2	Idem
26.	2005-6-20	Rescheduling of claims in respect of contributions to the State Fund for the Rehabilitation of the Disabled. (PFRON) and interest	996,5	Idem

(in PLN thousands)

No	Date of transfer of assets and liabilities to the Operator	Type of restructured claims	Nominal amount	Aid amount
27.	2005-6-20	Restructuring of claims in respect of real-estate tax due to the Stalowa Wola City Council for September 2002 to June 2003	3 044,3	Idem
Sum 2			27 897,1	19 293,7 (*)

(*) The Polish authorities did not provide information on the aid equivalent of the measure. This aid amount was calculated assuming that 30,84 % of the liabilities restructured under the amended Act of 30 October 2002 on State aid for enterprises of special significance for the labour market would be paid back to the creditors from the proceeds obtained from the sale of the beneficiary's assets, in the procedure provided for in that legislation. The ratio 30,84 % is the figure assumed by the modified restructuring decision of 17 June 2005. The amount written-off will then be 69,16 % of the overall liabilities. The aid equivalent is 100 % of the liabilities written off.

Table 4

Aid granted after 30 April 2004

(in PLN thousands)

No	Alleged date of disbursement of aid	Granting authority	Form of aid	Nominal amount	Aid amount
28.	2004-12-21 - 2005-10-19	Different authorities	Deferral of public-law liabilities	22 094,4	0,259
29.	2005-4-25	Social Insurance Institution (ZUS). Rzeszów Branch	Deferral of public-law liabilities	16 386,2	0,0
30.	2007-7-2	Industrial Development Agency (ARP)	Debt-to-equity swap (see measure 8 in table 2)	40 000,0	40 000,0
31.	2007-7-2	Industrial Development Agency (ARP)	Debt-to-equity swap (see measure 15 in Table 2)	35 000,0	35 000,0
Total 3				113 480,6	75 259,0

Table 5

Measures granted and planned

(in PLN thousands)

	Category of measure	Nominal amount	Aid amount
I	Restructuring aid granted prior to 30 April 2004	147 482,6	131 006,2
II	Restructuring aid granted on the basis of the amended Act of 30 October 2002 on State aid for enterprises of special significance for the labour market	27 897,1	19 293,7
III	Deferral of public-law liabilities — Measures claimed as <i>de minimis</i> by Poland (*)	22 094,4	0,259
IV	Deferral of public-law liabilities by the Social Insurance Institution (ZUS) (**)	16 386,2	0,0
V	Debt-to-equity swap — granted on 2 July 2007 by the ARP	75 000,0	21 200,0

(*) Granted after December 2004.

(**) Granted in 2005.

7. ASSESSMENT OF THE MEASURES

7.1. Competence of the Commission

- (87) As some of the events relevant for the present case took place before Poland's accession to the European Union on 1 May 2004, the Commission must first determine whether it is competent to act with regard to the measures in question.
- (88) Measures that were put into effect before accession and are not applicable after accession cannot be examined by the Commission either under the interim mechanism procedure, governed by Annex IV, paragraph 3 of the Treaty of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia to the European Union, or under the procedures laid down in Article 88 of the EC Treaty. Neither the Accession Treaty nor the EC Treaty requires or empowers the Commission to review these measures.
- (89) However, measures put into effect after accession constitute new aid and fall within the competence of the Commission under the procedure laid down in Article 88 of the EC Treaty. The criterion determining the moment at which a certain measure was put into effect is the legally binding act by which the competent national authorities undertake to grant aid ⁽¹²⁾.
- (90) Individual aid granted prior to accession is considered inapplicable after accession if the exact amount of the State's financial exposure through that aid measure was known when the aid was granted.
- (91) On the basis of the information provided by the Polish authorities, the Commission has been able to determine that the measures listed in Table 2 above were granted before accession and are not applicable thereafter. The Commission is not therefore competent to assess their compatibility with the common market. However, they have to be taken into account for determining the compatibility of aid measures granted or to be granted after accession. They amount to PLN 147 million (EUR 35 million) ⁽¹³⁾.
- (92) With regard to the measures granted on the basis of the amended Act of 30 October 2002 on State aid for enterprises of special significance for the labour market, which

are listed in Table 3, the Commission's doubts as to the point in time at which they were granted have not been allayed. The Polish authorities have not provided new arguments in this respect in their comments on the decision to initiate the formal investigation procedure. The consent of the individual granting authorities to restructure their claims under this legislation is necessary but not sufficient for such restructuring to take place. The decisive element of the procedure under this Act is the restructuring decision. The President of the ARP issued the restructuring decision on 29 April 2005 and the Commission therefore considers that these measures were granted after accession. The Commission is therefore competent to assess their compatibility with the common market. As these measures were granted in contravention of the standstill clause in Article 88(3) of the EC Treaty, they constitute unlawful aid amounting to PLN 27,897 million (EUR 6,61 million).

- (93) Lastly, if the measures listed in Table 4 constitute State aid, the Commission is competent to assess their compatibility with the common market, as they were clearly granted after accession.

7.2. Justification of the revocation

- (94) Article 9 of Regulation (EC) No 659/1999 provides that 'the Commission may revoke a decision [...] after having given the Member State concerned the opportunity to submit its comments, where the decision was based on incorrect information provided during the procedure which was a determining factor for the decision. Before revoking a decision and taking a new decision, the Commission shall open the formal investigation procedure pursuant to Article 4(4).'
- (95) As already mentioned, the decision of 20 December 2006 was based on incorrect information, namely the restructuring plan of February 2006, which was no longer valid at the time when the Commission took that decision. The Polish authorities did not submit the updated version of the restructuring plan while the investigation procedure initiated in November 2005 was still under way, even though the plan had already been approved by the relevant bodies of HSW. The restructuring plan is the most important source of information for the Commission to assess the compatibility of restructuring aid. Hence, though the February plan had not been a false source of information, it became one after the November plan was adopted. The February plan, on which the Commission based the decision of 20 December 2006, was therefore an incorrect source of information at the time the Commission adopted that decision.

⁽¹²⁾ See Case T-109/01 *Fleuren Compost v Commission* [2004] ECR II-127, para. 74.

⁽¹³⁾ The amount of PLN 147 million includes the loans granted to HSW by the ARP before accession amounting to PLN 75 million. These two loans were in 2007 converted into equity and are, thus, also featured as a debt-to-equity swap in Table 4.

- (96) The Commission therefore considers that the decision of 20 December 2006 was based on incorrect information such that its reasoning has to be modified and that decision should thus be revoked pursuant to Article 9 of Regulation (EC) No 659/1999.

7.3. State aid within the meaning of Article 87(1) of the EC Treaty

- (97) Article 87(1) of the EC Treaty provides 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 and affects trade between Member States is incompatible with the common market.

- (98) The Polish authorities have not contested that the measures listed in Tables 2 and 3 constitute State aid.

7.3.1. February plan

- (99) The Polish authorities submit that the aid in the form of the deferral of the payment of HSW's tax and social security liabilities (measures 28 and 29 in Table 4) does not constitute State aid, as it is *de minimis* or the aid element is equal to zero. The Polish authorities base this argument on the calculation of the aid element of the measures.

- (100) The Commission cannot subscribe to the method of calculation used by the Polish authorities. These measures are extended to a company in financial difficulties. The risk of debt rescheduling in favour of HSW is higher than for healthy companies, which should be reflected in the interest charged. The reference rate cannot therefore be applied as the benchmark. The calculation method whereby the actual interest rate charged is compared with the reference rate is not appropriate in the present case, so the Commission cannot accept Poland's argument.

- (101) It is established Commission practice⁽¹⁴⁾ that the aid element in the case of firms in difficulty may not exceed the nominal amount. The aid measures in the form of deferrals listed in Table 4 total PLN 38,480 million (EUR 9,12 million).

- (102) The Commission concludes that the measures listed in Table 3 and the deferrals listed in Table 4 as measures 28 and 29 are financed from State resources. They favour an individual undertaking by conferring on it an advantage not available to it on the market. HSW is active in the production of construction machinery, which is sold within the EC under conditions of intensive competition

between operators from different Member States. These measures therefore constitute State aid within the meaning of Article 87(1) of the EC Treaty.

7.3.2. November plan

- (103) In the decision of 20 December 2006, the two loans⁽¹⁵⁾ whose conversion to equity is investigated here were considered to be State aid granted before accession. The aid amount was calculated at 100 % of the nominal value of the loans. The Polish authorities did not question that approach until the Commission decision of 10 October 2007.

- (104) The notified debt-to-equity swap consists of a capital injection by the ARP. It therefore involves State resources. It confers an advantage on the company because, as a company in difficulties, HSW would not have obtained that financing on those conditions on the market. As mentioned above, the Polish authorities admit that the beneficiary is better off thanks to the swap.

- (105) As regards the Polish authorities' suggestion that the debt-to-equity swap met the market-economy creditor test, the Commission notes that HSW was at that time in the process of restructuring and its improved situation at the time of the debt-to-equity swap resulted from earlier State aid. The Commission therefore concludes, on the basis of established practice and case law⁽¹⁶⁾, that the swap does not pass the market-economy creditor test.

- (106) The debt-to-equity swap, which was granted after accession, therefore constitutes State aid, which has not been contested by the Polish authorities.

- (107) All the remaining measures presented in the decisions initiating the formal procedure constitute State aid, which has not been contested by the Polish authorities.

7.4. Compatibility of the aid: derogation under Article 87(3) of the EC Treaty

- (108) The exemptions in Article 87(2) of the EC Treaty do not apply to the present case. As for the exemptions under Article 87(3) of the EC Treaty, since the primary

⁽¹⁴⁾ See cases C 30/98 *Wildauer Kubelwelle, Lautex Weberei und Veredlung* (OJ C 387, 12.12.1998).

⁽¹⁵⁾ These loans appear as measures 8 and 15 in Table 2.

⁽¹⁶⁾ Case T-11/95 *BP Chemicals v Commission* [1998] ECR II-3235.

objective of the aid concerns the restoration of the long-term viability of an undertaking in difficulty, only the exemption of Article 87(3)(c) of the EC Treaty, which allows the Commission to authorise State aid granted to promote the development of certain economic activities where such aid does not adversely affect trading conditions to an extent contrary to the common interest, can be applied.

7.4.1. *Applicable legal basis*

(109) As the Commission is revoking the decision of 20 December 2006 pursuant to Article 9 of Regulation (EC) No 659/1999 and replacing it with this decision, the compatibility of the whole restructuring process has to be verified again.

(110) The Commission will assess the measures constituting new aid and the full restructuring plan (including the February 2006 and November 2006 plans) in accordance with the applicable rescue and restructuring guidelines. The current Community Guidelines on State aid for rescuing and restructuring firms in difficulty⁽¹⁷⁾ entered into force on 10 October 2004. The previous 1999 rescue and restructuring Guidelines⁽¹⁸⁾ ('1999 Guidelines') apply to measures whose notification was registered before this date. According to point 104 of the 2004 Guidelines, the Commission will examine the compatibility with the common market of any rescue and restructuring aid granted without its authorisation and therefore in breach of Article 88(3) of the Treaty on the basis of those Guidelines if some or all of the aid is granted after 1 October 2004, the date of their publication in the Official Journal.

(111) In the present case, many of the measures were notified on 8 October 2004 (two days before the entry into force of the 2004 Guidelines). However the Commission was also informed by Poland in its letter dated 7 March 2006 about additional measures granted to HSW in breach of Article 88(3) of the EC Treaty. The measures described in rows III and IV of Table 5 were all granted after December 2004 and hence after the publication of the 2004 Guidelines. Furthermore, the debt-to-equity swap was granted only in July 2007. The Commission therefore concludes that the 2004 Guidelines apply to the present case with regard to both the notified and the non-notified measures, since they all relate to a single restructuring plan.

(112) In order to assess the compatibility of the new restructuring aid, it is necessary to look at the restructuring as a whole. All the aid measures, not just the new aid, have to

be taken into account to establish whether the plan will result in the restoration of viability, to establish that the aid is limited to the minimum necessary and to determine the appropriate compensatory measures to limit the distortion of competition.

7.4.2. *Eligibility of the firm*

(113) For all the reasons given in the initial decision initiating the formal investigation procedure⁽¹⁹⁾, the company is a company in difficulty as defined in section 2.1 of the 2004 Guidelines and is therefore eligible for restructuring aid.

7.4.3. *Restoration of viability*

(114) Point 35 of the 2004 Guidelines states that 'the restructuring plan, the duration of which must be as short as possible, must restore the long-term viability of the firm within a reasonable timescale and on the basis of realistic assumptions as to future operating conditions. [...] The improvement in viability must derive mainly from internal measures [...]'.

Decision of 23 November 2005 initiating the formal investigation procedure

(115) The first crucial problem of HSW was its high indebtedness. The Commission notes that the financial restructuring has been completed.

(116) In the original decision initiating the formal investigation procedure, the Commission expressed doubts because the restructuring was mainly financial in nature and expressed concern that insufficient account was being taken of industrial aspects of the restructuring. In their comments, the Polish authorities have provided sufficient evidence that the obsolete organisational structure was actually one of the key problems that the company was facing. This problem was addressed by separating the part of the company directly linked to production from the parts to be sold. This was the reason for the temporary creation of the independent HSW-Trading by HSW.

(117) The sale of shares in subsidiaries and the spinning-off and sale of certain service departments was planned as one of the main elements of restructuring. In the decision initiating the formal investigation procedure, the Commission expressed doubts as to whether the sale plans were realistic. However, HSW has in fact realised more than four times the forecast revenue from the sales.

⁽¹⁷⁾ OJ C 244, 1.10.2004, p. 2.

⁽¹⁸⁾ OJ C 288, 9.10.1999, p. 2.

⁽¹⁹⁾ See in particular points 85 *et seq.* of the initial opening decision.

(118) Another key factor for the success of the restructuring was the situation regarding the ownership of the trading company Dressta. The controlling share in Dressta held by one of the competitors of HSW obstructed full access to the important North American market. The problem is now solved as HSW has gained control of the company [...].

(119) The restructuring of employment to reduce the workforce by more than 1 000 workers is a real and credible cost-cutting measure.

(120) HSW achieved a profit for the first time in 2005. It also made a profit in the first half of 2006. The November plan suggested that profits would fall at the end of the restructuring period (2007), due to high restructuring costs and the fact that profits for 2005 were inflated by the one-off sale of assets in that year. However, from 2007 onwards, the net result is expected to improve and [...] by 2012 [...]. By the end of the restructuring period the liquidity problem should have been resolved.

Decision of 10 October 2007 re-initiating the investigation procedure

(121) The Commission had doubts as to whether the November plan could restore the long-term viability of HSW.

(122) First, it seemed that HSW was in constant need of additional cash-flow and that the restructuring measures envisaged in the February plan were insufficient, which put into question the credibility of both restructuring plans.

(123) There is nothing in the explanations provided by the Polish authorities to suggest that the additional cash-flow was anything other than a one-off aid measure granted in 2007, following a rather sudden and substantial change in marketing practices by HSW's competitors. The Polish authorities have demonstrated that in the future HSW will in all likelihood be able to generate sufficient cash-flow to offer competitive conditions to its clients and suppliers: the indicators for HSW's financial results after the implementation of various cost-reduction measures are satisfactory. The Commission is therefore satisfied that coverage of those additional cash-flow needs was necessary to keep HSW

afloat pending the completion of its restructuring and that the restructuring plan is aimed at ensuring that such financial gaps do not reoccur.

(124) Second, on the question of hedging policy, the Polish authorities provided sufficient evidence that the company is now tackling the exchange-rate risk in a more efficient way and hence that one of the principal causes of the company's difficulties has been remedied. Focusing its sales on the more profitable markets of bulldozers and pipelayers has resulted in operating profits. By accounting for most of its sales in euro rather than US dollars, HSW has already decreased variations in the accounting currency and this strategy should bring further benefits in the future when the proportion of sales carried out in euro is set to increase further. Indeed, this strategy is crucial to the company's return to profitability. If HSW continues to [...] as is envisaged both in the February plan and in the November plan it should be able to increase its profits, even if all other factors remain equal. The credibility of HSW's restructuring strategy has also been boosted by the confidence of market operators in the success of the restructuring.

(125) As regards the debt-to-equity swap, the Commission notes that the ARP swapped the nominal value of its loans for equity and thereby became a shareholder of HSW.

(126) The Commission notes that the decision of 20 December 2006 considered the aid element of these two loans to be 100 % of the loan principal, i.e. a total of PLN 75 million, as indicated by the Polish authorities in the notification.

(127) This debt-to-equity swap changes the form of State aid, since instead of having to reimburse PLN 96,2 million ⁽²⁰⁾ (original two loans totalling PLN 75 million plus PLN 21,2 million in interest) to the ARP and paying regular interest, HSW issued shares amounting to PLN 75 million which have been taken over by the ARP.

(128) The Commission notes that the ARP implemented the swap on 2 July 2007 without respecting the standstill clause.

(129) Poland admits that the company was better off after the debt-to-equity swap.

⁽²⁰⁾ These amounts are PLN 1,7 million lower than those presented in the decision of 10 October 2007. Poland explained that the debt-to-equity swap was implemented slightly later than initially planned, so HSW had repaid a higher amount of interest due, meaning that less remained to be repaid.

(130) The Commission notes that the debt-to-equity swap will free assets which had served as security for the loans, thereby improving the cash flow of the beneficiary, enabling it to obtain new credit. In accounting terms, the debt-to-equity swap will have the following impact on HSW's balance sheet. The beneficiary will see its assets increase, since it will not have to use available cash for the reimbursement of the loans. Furthermore, there will be no reduction on the debit side of the balance sheet caused by the repayment of loans. This will also increase the share of equity on the balance sheet, improving both the relative level of indebtedness and HSW's creditworthiness. Thanks to this operation, in the opinion of the Polish authorities HSW will be able to accumulate the resources needed for its proper functioning on the market and for future necessary investments ⁽²¹⁾.

(131) In addition, as regards the profit and loss account, there will be no need to pay interest (a total of PLN 21,2 million) on the loans. Instead HSW would only have to pay potential dividends to the shareholders (including the ARP) in the event of distributable profits.

(132) In view of the above, the Commission concludes that its doubts as to whether the November plan would lead to the restoration of viability have been allayed.

7.4.4. Avoidance of undue distortion of competition

(133) Under points 38 to 42 of the 2004 Guidelines, measures must be taken to mitigate as far as possible any adverse effects of the aid on competitors. The aid must not unduly distort competition. This usually means limiting the company's presence on given markets at the end of the restructuring period. The compulsory limitation or reduction of the company's presence on a given market represents a compensatory factor in favour of its competitors. It should be in proportion to the distortive effects of the aid and, in particular, to the relative importance of the firm on its market or markets.

(134) According to point 56 of the Guidelines, the conditions for authorising aid are less stringent where compensatory measures are carried out in assisted areas. For the purposes of analysing the impact of the restructuring aid on the market and HSW's competitors, the

Commission is taking account of the fact that HSW is located in an Article 87(3)(a) EC Treaty assisted area.

Compensatory measures implemented under the February plan

(135) According to the Polish authorities, HSW plans to reduce production capacity from 1 500 construction machines p.a. to 1 200, i.e. by 20 %. The Commission considers this capacity reduction to be insufficient, as the company is anyway planning to use only 66 % of its capacity at the end of the restructuring, i.e. in 2007. None of the information that the Commission has received from the Polish authorities suggests that the company was actually selling more than 1 200 machines before the restructuring began.

(136) Furthermore, the Polish authorities claim that the beneficiary has sold a number of profitable production companies, thereby limiting its activities and production capacity. At least two of the major subsidiaries sold (HSW-Walcownia Blach Sp. z o.o. and HSW-Huta Stali Jakosciowych) were profitable and sold at a profit. In 2005 the combined turnover of these subsidiaries was PLN 460 million (EUR 109 million), with 1 000 employees, whereas turnover from the core activities of the HSW group (HSW and HSW-Trading) was PLN 430 million (EUR 101,9 million), with 2 400 employees. The two subsidiaries sold were active in the production of final steel products. According to an assessment submitted to the Commission, at the time of their sale these subsidiaries were profitable with a forecast return on sales was about 6 %. These two subsidiaries constituted a very significant part of the HSW group, with profitable activities and good prospects on the market.

Compensatory measures under the November plan

(137) The 2004 Guidelines recognise that different forms of aid can have different effects on competition. Furthermore, in order to limit the distortive effect, point 45 stipulates that the amount of the aid or the form in which it is granted must be such as to avoid providing the company with surplus cash which could be used for aggressive, market-distorting activities not linked to the restructuring process. The Commission doubted whether the compensatory measures under the November plan were sufficient. The Polish authorities admit that the effect of swapping HSW's debt for equity is advantageous for HSW, as it significantly improves the company's cash-flow situation. HSW is better off thanks to this change in the form of State aid. Moreover, HSW plans to use a major part of the free cash-flow to offer its customers

⁽²¹⁾ As explained in footnote 18, these amounts should also be reduced slightly as the overall additional cash is equal to 96,2 million. It can nevertheless be concluded that it cannot be altered significantly.

competitive conditions. The Commission therefore considers that the compensatory measures implemented under the February plan would, on their own, be insufficient, as the swap has an additional distorting effect on competition. As a result, the compensatory measures had to be increased, as they have to be in proportion to the distorting effects of the aid ⁽²²⁾.

(138) The Polish authorities informed the Commission by letter dated 22 December 2008 that additional divestments of assets within the meaning of the first sentence of paragraph 39 of the 2004 Guidelines had been implemented.

(139) The Polish authorities informed the Commission that the beneficiary had sold an additional number of production companies, thereby limiting its activities and production capacity. Six of the subsidiaries sold (HSW-Zakład Kuźnia Matrycowa Sp. z o.o., HSW-Tlenownia Sp. z o.o., HSW-Sprężynownia z o.o., HSW-Lasowiak Sp. z o.o., HSW-Zakład Metalurgiczny Sp. z o.o. and Informatyka Sp. z o.o.) were profitable. The total revenue generated by these companies in the year prior to their sale amounted to PLN 185 million (EUR 43,8 million) and they employed 1 100 workers.

(140) Five of these companies (HSW-Zakład Kuźnia Matrycowa Sp. z o.o., HSW-Tlenownia Sp. z o.o., HSW-Sprężynownia z o.o., HSW-Zakład Metalurgiczny Sp. z o.o. and Informatyka Sp. z o.o.) supplied materials and services to one another within the HSW group as well as to external customers. They supply spare parts such as forged shapes and hot-coiled springs, as well as providing services to other branches of industry, including the rail, machine building, power and mining sectors.

(141) Lastly, the Polish authorities pledged that the ARP would sell its HSW shares by the end of 2009.

(142) As five of the subsidiaries sold by HSW were profitable and were contributing to the production potential of HSW, the Commission is of the opinion that this sale can be considered as a compensatory measure limiting the distortion of competition created by the aid. Taking account of this and the plans to privatise HSW, the Commission considers that the proposed compensatory measures sufficiently limit the distortion of competition created by the aid.

7.4.5. Aid limited to the minimum

(143) Pursuant to points 43 to 45 of the 2004 Guidelines, the aid must be limited to the strict minimum necessary to enable the restructuring of the firm. The form in which the aid is granted must be such as to avoid providing the company with surplus cash which could be used for aggressive, market-distorting activities not necessary for the restructuring process.

(144) In particular, the aid beneficiary is expected to make a significant contribution to the restructuring from its own resources or from external financing on market conditions.

(145) The Polish authorities have provided various details on the amounts considered to be own contributions of the beneficiary to the restructuring costs.

(146) First, the company plans to obtain bank loans totalling PLN 46,9 million (EUR 11,1 million). The Polish authorities have provided sufficient evidence that HSW will be able to obtain such financing on the market, as it already benefited from private financing amounting to PLN 31,9 million (EUR 7,6 million) between 2003 and 2005. The Polish authorities claim that the beneficiary will be able to find market financing by the end of the restructuring period.

(147) Furthermore, in the February plan HSW had included income from the sale of subsidiaries amounting to PLN 112,2 million (EUR 26,6 million). Under the November plan, the total income from the sale of subsidiaries had increased to PLN 126 million (EUR 29,8 million).

(148) Lastly, the beneficiary sold assets amounting to PLN 52,1 million (EUR 12,3 million) under the February plan. Under the November plan this amount increased to PLN 61,4 million (EUR 14,5 million) owing to a further sale of assets.

(149) The Commission's doubts as to whether the own contribution of the beneficiary is significant and reaches the threshold of the 2004 Guidelines have been allayed. The restructuring costs amount to PLN 456,9 million (the financial restructuring costs constitute almost half of the total restructuring costs, the remainder being mainly expenses related to the modernisation of the company's infrastructure and organisational restructuring). As regards the sources of financing of the restructuring, PLN 252,9 million can be considered an own contribution to the restructuring.

⁽²²⁾ See point 40 of the 2004 Guidelines.

This total includes financing from private banks (PLN 61,6 million), revenue from the completed sale or lease of assets (PLN 61,4 million) and revenue from the sale of subsidiaries (PLN 126,4 million) ⁽²³⁾. HSW's own contribution to the overall restructuring is therefore 53,9 %, whereas point 44 of the 2004 Guidelines fixes a 50 % minimum level for large enterprises.

- (150) In the decision of 10 October 2007, the Commission not only raised doubts about the own contribution to the costs of the overall restructuring but expressed the view that the Polish authorities' explanation of the need for the additional cash-flow generated by the debt-to-equity swap had failed to satisfy the Commission that no surplus cash had been provided to HSW. In this respect, the Commission doubted whether the marketing measures designed to enable HSW to compete on the market represented genuine restructuring measures and whether the aid was therefore limited to the minimum necessary. The Polish authorities have allayed these doubts by demonstrating that these measures were necessary for the restoration of viability because HSW needed them in order to stay on the market. It has also been underlined that the additional cash-flow will not be used for the purchase of additional production capacities. The Commission can therefore accept the measures as being necessary for the process of the successful restructuring.

7.4.6. 'One time, last time' principle

- (151) The Commission noted, in the decision to initiate the formal investigation procedure, that HSW — Zakład Zespołów Mechanicznych received restructuring aid granted before accession for the period 2003-2007. It therefore had to be demonstrated that this restructuring aid had had no spillover effects on the parent company. The Polish authorities were also asked to assure the Commission that the restructuring aid to HSW, if approved by the Commission, would not have spillover effects on HSW — Zakład Zespołów Mechanicznych.
- (152) The Polish authorities have assured the Commission that bilateral relations between HSW — Zakład Zespołów Mechanicznych and HSW are based on market terms (including terms of payment and of delivery) and that the companies, as distinct legal entities, keep separate accounts. HSW's sole consideration when choosing HSW — Zakład Zespołów Mechanicznych as a partner for supplying materials was its geographical proximity.

7.4.7. Separation between subsidised special military production and civil production

- (153) In its decision of 23 November 2005 initiating the formal investigation procedure, the Commission raised doubts as to whether the separation between subsidised special military production (cannon) and civil production of construction machinery was sufficient to prevent cross-subsidisation between these two fields of activity. The Polish authorities have provided information assuring the Commission that the current cost-accounting system permits the clear separation of costs for the two types of activities mentioned above.

8. CONCLUSION

- (154) The Commission concludes that the State aid in this case, some of which was granted in breach of the conditions laid down in Article 88(3) of the Treaty, is nevertheless compatible with the common market,

HAS ADOPTED THIS DECISION:

Article 1

The Decision of the Commission of 20 December 2006 on State aid C44/05 (ex NN 79/05, ex N 439/04) is revoked.

Article 2

The State aid in the sum of PLN 66,377 million granted or to be granted in favour of Huta Stalowa Wola SA, some of which was granted in breach of the conditions laid down in Article 88(3) of the Treaty, is compatible with the common market. The aid granted to Huta Stalowa Wola SA in the form of a debt-to-equity swap in respect of loans totalling PLN 75 million is also compatible with the common market.

Article 3

This Decision is addressed to the Republic of Poland.

Done at Brussels, 10 March 2009.

For the Commission

Neelie KROES

Member of the Commission

⁽²³⁾ All three amounts increased compared to the February restructuring plan.

COMMISSION DECISION**of 22 July 2009****on State aid C 18/05 (ex N 438/04, N 194/05 and PL 34/04) awarded by Poland to Stocznia Gdańsk***(notified under document C(2009) 5685)***(Only the Polish text is authentic)****(Text with EEA relevance)**

(2010/175/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

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

Whereas:

I. THE PROCEDURE

- (1) Pursuant to Article 88(2) EC Treaty, Poland notified by letter of 8 October 2004, registered on the same day, restructuring aid measures extended in favour of Stocznia Gdańsk — Grupa Stoczni Gdynia S.A. (Gdańsk Shipyard). Poland informed the Commission of these measures with a view to obtaining legal certainty that they had been granted before accession and therefore did not constitute new aid which could have been examined by the Commission under Article 88 EC Treaty. In the event of the Commission finding these measures to be new aid, Poland asked for them to be approved as restructuring aid. Poland submitted to the Commission the Restructuring Plan for Gdańsk Shipyard (Update) dating from March 2004. The case was registered as N 438/04.
- (2) By letter of 11 November 2004 the Commission asked Poland for supplementary information on case N 438/04, to which Poland replied by letter of 17 January 2005, registered on 21 January 2005.
- (3) Pursuant to point 3 of Annex IV to the Accession Treaty governing the interim mechanism procedure, Poland had notified previously, on 29 April 2004, restructuring

measures in favour of Stocznia Gdynia S.A. ('Gdynia Shipyard'), at that time the parent company of Gdańsk Shipyard. The case was registered as PL 34/04. By letter of 19 May 2004 the Commission asked Poland to submit certain missing documents. These were provided on 16 June 2004. The Commission requested further information by letters of 30 July 2004, 8 October 2004, 23 November 2004 and 4 March 2005, to which Poland replied, respectively, by letters of 3 September 2004, registered on 7 September 2004, 10 November 2004, registered on 15 November 2004, 17 February 2005, registered on 21 February 2005, 30 March 2005, registered on 1 April 2005 and 18 April 2005, registered on 20 April 2005.

- (4) By letter of 8 February 2005, registered on 9 February 2005, Poland agreed to merge the two cases N 438/04 and PL 34/04 as they concerned two companies belonging to the same group — the Gdynia Shipyard Group. The information provided thereafter with respect to PL 34/04 was also deemed relevant to case N 438/04.
- (5) By letter of 22 April 2005, registered on the same day, Poland accepted that the Commission would treat the notification of 29 April 2004 of case PL 34/04 as a notification under Article 88(2) EC Treaty with regard to any measures found to constitute new aid. The case was attributed a new number: N 194/05.
- (6) On 1 June 2005 the Commission adopted a decision to open the formal investigation procedure with respect to the measures examined in case N 438/04 and N 194/05, which was published in the Official Journal ⁽²⁾, and invited Poland and interested parties to submit comments.
- (7) Having been granted an extension of the deadline for submitting comments (letter of 9 August 2005), Poland submitted its comments by letter of 2 September 2005, registered on 5 September 2005.

⁽¹⁾ OJ C 220, 8.9.2005, p. 7.

⁽²⁾ See footnote 1.

- (8) Gdynia Shipyard Group submitted comments by letter of 10 October 2005, registered on 14 October 2005. Comments were also submitted by Ray Car Carriers (by letter of 7 October 2005, registered on 10 October 2005), by the Danish Permanent Representation to the EU (by letter of 7 October 2005, registered on 11 October 2005), by the Danish shipbuilding association Danish Maritime (by letter of 7 October 2005, registered on the same day), by the Solidarity trade union (by letter of 7 October 2005, registered on 10 October 2005) and by the Polish shipbuilding association (by letter of 10 October 2005, registered on 11 October 2005).
- (9) The Commission forwarded these comments to Poland by letters of 26 October 2005 and 12 December 2005⁽³⁾. Poland responded to the comments provided by Gdynia Shipyard Group by letter of 16 January 2006, registered on 18 January 2006. Poland did not provide any comments on the submissions of the other third parties.
- (10) The Commission sought the assistance of an external consultant for the evaluation of the Restructuring Plan for Gdańsk Shipyard (Update) dated March 2004. The consultant transmitted his report to the Commission in December 2005.
- (11) By letter of 13 January 2006, the Commission asked Poland for information on the latest developments in its restructuring strategy for Gdańsk Shipyard and the whole Gdynia Shipyard Group. Poland replied by letter dated 20 February 2006, registered on 22 February 2006, and a meeting between representatives of the Commission, the Polish authorities and Gdynia Shipyard group took place on 22 February 2006. Poland announced that the 2004 restructuring plan for Gdańsk Shipyard was outdated and that it had adopted a new strategy for the restructuring of Gdańsk Shipyard involving its spinning-off from Gdynia Shipyard Group and its privatisation. Poland also announced that an amended restructuring plan was to be submitted to the Commission by 30 June 2006.
- (12) As follow-up to this meeting, the Commission sent a letter to Poland on 8 March 2006, to which Poland replied by letter of 13 March 2006, registered on the same day, announcing a privatisation timetable for Gdańsk Shipyard. Poland provided additional information on the privatisation process by letter dated 29 March 2006, registered on 30 March 2006. The Commission asked for further information by letter of 30 March 2006, to which Poland replied by letter of 19 April 2006, registered on 20 April 2006.
- (13) By letter of 6 April 2006, registered on 10 April 2006, Poland submitted a first draft of the document 'A strategy for the shipbuilding sector (maritime construction shipyards) in Poland 2006-10.' The Commission provided comments by letters of 12 April 2006 and 28 April 2006. The document was finally approved by the Polish Government on 31 August 2006 and sent to the Commission by letter of 1 September 2006, registered on the same day.
- (14) By letter of 16 May 2006, Gdynia Shipyard Group submitted to the Commission the 'Evaluation report of Gdańsk Shipyard — Gdynia Shipyard Group' dated 30 September 2005.
- (15) By letter of 26 May 2006, registered on 30 May 2006, Poland submitted further information on the ongoing privatisation process, including the list of companies which had expressed an initial interest in acquiring Gdańsk Shipyard and the list of companies which had submitted initial offers. By letter of 13 July 2006, registered on 17 July 2006, Poland submitted further information on the ongoing privatisation process, informing the Commission that two companies had submitted binding offers to purchase Gdańsk Shipyard shares and providing a comparative analysis by the privatisation consultant of these offers.
- (16) On 9 June 2006, Gdańsk Shipyard submitted to the Commission the first draft of a modified restructuring plan. Commission representatives visited the yard on 14 June 2006 and made initial comments on the modified restructuring plan. The Commission's external consultant provided his comments in a report dated July 2006. Lastly, the Commission commented on the shortcomings of the modified restructuring plan by letter of 17 July 2006.
- (17) Poland submitted additional comments regarding the modified restructuring plan by letter of 13 July 2006, registered on 17 July 2006.
- (18) Several meetings attended by representatives of the Commission and the Polish authorities were held on the privatisation process and the preparation of the modified restructuring plan: in Brussels on 31 January, 22 February and 10 May 2006 and on the premises of Gdańsk Shipyard on 13 June 2006.
- (19) Poland replied to the Commission's letter of 17 July 2006 by letter dated 31 August 2006, registered on 1 September 2006.
- ⁽³⁾ By letter of 17 November 2005, registered on 18 November 2005, the Polish authorities asked for selected excerpts in English from the third parties' submissions to the Commission to be translated into Polish. The Commission forwarded these translations by letter of 12 December 2005.

- (20) On 4 September 2006, the final version of the modified restructuring plan of the yard dated August 2006 and entitled 'Restructuring Plan for Gdańsk Shipyard — Update' was submitted to the Commission.
- (21) By letter of 12 September 2006, registered on 13 September 2006, Poland provided further information on the restructuring process of Gdańsk Shipyard, stating in particular that the capital of Gdańsk Shipyard and Gdynia Shipyard Group had been separated. The majority of shares in Gdańsk Shipyard was taken over by the state-owned Industrial Development Agency and its subsidiaries. Additional information was submitted by letter of 26 September 2006.
- (22) Poland notified additional new aid for Gdańsk Shipyard by letter of 21 November 2006, registered on 27 November 2006.
- (23) On 7 December 2006 a meeting took place between the Commission and the Polish Minister for Economic Affairs at which the Polish authorities committed to privatise the yard in order to improve the prospects for restoring its viability and to ensure a sufficient own contribution to the restructuring. Poland confirmed this undertaking by letter of 27 December 2006, registered on 4 January 2007, referring to the decision of the Polish Cabinet of 19 December 2006 to adopt a document entitled 'The state of the shipbuilding industry.' The undertaking to privatise the yard by 30 June 2008 was then confirmed in the letter from the Polish authorities of 5 January 2007. Poland requested the Commission to enter into talks on the issue of compensatory measures.
- (24) The Commission visited the yard on 19 December 2006, assisted by its external consultant, to collect the necessary facts and data to evaluate the compensatory measures. The Commission's external consultant submitted his report on the current capacity of the yard on 16 January 2007.
- (25) The Commission replied to the letter of 27 December 2006 by letter of 29 January 2007, in which it called on Poland to submit a proposal for compensatory measures for Gdańsk Shipyard by the end of February 2007.
- (26) By letter of 28 February 2007, registered on the same day, Poland undertook to privatise Gdańsk Shipyard by the end of 2007 and submitted a proposal for compensatory measures.
- (27) On that basis a technical meeting between the Commission, the Polish authorities and representatives of the yard took place on 15 March 2007, dealing mainly with compensatory measures but also with the ongoing privatisation process. The Commission and the Polish authorities agreed that the Commission would enter into direct discussions with Gdańsk Shipyard on technical issues in order to assemble all the data necessary for its assessment of the compensatory measures proposed by Poland.
- (28) By letter to Gdańsk Shipyard dated 29 March 2007, the Commission requested technical information on the capacity of the yard. By letter of 19 April 2007, registered on 3 May 2007, the yard replied to the above request. As the information provided was insufficient, the Commission requested further information by letter dated 10 May 2007, to which the yard replied by letter of 31 May 2007, registered on 7 June 2007. The Commission asked Poland to provide further clarifications by letter of 14 June 2007, in which it indicated that failure to provide all the requested information might lead the Commission to adopt a decision on the basis of Article 10(3) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (information injunction)⁽⁴⁾. Poland replied by letter of 22 June 2007, registered on 26 June 2007. Considering this reply to be insufficient, the Commission adopted a decision pursuant to Article 10(3) of Regulation (EC) No 659/1999 on 19 July 2007.
- (29) The Commission requested comprehensive information on new developments in the privatisation process by letter of 29 May 2007 and reiterated its request by letter of 6 June 2007. Poland responded to these requests by letter of 22 June 2007, registered on 25 June 2007 and, following a further request for information of 28 June 2007, completed its submission by letter of 11 July 2007, registered on the same day. The Commission asked for further information regarding the privatisation process and the planned compensatory measures by letter of 31 July 2007.
- (30) Poland submitted information on the planned compensatory measures by letter dated 20 August 2007, registered on 21 August 2007. Further information on the compensatory measures was submitted by letter of 30 August 2007, registered on the same day and by letter of 4 September 2007, registered on 10 September 2007. The Commission replied by letter dated 3 October 2007.

⁽⁴⁾ OJ L 83, 27.3.1999, p. 1.

- (31) From July 2007 the Commission and the Polish authorities corresponded intensively on the privatisation process of Gdańsk Shipyard. The Commission requested information on the privatisation process by letters of 30 July 2007, 13 August 2007, 3 October 2007, 30 November 2007 and 17 January 2008. The Polish authorities submitted information by letters of 21 August 2007, registered on 27 August 2007, 24 September 2007, registered on 25 September 2007, 23 October 2007, registered on 24 October 2007 and 25 October 2007, registered on 29 October 2007. By letter of 19 December 2007, registered on 20 December 2007, Poland indicated that ISD Polska would take over new shares in the yard, thus, acquiring control over the company. Supplementary information was submitted by ISD Polska, the new owner of Gdańsk Shipyard, by e-mail of 25 January 2008.
- (32) At the same time, by letter of 14 June 2007, the Commission asked the Polish authorities to provide information on the State aid received by Gdańsk Shipyard after the launch of the formal investigation procedure. The Polish authorities replied by letter of 11 July 2007, registered on the same day. The Commission asked for further explanations by letter of 13 November 2007. Poland replied by letter of 9 January 2008, registered on the same day.
- (33) On 24 January 2008, when a meeting took place between the Polish authorities, the new majority owner of Gdańsk Shipyard, ISD Polska, and the Commission, technical discussions started concerning the new majority owner's plans for restructuring the yard. The Polish authorities submitted information by letters of 25 January 2008, registered on 28 January 2008, and of 30 January 2008 and 4 February 2008, registered on the same days. Further information was submitted by letters of 14 February 2008, registered on 19 February 2008, 15 February 2008 and 21 February 2008, both registered on 3 March 2008, 26 February, registered on 12 March 2008, 10 March 2008, registered on the same day, and 10 April 2008 and 11 April, both registered on 17 April 2008. The Commission replied by letters of 30 January, 14 February, 25 February and 28 February 2008. On 11 February and 18 March 2008 meetings took place involving the Polish authorities, representatives of ISD Polska and the Commission.
- (34) By letter of 22 April 2008, the Commission again called on Poland to submit a comprehensive draft restructuring plan for the yard. In that letter the Commission indicated that in the event of failure to provide the requested information it might adopt a decision pursuant to Article 10(3) of Regulation (EC) No 659/1999.
- Following this letter the Commission received information from the yard by letters dated 23 April 2008, registered on the same day, and 25 April 2008, registered on 29 April 2008. By letter dated 30 April 2008 the Commission repeated its request for information. Poland submitted additional information by letter of 12 May 2008, registered on 13 May 2008, and ISD Polska provided additional information by letters of 9 May 2008, registered on the same day, 16 May 2008, registered on 26 May 2008, and 26 May 2008, registered on the same day.
- (35) Given that Poland had failed to provide all the information requested by the Commission, on 23 May 2005 the Commission adopted a decision pursuant to Article 10(3) of Regulation (EC) No 659/1999. Poland replied by letter of 26 June 2008, registered on the same day.
- (36) Poland submitted further information by letters of 1 July 2008 and 2 July 2008, both registered on 3 July 2008. By letter of 4 July 2008 the Commission requested additional information, which was provided by Poland by letters dated 7 July 2008, registered on the same day, 8 July 2008, registered on the same day and 8 July 2008, registered on 9 July 2008. Poland submitted further information by letters of 10 July 2008, registered on the same day, and 10 July, registered on 11 July, 11 July 2008, registered on the same day, 16 July 2008, registered on 17 July 2008, 17 July 2008, registered on 18 July 2008, 18 July 2008, registered on 25 July 2008, 21 July 2008, 28 July 2008, 4 August 2008, 13 August 2008, 20 August 2008, 21 August 2008, 25 August 2008, 1 September 2008, 8 September 2008, 9 September 2008, and 10 September 2008, all registered on the date of their submission.
- (37) On 12 September 2008 Poland submitted a revised joint restructuring plan for Gdańsk Shipyard and Gdynia Shipyard. Further information was submitted by Poland by letters of 16 September 2008, 17 September 2008, 19 September 2008, 23 September 2008, 25 September 2008, 26 September 2008, 1 October 2008, 2 October 2008, 3 October 2008, all registered on the date of their submission. Further information was submitted by letters of 6 October 2008, registered on 7 October 2008, and 22 October 2008, registered on the same day. By letter of 3 November 2008, registered on 4 November 2008, Poland stated that it would submit a stand-alone plan for Gdańsk Shipyard. By letter of 4 November, registered on 5 November 2008, the Polish authorities submitted an incomplete draft restructuring plan for Gdańsk Shipyard.

- (38) On 6 November 2008 the Commission adopted a negative decision on Gdynia Shipyard⁽⁵⁾ in which it found the restructuring plan prepared by ISD Polska for Gdynia Shipyard and Gdańsk Shipyard incompatible with the State aid rules.
- (39) On 8 December 2008 Poland submitted a stand-alone restructuring plan for Gdańsk Shipyard. Further information was submitted by letter of 11 December 2008, registered on the same day.
- (40) By letters of 23 December 2008, registered on 12 January 2009, and 13 February 2009, registered on the same day, the Commission requested further information, which was provided by Poland by letters dated 30 January and 20 February 2009, both registered on the date of their submission.
- (41) The Commission requested further clarifications by letter of 8 April 2009, registered on the same day. Poland submitted additional information by letters of 16 and 28 April 2009, both registered on the date of their submission.
- (42) On 8 May 2009 Poland submitted a revised restructuring plan for Gdańsk Shipyard. The plan was registered on the same day. Poland submitted further clarifications by letters of 21 May 2009, 1 June 2009 and 5 June 2009, all registered on the date of their submission.

II. DETAILED DESCRIPTION OF THE AID

1. The company

- (43) The aid recipient is Stocznia Gdańsk S.A. ('Gdańsk Shipyard'). The company is located in the Gdańsk-Gdynia-Sopot region in the north of Poland.
- (44) The activities of Gdańsk Shipyard comprise construction of sea-going vessels and other shipbuilding-related activities such as production of parts of vessels and steel parts as well as various ancillary services.
- (45) Gdańsk Shipyard went bankrupt in 1996 and in 1998 its assets were purchased by the biggest shipyard in Poland, Gdynia Shipyard, located approximately 20 km from Gdańsk Shipyard. The yard was renamed Gdańsk Shipyard — Gdynia Shipyard Group. Since then, Gdynia Shipyard has concluded contracts, purchased materials and arranged financing for Gdańsk Shipyard's production. Although Gdańsk Shipyard became to a large extent dependent on the parent company, in 2006 the Polish authorities decided within the framework of government strategy that the yards should be separated. In August 2006 the majority of shares in Gdańsk Shipyard were taken over by the State-owned Industrial Development Agency ('the IDA') and its subsidiary Centrala Zaopatrzenia Hutnictwa by way of a debt-for-equity transaction. This transaction separated Gdańsk Shipyard from Gdynia Shipyard.
- (46) Having undertaken in December 2006 to privatise Gdańsk Shipyard to improve the prospects for restoring its viability, on 17 September 2007 the Polish authorities launched the tender procedure for the subscription of shares in the newly increased capital of Gdańsk Shipyard, as per the Resolution of the Extraordinary General Meeting of 10 August 2007. ISD Polska, a subsidiary of Ukrainian steel producer Donbas and already a minority shareholder in Gdańsk Shipyard, submitted a binding offer to purchase the new shares in November 2007. Since January 2008, ISD Polska has been the majority shareholder in Gdańsk Shipyard. Since June 2008 ISD Polska has held 83,6 % of shares, with the remaining stake held by the IDA. The share capital amounts to PLN 405 million.
- (47) Gdańsk Shipyard rents three slipways with a total capacity of approximately 160 000 CGT (according to company figures). The company used to produce mainly container ships, bulk carriers, sections, blocks and hulls for its parent company Gdynia Shipyard and other companies. Following privatisation, in 2007 and 2008 the yard focused on producing hulls of smaller specialised vessels and semi-equipped hulls. In addition the yard produces blocks and sections for other yards and steel structures for various industries and construction businesses.
- (48) At end-2006 the yard employed 2 893 workers, 60 % being directly engaged in production. In 2008 the workforce was reduced to 2 235, a fall of 23 %.
- (49) The restructuring of Gdańsk Shipyard began as early as 1998, immediately after it was declared bankrupt and its assets were taken over by Gdynia Shipyard. According to the information provided by the Polish authorities, Gdynia Shipyard Group (to which Gdańsk Shipyard belonged until August 2006) first experienced difficulties in 2002. In fact, after the bankruptcy in 1996, Gdańsk

⁽⁵⁾ Commission Decision C(2008) 6771 of 6 November 2008 in case C 17/05 Restructuring aid for Stocznia Gdynia, not yet published.

Shipyard made a profit for the first time in the first half of 2002 and afterwards began to make significant losses. The problems of the Group naturally spilled over to Gdańsk Shipyard. The factors contributing to the difficult financial situation were external, such as Asian competition, the zloty's strong position against the dollar, difficulties with accessing financing for ships following the problems of Stocznia Szczecin Porta Holding S.A. and the fall of a gantry crane in Gdynia Shipyard during a storm in 1999. Other factors were of a more internal nature. In its attempt to fill its order book, especially after the increase in its production potential following the acquisition of Gdańsk Shipyard in 1998, Gdynia Shipyard took a number of managerial decisions which proved to be problematic. Gdynia Shipyard assumed design, technological, financial and commercial

risks (new products, prototypes, loss-making construction of vessels new for the yard: small bulk carriers, chemical carriers, ro-lo vessels, chemical-gas carriers, bulk-container carriers and general cargo vessels). The rate at which the yard reduced operating costs was also unsatisfactory.

- (50) The Group's financial difficulties led to arrears in settling public and civil law obligations and wages, shortages in supplies of materials, slowdowns in production processes, increased costs (labour consumption, penalties), and delays in completing contracts.
- (51) The following data on the operation of the shipyard has been made available.

Table 1

Operation of Gdańsk Shipyard

	1999	2000	2001	2002	2003	2005	2006	2007	2008
Turnover	153	212	251	168	98	185,6	221	308	248
Operating result (1999 to 2003); Net result (2005 to 2008).	- 32	- 49	- 38	- 14 (*)	- 47	- 100	- 71	- 237	- 17

(*) The first half of 2002 was a break-through for the yard (in restructuring since 1998), when for the first time it made a profit on a half-year basis. However, the overall result for 2002 was still negative.

2. Decision to initiate proceedings under Article 88(2) of the EC Treaty

- (52) In its decision to open a formal investigation, the Commission decided that a number of measures indicated in part A of Annex II to the decision had been granted to Gdańsk Shipyard prior to 1 May 2004 and were not applicable after accession within the meaning of point 3 of Annex IV to the Accession Treaty and, therefore, would not be examined under the procedure laid down in Article 88(2) of the EC Treaty. Those measures are therefore not caught by this decision. Nonetheless, they had to be taken into account when assessing the compatibility with the common market of the measures granted after accession.
- (53) The Commission also indicated that some of the measures for Gdańsk Shipyard constituted new aid because they had been granted after Poland's accession to the EU on 1 May 2004 or had not yet been granted at the time of the decision. The Commission listed these measures in part B of Annex II to the decision.
- (54) In essence, the Commission argued that no legally binding decision had been taken on the measures listed in part B of Annex II to the decision prior to Poland's accession, although it recognised that some preliminary

steps had been taken at that time with a view to adopting a legally binding decision.

- (55) With regard to the restructuring of public debt under the Chapter 5a procedure based on the State Aid (Enterprises of Special Significance for the Labour Market) Act of 30 October 2002, as amended ⁽⁶⁾ (measures 10-16 of part B of Annex II to the Decision) the Commission concluded that a restructuring decision issued by the Chairman of the IDA, the government agency responsible for administering the Chapter 5a procedure, would constitute a legally binding decision to award aid. In this case, however, no such restructuring decision had been issued prior to accession ⁽⁷⁾. A decision issued by the Chairman of the IDA on 30 April 2004 approving the March 2004 restructuring plan for Gdańsk Shipyard did not fulfil the procedural and substantive requirements to qualify as a restructuring decision and thus did not constitute a legally binding decision to award aid.
- (56) The Commission accepted Poland's explanation that the interest accrued on these public-law debts would be automatically written off together with the principal in view of its ancillary nature, without it being necessary to issue a separate decision.

⁽⁶⁾ The legal basis is described in detail in the decision to open a formal investigation, part 3.2.

⁽⁷⁾ The decision to restructure Gdańsk Shipyard had in fact been issued on 30 December 2004.

- (57) The Commission did not find any evidence of legally binding decisions for a series of measures listed as measures 17-22 in part B of Annex II to the decision. These measures related to restructuring of public liabilities on the basis of legal acts other than the above-mentioned Act of 30 October 2002. As regards the guarantee listed as measure 23 of part B of Annex II to the decision, the Commission responded in particular to Poland's main argument, namely that this measure had been included in the March 2004 restructuring plan for Gdańsk Shipyard, which had been approved by the shipyard's Supervisory Board, on which the Treasury was represented.
- (58) The Commission found in particular that the Supervisory Board had not been empowered to adopt decisions with financial repercussions for the shareholders in so far as the shareholders had not taken the requisite steps to that end. The Commission also found that, even assuming that the Supervisory Board was entitled to take such decisions on behalf and on account of the shareholders, it remained unclear whether such a decision would create a positive obligation on the part of the Treasury to award State aid, since it is not normally possible to assimilate actions taken by the state as a market player with actions taken by the state in pursuance of various public goals.
- (59) The Commission also noted that notification had been given of measures 24 and 25 of part B of Annex II to the Decision (cancellation of debt and capital injection) as alternatives in the light of Gdynia Shipyard's being unable to realise the planned capital injection in Gdańsk Shipyard; hence it was clear that these measures had not been granted before accession and that they constituted planned new aid.
- (60) Furthermore, the Commission noted that Gdynia Shipyard Group had been benefitting from production guarantees provided by the Export Credit Insurance Corporation, the Polish export credit agency. The Commission raised doubts as to the commercial nature of these guarantees since they had been issued within the framework of the Export Credit Insurance Corporation's non-commercial activities (with Treasury guarantees). Considering that the group was in financial difficulties, the Commission doubted whether the premiums charged properly reflected the risk involved and whether the collateral required by the Export Credit Insurance Corporation was sufficient.
- (61) Having found that a number of measures for Gdańsk Shipyard constituted new aid, the Commission expressed doubts that any of the conditions for the aid to be approved as restructuring aid had been met.
- ### 3. Comments from interested parties
- (a) Comments by Gdynia Shipyard Group
- (62) The Commission notes that Gdańsk Shipyard itself did not submit comments on the decision to open the formal investigation. However the comments submitted by its parent company also addressed the Commission's conclusions on its competence in respect of the measures listed in part B of Annex II to the decision and in respect of the Commission's doubts on the compatibility of this aid.
- (63) With regard to the restructuring of public debt under the Chapter 5a procedure, Gdynia Shipyard Group argued that the aid had been awarded by the restructuring decision issued by the Chairman of the IDA. Gdynia Shipyard Group maintained, however, as did Poland in the initial phase of the Commission's investigation, that the decision concerning Gdańsk Shipyard had been adopted by the Chairman of the IDA prior to accession, on 30 April 2004.
- (64) Gdynia Shipyard Group argued that it was the agreement of all the individual public creditors to the restructuring under the Chapter 5a procedure which constituted the award of the aid, prior to accession ⁽⁸⁾.
- (65) Contrary to what Poland stated in the first phase of the Commission's investigation, Gdynia Shipyard Group argued that no default interest had accrued after 30 June 2003 on the public-law debts restructured under Chapter 5a.
- (66) Gdynia Shipyard Group also commented on other aspects of the decision. In particular, it stated that the production guarantees provided to the yard by the Export Credit Insurance Corporation did not constitute State aid. Gdynia Shipyard Group argued that the Export Credit Insurance Corporation guarantee scheme was a self-financing system in which, over the long-term, the premiums collected exceeded the risks covered and the amounts actually paid out. Gdynia Shipyard Group described the conditions in which the Export Credit Insurance Corporation issues these guarantees (premiums and type of collateral required).
- ⁽⁸⁾ For details see recital 67 of the Commission decision to open a formal investigation.

(67) With regard to the requirement that aid be limited to the minimum necessary, the recipient argued that the amount of the aid had been limited to the strict minimum, and that it would be justified to award more aid, if available. Gdynia Shipyard Group also suggested that even if the Commission defined the restructuring costs narrowly (i.e. as not including the running costs of the yard), the financing component of these costs free of State aid would still be of the order of 30 %, thus satisfying the 1999 Restructuring Guidelines ⁽⁹⁾.

(68) Gdynia Shipyard Group also argued that the State aid to the group did not distort competition in Europe, claiming that the real competitive threat to European shipyards came from the Far East. The recipient acknowledged that container vessels were also built in other European shipyards, particularly in Germany, but claimed that these vessels differed in terms of design and technical specifications.

(b) Comments by other interested parties

(69) Denmark and Danish Maritime supported the Commission's efforts to ensure that State aid was granted in line with the applicable rules. They pointed out that, as a result of the competitive situation in the world shipbuilding market, a number of Danish shipyards had closed or faced bankruptcy without any State aid being provided. They also confirmed that the product range of the Danish yards was similar to that of the Polish yards, with the result that the Danish yards could be affected by unfair competition. Denmark also urged the Commission to require a reduction in capacity at Gdańsk Shipyard so that State aid was not used to increase overcapacity worldwide.

(70) Ray Car Carriers, as the largest customer of Gdynia Shipyard Group and a minority shareholder of the parent company of Gdańsk Shipyard, stressed the importance of the group to its own operations in view of its ongoing contracts with the yard.

(71) The Solidarity trade union highlighted the declining situation at the yard, arguing that speedy restructuring was needed. The union described some of the restructuring measures already undertaken at the yard and expressed the belief that, with the technology and workforce available to it, it would join the ranks of the profitable European shipyards. State aid was therefore necessary to implement the restructuring plan.

(72) The Polish shipbuilding association Forum Okrętowe explained the reasons for the yard's difficulties and expressed its support for the restructuring process and for the use of State aid to that end.

(c) Comments by Poland

(73) Like the Gdynia Shipyard Group, Poland commented on aspects relating to both the Commission's competence and the compatibility of the aid with the common market.

(74) With regard to the restructuring of public debt under Chapter 5a, Poland did not put forward any additional arguments. However, in its response to the Gdynia Shipyard Group's comments, Poland expressed disagreement with the latter's interpretation of Polish law.

(75) With regard to the measures indicated in part B of Annex II to the decision, Poland did not rebut the conclusions of the Commission as indicated in the decision to open a formal investigation.

(76) As regards the compatibility of the new aid with the common market, Poland stated that the March 2004 restructuring plan constituted a sound economic basis for the yard's restructuring process. While Poland acknowledged that the restructuring process had been carried out with limited financial resources, it argued that it had already improved the yard's financial situation. In addition, the Polish authorities provided a brief description of the restructuring measures enshrined in the March 2004 restructuring plan in order to demonstrate that restructuring was not purely financial in scope. They defended the compensatory measures proposed in the March 2004 restructuring plan and implemented within Gdynia Shipyard Group. With regard to the requirement that aid be limited to the minimum necessary, Poland stated that the aid was not used for purposes other than restructuring and claimed that the aid intensity amounted to 31 %, i.e. aid as a percentage of the total restructuring costs, including operating costs. Poland argued that the planned capital injection from Gdynia Shipyard to Gdańsk shipyard, re-negotiation of contract prices and the cumulated profits and positive cash flow generated by the yard in future should be regarded as constituting an 'own contribution'.

(77) The Polish authorities described in detail how the Export Credit Insurance Corporation's guarantee system operated and argued that these guarantees had been provided on market terms and thus did not constitute State aid.

⁽⁹⁾ The recipient asserts that the 1999 Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 288, 9.10.1999, p. 2) apply.

4. Chronological description of decisive events following the Commission's decision to open the formal investigation

- (78) The Commission investigation and the events which occurred in the course of it are summarised below.
- (79) In reply to the Commission's decision to open the formal investigation, the Polish authorities submitted explanations of two types in autumn 2005: first, questioning the competence of the Commission to act in respect of the measures identified as new aid in its decision, and, second, arguing that even if these measures constituted new aid, they were compatible with the common market as restructuring aid. The reaction of Gdynia Shipyard Group to the Commission's decision was of a similar nature. Both are described above.
- (80) In support of its argument on the compatibility of the aid, Poland referred to the 2004 restructuring plan for Gdańsk Shipyard submitted to the Commission in October 2004 with regard to which the Commission opened the formal investigation because of doubts as to its credibility and robustness. Nevertheless, the Commission carefully studied the 2004 restructuring plan and sought assistance from an external consultant. The Commission concluded that the 2004 restructuring plan did not fulfil any of the conditions for the approval of restructuring aid prescribed by the relevant guidelines. At a meeting on 22 February 2006 the Commission explained its main concerns to the Polish authorities. The Commission highlighted the main weaknesses of the 2004 restructuring plan: low investments, low planned productivity, high production costs, in particular overheads, and insufficient strengthening of the yard's own capital base. The aid provided to the yard had to be regarded as operating aid in support of debt restructuring and the yard's continued operation.
- (81) In December 2005 the Commission learned from public sources⁽¹⁰⁾ that Korporacja Polskie Stocznia ('KPS'), a capital group under public ownership, had been created with the aim of integrating the three largest Polish shipyards in Gdynia, Gdańsk and Szczecin under one umbrella ('the consolidation plan'). The main role of KPS was to finance the shipyards' production. Poland did not inform the Commission about the consolidation plan at any stage of the procedure, either prior to or after the decision to open the formal investigation.
- (82) At the same time, the Commission learned from the press about ongoing talks on the sale of the shipyards in Gdynia and Gdańsk to strategic investors and on the separation of the two companies, which until that date had operated as part of the same group. The Commission asked the Polish Government by letter of 13 January 2006 to spell out what its strategy for Gdynia Shipyard Group actually was.
- (83) Poland explained by letter of 20 February 2006 that a consolidation plan had indeed been envisaged previously but that it had been discarded and a new restructuring strategy for the Polish shipbuilding sector would be adopted shortly.
- (84) At the meeting of 22 February 2006 and by letter of 13 March 2006 the Polish authorities informed the Commission that the 2004 restructuring plan for Gdańsk Shipyard was outdated and had to be amended. The Polish authorities undertook to submit the amended restructuring plan by June 2006. They also presented the main features of the new restructuring strategy for the Polish shipbuilding sector. First, Gdańsk Shipyard was to be separated from Gdynia Shipyard Group as soon as possible. Second, the Government was to allow an injection of private capital into Gdańsk Shipyard with the long-term objective of fully privatising the yard.
- (85) The Commission received the first draft of the 2006 restructuring plan on 9 June 2006. Having visited the yard and received the opinion of an external consultant, the Commission expressed serious concerns about this draft during the on-site visit on 14 June 2006 and in writing on 17 July 2006, pointing out that the restructuring plan did not appear to be achievable and would be unlikely to allow the yard to restore long-term viability without unduly distorting competition. The Commission noted that the restructuring strategy did not seem to be based on a thorough analysis of the profitability of the different activities of the yard in the past, but instead assumed considerable expansion in shipbuilding activity, that there was no real prospect of financing restructuring from resources free of State aid and, lastly, that in view of its expansionist nature, the plan clearly failed to comply with the compensatory measures requirement. Referring to continuous reliance on ship financing guarantees provided by the Export Credit Insurance Corporation, a government agency, the Commission warned the yard and the Polish authorities that these guarantees constituted State aid.
- (86) Despite these warnings, the 2006 restructuring plan eventually submitted by Poland in September 2006, with a two-month delay, did not differ substantially from the first draft.

⁽¹⁰⁾ Minutes of the Council of Ministers of 25 January 2005 and 5 October 2005, published on the website.

- (87) In August 2006, the majority of shares in Gdańsk Shipyard were taken over by the ARP and its subsidiary Centrala Zaopatrzenia Hutnictwa by way of a debt-for-equity transaction (Gdynia Shipyard's shares in Gdańsk Shipyard served as collateral for a loan awarded by the ARP to Gdynia Shipyard, part of which became payable in June 2006). As a result Gdańsk Shipyard was separated from Gdynia Shipyard Group.
- (88) At a meeting on 7 December 2006 and by letter of 29 January 2007 the Commission indicated to the Polish authorities that a preliminary examination had concluded that the 2006 restructuring plan for Gdańsk Shipyard did not comply with any of the conditions for the approval of restructuring aid under the current guidelines.
- (89) The Polish authorities announced at that meeting that they intended to privatise Gdańsk Shipyard. Poland indicated that the privatisation process was to be completed by June 2008. By letter of 28 February 2007 Poland undertook to privatise Gdańsk Shipyard by end-2007. Pending preparation of the privatisation documents, Poland asked the Commission to issue a statement on the necessary compensatory measures for Gdańsk Shipyard so that potential investors could be provided with the correct information.
- (90) In the following months the management of Gdańsk Shipyard conducted talks with various potential investors with a view to finding a strategic investor for the yard who would acquire newly issued shares in the company, thus providing the funds necessary for the restructuring process and taking control of the company.
- (91) At the same time, following an agreement reached with the Polish authorities in December 2006, the Commission was engaged in intensive discussions with the Polish authorities and Gdańsk Shipyard with a view to determining the necessary compensatory measures. By letter of 28 February 2007 Poland undertook to close one slipway at Gdańsk Shipyard after outstanding orders had been completed, i.e. as of January 2010.
- (92) The Commission asked Gdańsk Shipyard to provide information so that it could determine whether this proposal constituted a genuine compensatory measure. Since the information submitted was not complete and did not demonstrate that the compensatory measures proposed by Poland for the yard were sufficient, on 19 July 2007 the Commission adopted a decision pursuant to Article 10(3) of Regulation (EC) No 659/1999 enjoining Poland to submit the information necessary to resolve the issue of compensatory measures at Gdańsk Shipyard.
- (93) The Polish authorities replied by letter of 20 August 2007, arguing that the closure of more than one slipway was not an option as this would make it impossible to restore the yard's long-term viability. However, the study submitted in support of this position was based on the assumption that no restructuring or adjusting measures would be implemented after the slipways were closed. The Polish submission also suggested that the future owner of the yard might consider purchasing a new launching facility, given that the slipways used by the yard to date were rented from third parties. Therefore by letter of 3 October 2007 the Commission noted that the issue of the necessary compensatory measures remained unsolved and that Poland should duly inform potential investors interested in acquiring Gdańsk Shipyard about the State aid it had received after Poland acceded to the European Union, and of the need to prepare a credible restructuring plan based on the adoption of genuine compensatory measures. The Polish authorities also proposed that the scope and method of implementation of the necessary compensatory measures be agreed with the yard's new owner.
- (94) In September 2007 the Polish authorities launched the tender procedure for the subscription of shares in the newly increased capital of Gdańsk Shipyard in accordance with the Resolution of the Extraordinary General Meeting of 10 August 2007. ISD Polska, a subsidiary of Ukrainian steel producer Donbas and already a minority shareholder in Gdańsk Shipyard, submitted a binding offer to purchase the new shares in November 2007. The newly subscribed shares were registered by the competent court in January 2008. ISD Polska also purchased most of the existing shares in Gdańsk Shipyard from Gdynia Shipyard, the IDA and its subsidiary Cenizin. As of January 2008, ISD Polska held 79 % of shares in Gdańsk Shipyard. In April 2008 ISD Polska's parent company set up a new subsidiary: ISD Stocznia. Subsequently, the shares in Gdańsk Shipyard were transferred from ISD Polska to ISD Stocznia, which became the formal owner of Gdańsk Shipyard.
- (95) On 24 January 2008 the first meeting between the Polish authorities, the Commission and the new majority owner of Gdańsk Shipyard — ISD Polska — took place. Intensive technical discussions subsequently took place on the new majority owner's plans for restructuring the yard. On 11 February and 18 March 2008 additional meetings took place between the Polish authorities, representatives of ISD Polska and the Commission.
- (96) In reply to the Commission's requests for information Poland submitted several documents presenting in a non-detailed way alternative strategies for ISD Polska as regards the State aid investigation.

- (97) First, the Commission received a summary document highlighting some features of ISD Polska's restructuring strategy for the yard and based on the assumption that the State aid (EUR 20 million in the opinion of ISD Polska) would be repaid. This was allegedly the basis of ISD Polska's decision to acquire the yard. ISD Polska later indicated at a meeting on 18 March 2008 that this alternative was no longer under consideration, since the recoverable State aid was higher than originally estimated by ISD Polska.
- (98) Second, the Commission received a draft version of the business plan providing for restructuring to be undertaken in accordance with the Guidelines. Under this scenario the yard would diversify into three activities: shipbuilding as the core activity, production of wind power plants and production of steel structures. As regards the yard's capacity, the plan provided for activities to be carried out on the three existing slipways until 2012; these would be replaced by a new floating dock as of 2013. The draft business plan provided for investment of EUR 183 million.
- (99) Third, the Commission received a short analysis from ISD Polska allegedly demonstrating that the immediate closure of two slipways and an output limitation as of 2013 would prevent the yard from restoring viability.
- (100) None of the above-mentioned documents presented by the Polish authorities following privatisation can be regarded as constituting a comprehensive, cohesive restructuring plan as required by the Guidelines.
- (101) By letter of 22 April 2008 the Commission again called on Poland to submit a draft plan for the comprehensive restructuring of the yard. Since the information provided was deemed insufficient, on 23 May 2008 the Commission adopted a decision⁽¹¹⁾ pursuant to Article 10(3) of Regulation (EC) No 659/1999 enjoining Poland to supply all the documentation, information and data necessary to assess whether viability would be restored to Gdańsk Shipyard, and if so, when, whether sufficient compensatory measures would be implemented, whether State aid would be limited to the minimum necessary and what would be the own contribution free of State aid as required by the Guidelines, i.e. to assess whether restructuring aid for Gdańsk Shipyard would be compatible with the common market. The deadline for submitting the information requested was 26 June 2008.
- (102) At a meeting held on 10 June 2008 it emerged that the Polish authorities were conducting intensive talks with ISD Polska and Gdańsk Shipyard on the possible purchase of Gdynia Shipyard and a merger of the two yards. Poland proposed compensatory measures to be implemented in the merged yard and indicated that the new investor had requested additional State aid as a condition for taking part in the privatisation of Gdynia Shipyard. Poland also informed the Commission that ISD Polska was preparing a joint restructuring plan for both yards to be submitted to the Commission by 26 June 2008 further to the information injunction referred to above.
- (103) At the request of the Polish authorities, the Commission informed Poland and ISD Polska at the meeting of 10 June 2008 and again at the meeting of 13 June 2008 that certain framework conditions would have to be met if ISD Polska was to purchase Gdynia Shipyard with the intention of operating it jointly with the one in Gdańsk. These framework conditions were that ISD Polska would have to present a joint restructuring plan for both yards by 26 June 2008, contribute significantly to the restructuring costs and adopt genuine compensatory measures in accordance with the relevant guidelines. The Commission stated that ISD Polska's proposed contribution to the restructuring costs was insufficient, bearing in mind the amount of State aid that the two yards had received in the past and the additional aid that ISD Polska had applied for in connection with privatisation.
- (104) On 26 June 2008 the Commission received a draft restructuring plan dated June 2008 and prepared by ISD Polska entitled 'Restructuring Plan for the New Gdańsk-Gdynia Shipyard', presenting a joint restructuring strategy for the shipyards in Gdańsk and Gdynia (hereinafter the 'joint restructuring plan (ISD)').
- (105) On 12 September 2008 Poland submitted the final 'Restructuring Plan for the New Gdańsk-Gdynia Shipyard' prepared by ISD Polska ('the joint restructuring plan of 12 September'), which was essentially an updated version of the joint restructuring plan of 26 June 2008.
- (106) On 6 November 2008 the Commission concluded the investigation into restructuring aid for Gdynia Shipyard, finding the aid for the yard incompatible with the common market and ordering its recovery⁽¹²⁾. In this decision the Commission rejected the joint restructuring plan of 12 September, since it had not been demonstrated that this plan would restore the long-term

⁽¹¹⁾ Commission Decision of 23 May 2008 (C(2008) 2277).

⁽¹²⁾ Commission Decision C(2008) 6771 of 6 November 2008 in case C 17/05 Restructuring aid for Stocznia Gdynia, not yet published.

viability of the two yards operating within one group, that the aid would be limited to the minimum necessary and that provision would be made for measures to limit the distortion of competition created by the aid.

- (107) In November 2008 the Commission received a draft stand-alone restructuring plan for Gdańsk Shipyard prepared by ISD Polska. Following intensive correspondence between the Commission, the Polish authorities and ISD Polska, on 8 May 2009 the Commission received the final restructuring plan for Gdańsk Shipyard, entitled 'Restructuring Plan for Gdańsk Shipyard. Revised version of the plan of 5 December 2008' and dated 7 May 2009 ('the 2009 Restructuring Plan').

5. The 2009 Restructuring Plan

- (108) The 2009 Restructuring Plan recalls the failure of the 2006 Restructuring Plan to restore viability to the yard and identifies the causes of the yard's current financial difficulties. It underlines the failure to privatise the yard in 2006 and to raise the yard's capital to levels permitting restructuring. The plan identifies macro-economic factors such as the Polish zloty's appreciation against the US dollar, the increase in steel prices and external factors such as the outflow of qualified workforce from the yard, high absenteeism, poor organisation and low productivity.

(a) Sales strategy

- (109) The plan is based on an assumption that the yard will diversify its activities. It is assumed that the company will process around [... more than 100] (*) thousand tonnes of steel each year: [... around 15 %] tonnes for shipbuilding, [... around 40 %] tonnes for wind tower production and [... around 45 %] tonnes for the production of steel structures.
- (110) As regards the shipbuilding business, ISD Polska will target the market segment of semi-equipped hulls of specialist off-shore vessels and seismic vessels.
- (111) The market analysis is based on a comparison with the production of other European shipyards and the experience of Gdańsk Shipyard. Under the plan, the yard is to concentrate on producing semi-equipped off-shore and seismic vessels as a subcontractor of other yards. The 2009 Restructuring Plan describes the

previous experience of Gdańsk Shipyard in building hulls for off-shore vessels and explains that the yard has orders for vessels of this type.

- (112) According to the planned production portfolio, up to [...] hulls/vessels will be produced each year. The yard plans to conclude long-term cooperation agreements with shipyards specialising in the off-shore vessel segment and to build parts of complete vessels for these yards.
- (113) As regards its non-shipbuilding business, ISD Polska intends to start production of wind towers and steel structures. Under the plan, wind tower production is to start in 2012 at [...] wind towers, rising to [...] wind towers as of 2015 (with a height of 80 meters).
- (114) The plan provides for the production of various steel structures (e.g. jibs, prefabricates, storage structures, steel structures for the building industry), rising from [...] more than 10 000] tons in 2008 to [...] more than 50 000] tons as of 2013 ⁽¹³⁾.
- (115) The restructuring plan describes the know-how of ISD Polska (or of other companies belonging to the Donbas group) in the steel structures field. Provision is made for some production to move from Huta Częstochowa to Gdańsk Shipyard. The plan summarises the results of a market study by an independent consultant undertaken in preparation for the development of the steel structure segment in Gdańsk Shipyard after the entry of ISD Polska at the beginning of 2007. The study forecasts growth in the steel structure segment in Europe and Poland in particular (e.g. development of infrastructure with the help of Structural Funds). The plan explains that Gdańsk Shipyard has potential to develop steel structure activity in view of anticipated growth in the market for steel structures, the yard's good location by the sea, enabling cheap transport, and the experience acquired by ISD Polska Group.
- (116) ISD Polska started production of steel structures at Gdańsk Shipyard immediately after it took over the yard. In 2008 the yard sold around [...] more than 10] thousand tonnes of steel structures, mainly wind tower parts.
- (117) The 2009 Restructuring Plan contains various forecasts for the volume of production of steel structures, as shown in the following Table 2.

(*) Parts of this text have been hidden so as not to divulge confidential information. These have been indicated with a dotted line in square brackets.

⁽¹³⁾ It was assumed that production of jibs would increase from [...] tonnes in 2008 to [...] tonnes in 2009, production of storage structures from [...] tonnes in 2008 to [...] tonnes in 2009, production of steel structures for buildings from [...] to [...] tonnes in 2011 and construction of vessel parts for other producers from [...] to [...] tonnes in 2011.

Table 2

Planned production of steel structures in tonnes (2009 Restructuring Plan)

Products	2008	2009	2010	2011	2012	2013	2014
Jibs	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Prefabricates	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Storage structures	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Steel structures for building	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Total	[... more than 10 000]	[...]	[...]	[...]	[...]	[... more than 50 000]	[... more than 50 000]

(b) Industrial and operational restructuring

(118) The 2009 Restructuring Plan observes that the production assets of the yard have deteriorated significantly and are at the level of European shipyards at the beginning of 1990s. The planned investments amount to PLN [... below 100] million for shipbuilding and PLN [... around 200] million for non-shipbuilding production (PLN [...] million for wind towers and PLN [...] million for steel structures).

(119) The investments in shipbuilding will be implemented between 2009 and 2011. The main components⁽¹⁴⁾ are investments in new launching infrastructure, portals for cutting, panel processing and ventilation. These investments, in combination with organisational changes, should result in a productivity improvement from the current 45 man-hours/CGT to the target of 27 man-hours/CGT⁽¹⁵⁾.

(120) The main organisational needs are identified in the following areas: sales (contracts), purchase of materials and services, design capabilities, production, human resources and information technology.

(121) The 2009 Restructuring Plan envisages the creation of a Planning Centre tasked with planning production efficiently at all levels of organisation of the yard. It is designed to eradicate deficiencies in the planning, scheduling, budgeting and monitoring of the production process.

(122) In the area of contracting, ISD Polska intends to introduce indexation clauses to protect the yard from increases in prices for materials and wages by transferring

the risk to the shipowner. The yard also intends to reduce penalties for construction delays. The yard should introduce a new model contract. Extracts from some existing shipbuilding contracts were attached to the Restructuring Plan with a view to demonstrating that the yard is able to negotiate indexation clauses insuring the risk of steel price fluctuations.

(123) To protect itself from the risk of currency fluctuations, the yard intends to introduce the necessary infrastructure, after having identified costs and revenue generating currency-related risks and defined the permissible exposure to these risks. The Restructuring Plan proposes to address this risk with four pillars: taking this risk into account when defining the strategy of the yard (definition of risk-tolerance, control of risk), adjusting the organisational structure, using information technology and adopting various risk-limitation methods (natural hedging, indexation clauses in contracts and purchase of financial products such as currency options and forwards). The plan describes the currency hedging policy proposal in greater detail. It identifies three hedging instruments the yard should use (natural hedging, fx forward transactions and currency options); it quantifies the exposure of the order book to currency risks until 2012 and estimates the costs of these hedging instruments on that basis. According to the plan, ISD Polska has contacted a number of banks, which, for the purpose of preparing hedging offers requested ISD to submit a satisfactory hedging strategy. According to the plan, this strategy should be drawn up in the first six months of restructuring.

(124) In the area of production, the objective is to address the problem of inefficient logistics resulting from the long distances between the prefabrication area and the ship assembly facilities. The plan proposes to change the yard's layout and to revise the shipbuilding technology. In order to shorten the ship production cycle the yard will ensure an optimised supply of materials and smooth functioning of the production process, with the potential labour reserves resulting from the cyclical nature of shipbuilding production deployed in the more flexible steel structure business.

⁽¹⁴⁾ The full list of investments is to be found in Tables 27 and 28, p. 138 and pp. 96-97 of the 2009 Restructuring Plan of ISD Polska.

⁽¹⁵⁾ Table 42, page 247 of the 2009 Restructuring Plan (ISD Polska).

- (125) Where purchases and management of materials are concerned, the main objective is to cut costs. Restructuring measures include managing a single, cohesive database of materials, purchasing according to the production plan, implementing framework agreements and electronic auctions to achieve savings, stock management, purchasing materials by selecting from at least three offers, cooperation on purchasing with Huta Częstochowa etc.
- (126) In the IT field, the yard plans to recruit and train qualified workforce, extend the use of and modernise existing information technology and introduce a single IT system in the yard integrated with all or almost all organisational units.
- (127) In the employment field, the objective is to tackle high rotation and absenteeism. ISD Polska plans to cooperate with a local recruitment agency. Internally, the plan provides for career development policies, the introduction of a motivational system of remuneration (overtime management, evaluation of employees, monitoring of absenteeism, remuneration based on projects and the timeliness and quality of implementation) and development of the company's identity. The plan states that the number of employees must be reduced.
- (128) At the end of 2008 the company employed 2 235 people. In other words, the number of employees had been reduced by 658 from 2 893 at end-2006.
- (129) The plan provides for a reduction by end-2011 in the number of employees directly engaged in production by [...] and in the number of employees in the administration and other persons on permanent contracts by [...]. On the other hand the company plans to gradually increase employment in non-shipbuilding activities by around [...] workers (in 2013) in wind tower production and by [...] workers (in 2013) in the steel structure business. As a result, the number of persons employed by the company would be reduced by [...]. The planned employment target for shipbuilding is [... fewer than 1 500] workers.
- (130) The revised plan includes a calculation of the costs and effects of employment restructuring.
- (131) In the field of design activities, the plan provides for the work of the design office to be rationalised and for improved links to the production process. The plan assumes that additional instruments and systems will be purchased for the design office; however, where shipbuilding is concerned, it assumes that standardised projects will be implemented, thus reducing the costs of developing new designs.
- (132) The plan contains a brief, general description of the desired effects of these organisational restructuring measures and quantifies them in a summary way when it asserts that the productivity improvement due to these measures will be about 12 man-hours/CGT ⁽¹⁶⁾.
- (c) Financial restructuring
- (133) In the area of financial restructuring, the plan provides for new State aid in the form of a PLN 46,7 million capital injection and a PLN 103,3 million loan. In total, the new aid would amount to PLN 150 million (nominal value).
- (d) Costs of restructuring and own contribution
- (134) The 2009 Restructuring Plan quantifies the costs of restructuring incurred by Gdańsk Shipyard in the past (after 1 May 2004) at PLN 405 million. The planned investments amount to PLN [...] around 300] million. The plan provides for the repayment of accumulated public debts of PLN 95,3 million and of accumulated civil liabilities of PLN [...] million. The costs of employment restructuring are expected to amount to PLN [...] million. It is assumed that PLN [...] million will be needed to balance the yard's finances (coverage of past losses, provision of sufficient liquidity and capital). In total, restructuring costs would amount to PLN [...] more than 1 000] million.
- (135) The plan assumes that PLN [...] around 500] million will be financed from resources free of aid, i.e. own contribution. This amount includes PLN 305 million in the form of a capital injection provided by ISD Polska (already registered and paid), PLN [...] million from selling and leasing redundant assets and PLN [...] million from an investment loan to be obtained on the market and designed to finance investments in non-shipbuilding activities.
- (136) As regards the revenue from selling and leasing assets, the yard plans to sell its shares in Kuznia Gdańsk ([...] % of shares). The yard has started negotiations with potential buyers and received an offer for the shares, which was taken into account in the restructuring plan. The amount offered was PLN [...] million. Furthermore, the yard plans to lease assets to neighbouring cooperating companies, with an estimated revenue (on the basis of existing lease agreements) of PLN [...] million from the lease of land (2009-12) and PLN [...] million from the lease of production facilities (2009-12).

⁽¹⁶⁾ Graph number 38, p. 141 of the Joint Restructuring Plan of ISD.

- (137) As regards the investment loan of PLN [...] million for the development of wind tower production, this business will be operated by a special-purpose company.
- (138) To demonstrate that wind tower production will attract external capital, the Polish authorities submitted conditional undertakings by two banks to provide financing to ISD Stocznia for this project dated 1 June 2009. Having reviewed the business plan for wind tower production and the financial projections, the banks declared that they regarded the financial assumptions underlying the business plan as reflecting current market conditions, that the wind tower project had significant potential and that they considered the project to be viable and profitable.
- (139) The banks' undertakings to provide financing for the wind tower project are subject to fulfilment of the following conditions: a) a positive decision by the Commission regarding the 2009 Restructuring Plan for Gdańsk Shipyard, b) ISD Stocznia obtaining all the administrative permits necessary to implement the wind tower project, c) collateral in form of a mortgage on a

designated area of Gdańsk Shipyard and d) a positive decision regarding financing of the project by the Bank's lending committee and management board. One of the banks has stated that it is willing to finance up to PLN [...] million and the other is prepared to provide up to PLN [...] million, i.e. PLN [...] million in total. In addition, the Polish authorities have submitted an agreement between the two banks and ISD Stocznia in which the banks declare that they are willing to grant a consortium credit or two parallel credits to finance the project. The banks have confirmed that their financing will be provided at the prevailing market conditions without any State guarantees.

(e) Financial projections

- (140) The plan's financial projections are based on the following assumptions, mostly derived from estimates by external experts.
- (141) The assumptions underlying the financial projections set out in the 2009 Restructuring Plan are presented in Table 3.

Table 3

Assumptions underlying the financial projections set out in the 2009 Restructuring Plan

	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
Inflation	1,80 %	2,13 %	2,44 %	2,31 %	2,28 %	2,26 %	2,24 %	2,19 %	2,15 %	2,11 %
WIBOR 3M	3,42 %	3,34 %	3,69 %	3,85 %	3,85 %	3,85 %	3,85 %	3,85 %	3,85 %	3,85 %
USD/PLN	3,00	2,70	2,50	2,35	2,32	2,32	2,32	2,32	2,32	2,32
EUR/PLN	3,90	3,75	3,50	3,30	3,25	3,25	3,25	3,25	3,25	3,25
Steel prices (EUR)	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Change in energy prices	[...] %	[...] %	[...] %	[...] %	[...] %	[...] %	[...] %	[...] %	[...] %	[...] %

- (142) The assumptions concerning changes in consumer prices and the annual average level of WIBOR 3M were based on the Global Insight forecast of 6 February 2009⁽¹⁷⁾. As for exchange rates, the forecast was inspired by a Goldman Sachs report which predicted that the PLN would appreciate against the euro over the next four years, rising to a level of PLN/EUR 3,25.

Shipbuilding activity

- (143) The plan anticipates an increase in shipbuilding wages. Pay was expected to be [...] around 15 %] higher in 2009 than in 2007. In the following years the anticipated wage increase amounts to [...] % p.a. The restructuring plan notes that, as a result of the financial crisis and the liquidation of the other two Polish yards in Szczecin

and Gdynia, workers' financial expectations have shrunk and therefore it seems reasonable to assume that wage increases over the coming years will be modest.

- (144) The financial projections are based on the assumption that shipbuilding activity, i.e. the delivery of 6 semi-equipped offshore vessels annually, will generate 30 % of the yard's revenue. The anticipated revenue is based on the prices agreed in the existing contracts of the yard, letters of intent and other market sources. The plan assumes that revenue from shipbuilding will amount to PLN [...] more than 300] million in 2009, and to PLN [...] around 300] million p.a in 2011-15. The yard expects to generate profits throughout the restructuring period (PLN [...] million in 2009, PLN [...] million in 2010, PLN [...] million in 2011 and in excess of PLN [...] million in the following years). The plan forecasts positive cash flows as of 2009, estimating the aggregate

⁽¹⁷⁾ Annex 16 to the 2009 Restructuring Plan.

net present value of the shipbuilding business for 2009-18, also taking into account the residual value of this investment, at PLN [...] between 400 and 500] million. The expected internal rate of return amounts to [...] more than 20 %].

Wind tower production

(145) The restructuring plan assumes that production will start in 2012 with an output of [...] towers, and will subsequently increase to [...] towers in 2013, [...] towers in 2014 and the target capacity of [...] towers in 2015.

(146) The plan assumes that revenue from the production of wind towers will amount to PLN [...] million in 2012 and will increase in the following years to a level in excess of PLN [...] million as from 2015 onwards. The company has submitted evidence that the yard will be able to obtain the requisite materials from the ISD group at prices denominated in euro. Since the materials will account for [...] % of costs of wind tower production, no additional hedging policy is considered necessary for this activity.

(147) The estimated net present value of the wind tower business is PLN [...] more than 200] million and the internal rate of return to [...] around 20] % (for the period 2009-18).

Steel structures

(148) The plan anticipates a significant increase in revenue from the steel structure business, rising from PLN [...] million in 2009 to PLN [...] million in 2010, PLN [...] million in 2011, PLN [...] million in 2012 and around PLN [...] million in the following years. Gross margins are expected to increase from [...] % in 2009 to more than [...] % as of 2013. The plan justifies this assumption with reference to ISD Polska's existing know-how and experience in the steel structure business. Nevertheless, the plan also observes that the anticipated margins are a conservative estimate and are lower than the margins actually achieved by ISD Polska in 2008 ⁽¹⁸⁾. The estimated net present value amounts to PLN [...] around 200] million for 2009-18 and the internal rate of return to [...] more than 50] % (annually). This high internal rate of return derives from the fact that the calculation does not take into account the

investments made to date by ISD Polska (in particular the capital injection into Gdańsk Shipyard of PLN 305 million), but is based on revenue from steel structure production since 2009. In addition, the company argues that this high internal rate of return is caused by synergies between the yard and the ISD group, thanks to which significant revenue from the yard's assets can be guaranteed even with limited investments.

(149) The company has submitted evidence that the yard will be able to obtain the requisite materials from the ISD group at prices denominated in euro. Since materials will account for [...] % of costs of wind tower production, no additional hedging policy is considered necessary for this activity.

Consolidated activity

(150) The expected pay-back period is [...] years (in nominal values) and [...] years in discounted terms. According to the plan's financial projections, the discounted pay-back (taking into account the changing value of money over time) will be achieved in [...] years after the entry of the investor i.e. in 2017. This calculation takes into account only the investor's financial exposure (PLN [...] million: capital injection of PLN 305 million and PLN [...] million for the purchase of existing shares).

(151) The estimated net present value of the project as a whole is around PLN [...] more than 800] million for 2009-18 and the internal rate of return is [...] more than 20] %.

(152) ISD Polska indicates that these financial results are very attractive for investors. The project generates synergy for the ISD group. All three activities of Gdańsk Shipyard will create demand for Huta Częstochowa's products. This vertical integration will allow more accurate demand forecasting at Huta Częstochowa and will also be beneficial for Gdańsk Shipyard, which will have guaranteed regular supplies, including even some prefabricates produced at Huta Częstochowa for shipbuilding.

(153) The 2009 Restructuring Plan comprises a sensitivity analysis scrutinising the effect of certain changes in the main assumptions underlying the 10-year EBIDTA and 10-year accumulated profits. In particular, the plan illustrates the financial consequences of the following risk factors:

⁽¹⁸⁾ Annex 40 to the 2009 Restructuring Plan presenting the profitability of the steel structure business at ISD Huta Częstochowa.

- further appreciation in the PLN to PLN 3,0 for EUR 1 in 2009-12,
- an additional increase in the cost of employment by 200 b.p. above the base scenario,
- steel prices 10 % higher than assumed in the base scenario,
- lower efficiency than assumed in the base scenario.

The materialisation of any of these factors would increase the pay-back period from [...] years assumed in the base scenario to [...] years. The company argues that this result indicates that the plan is not vulnerable to changing market conditions. In all scenarios the net present value of the project remains attractive.

(f) Avoidance of undue distortion of competition

- (154) In order to limit the distortion of competition created by the aid, the 2009 Restructuring Plan provides for implementation of the following measures. First, the yard will close two of the three currently used slipways, which are production assets used to launch vessels and indispensable to shipbuilding activities. The yard has already terminated the lease agreement for slipway B5 (as of 1 July 2009) and for slipway B3 (as of 1 January 2010).
- (155) Second, the yard has undertaken not to use more than one launching facility. If the yard purchases or otherwise acquires access to (e.g. by renting or leasing) another launching facility, it will take slipway B1 out of the production process (i.e., as the situation stands at the time of the decision, discontinue the renting agreement with the owner of slipway B1). Any other launching facility used by the yard will have a capacity of not more than 100 000 CGT approx.
- (156) Lastly, the yard has undertaken to comply with an annual production cap of 100 000 CGT for 10 years following the adoption of this decision.

6. State aid granted to Gdańsk Shipyard

- (157) According to the Polish authorities, since 1 May 2004 Gdańsk Shipyard has received a number of State aid measures that are listed in Table 4 below (see after recital 174).

(158) Table 4 sets out the aid granted after 1 May 2004, the date of Poland's accession to the EU. Notification of most of these measures was given by Poland by letters of 13 July 2007 and 9 January 2008. An updated list of these measures was attached to the 2009 Restructuring Plan (Annex 12). The list includes some of the measures described in part B of Annex I to the decision to open a formal investigation.

(159) Poland provided additional explanations on the restructuring of liabilities under Chapter 5a. The Polish authorities explained that the yard transferred to the Operator⁽¹⁹⁾ assets corresponding to 31,6 % of the value of the liabilities transferred to the Operator ARP Sp. z o.o.⁽²⁰⁾. According to Poland, the aid element is therefore equivalent to 68,4 % of the nominal value of the liabilities transferred to the Operator. This nominal value is set out in Table 4 below.

(160) The guarantee provided by the Treasury and referred to as measure 16 in Table 4 below was formally granted to Gdynia Shipyard Group, but for the production of vessels at Gdańsk Shipyard. The Polish authorities provided this information in their letter of 13 July 2007. Furthermore, the information regarding State aid for Gdańsk Shipyard presented in the 2009 Restructuring Plan included the Treasury guarantee. The loan covered by the Treasury guarantee was granted at an interest rate equal to LIBOR 3M + 100 basis points, whereas the risk of default when the guarantees were issued was estimated by the Polish authorities at 60 %. The Treasury guarantees were granted against collateral in the form of a blank promissory note issued by the yard and a notarial deed in which the yard agreed to the enforcement of its assets up to 120 % of the value of the guarantee. The Treasury charged a premium equivalent to 0,4 % of the guaranteed amount.

(161) Measure 17 in Table 4 is a guarantee provided to Gdańsk Shipyard by the IDA for a restructuring credit granted by NORD/LB Bank Polska S.A. The guarantee was granted in line with the agreement of 17 August 2005. In their submission of 9 January 2008 the Polish authorities claimed that this measure was included in Part A of Annex II to the opening decision as measure No 7, i.e. it was one of the measures granted before accession and not applicable after accession. However, the Commission notes that the guarantee agreement was signed on 17 August 2005, clearly after the Polish accession to the EU. Furthermore, in the annex to the 2009 Restructuring Plan, the guarantee is presented as one of the State aid measures.

⁽¹⁹⁾ A State-owned company implementing restructuring of public-law liabilities in accordance with Chapter 5a.

⁽²⁰⁾ For details of the restructuring procedure under Chapter 5a, see point 3.2 of the decision to open a formal investigation.

- (162) Table 4 also sets out loans granted by KPS to finance the yard's working capital requirements. Poland claims in its submissions of 11 July 2007 and 9 January 2008 that these loans do not constitute State aid because the interest charged corresponded to the risk assessment for the project for which the loans were sought.
- (163) For the loans granted in 2005-06, KPS charged interest ranging from 9,70 % to 11,62 %. It also charged a one-off fee ranging from 0,1 % to 0,4 %. According to the Polish authorities, KPS required collateral in the form of acceptance of enforcement, an agreement on cession of receivables, an unconditional payment order, a blank promissory note or asset pledges ⁽²¹⁾.
- (164) KPS was created in 2004 as a wholly-owned subsidiary of the IDA to operate as a risk capital fund for the Agency. Its initial role was to serve as a vehicle for the consolidation of the three largest shipyards in Poland, a project abandoned in 2006. According to the information provided by Poland in 2006 ⁽²²⁾, KPS was to be financed by a capital injection from the IDA, by a contribution in kind (shares in third companies) provided by the Agency and by a revolving bank loan guaranteed by the Agency, which was specifically earmarked as financial aid for the shipyards. According to the Polish Government's website, KPS was also to support shipbuilding operations in Poland by issuing bonds fully guaranteed by the IDA. Indeed, the document entitled 'A strategy for the shipbuilding sector (maritime construction shipyards) in Poland 2006-10' ⁽²³⁾ confirms that KPS should generate funds by issuing debt instruments to an amount of around USD 100 million, secured on the assets earmarked for restructuring the shipbuilding industry in form of funds transferred by the Treasury to the IDA.
- (165) Table 4 also includes Gdańsk Shipyard's outstanding public-law liabilities as presented by the Polish authorities in their submission of 9 January 2008 and in the annex to the 2009 Restructuring Plan. Poland confirmed in that letter that Gdańsk Shipyard had not been settling its public law liabilities regularly.
- (166) Gdańsk Shipyard also benefited from advanced payment guarantees from the Export Credit Insurance Corporation (hereinafter 'advance payment guarantees' or 'production guarantees'). The list of guarantees from which the yard benefited was submitted by Poland by letter of 11 July 2007. The Polish authorities indicated that although these guarantees were formally granted to Gdynia Shipyard Group, they were used for the production of vessels at Gdańsk Shipyard. In total after 1 May 2004 Gdańsk Shipyard benefitted from 20 Export Credit Insurance Corporation guarantees with a total nominal value of PLN 346 372 107,33.
- (167) A common feature of the industry is that shipyards typically are not able to raise sufficient working capital for the construction of vessels internally and rely on external financing, whether through borrowing (production loans) or advance payments from shipowners to pre-finance production. Shipowners typically pay 80 % of the price upfront in instalments, coinciding with certain decisive stages of the vessel's completion, the remaining 20 % being paid on delivery. Shipowners' involvement in financing shipbuilding is therefore crucial. Export Credit Insurance Corporation guarantees were provided to the yard to secure advance payments from shipowners against the risk of the shipyard defaulting on its obligation to deliver the vessel.
- (168) Various submissions by Poland on the operation of the Export Credit Insurance Corporation guarantee system ⁽²⁴⁾ indicate that these guarantees were granted to the yard in the following way. First, a contract was signed with the shipowner, which was typically conditional on the yard proving within a certain period of time that financing of production would be guaranteed by the Export Credit Insurance Corporation. The Export Credit Insurance Corporation issued a resolution undertaking to ensure financing of the ship as a whole by guaranteeing the advance payments. In subsequent individual agreements, the Export Credit Insurance Corporation activated the guarantee for each individual advance payment (typically four). Typically the Export Credit Insurance Corporation's overall exposure to the risk of the shipyard defaulting on its obligation to deliver the vessel was 80 % of the purchase price, i.e. the total amount of the advance payments made by the shipowner prior to delivery. This overall exposure was known when the Export Credit Insurance Corporation issued the resolution securing the financing of the ship by the shipowner. The guarantee expired on delivery of the vessel.

⁽²¹⁾ Letter of 9 January 2008, p. 15.

⁽²²⁾ Letter of 17 February 2006, registered on 22 February 2006.

⁽²³⁾ A strategy for the shipbuilding sector (maritime construction shipyards) in Poland 2006-10, adopted in August 2006, page 30.

⁽²⁴⁾ Reply of Poland of 2 September 2005 to the decision to launch a formal investigation.

- (169) The Export Credit Insurance Corporation's operations are varied ⁽²⁵⁾ and are essentially divided between commercial activities and activities effected on behalf of, and guaranteed by, the Treasury. A separate bank account in the name of 'Interes Narodowy' is kept for the purpose of the latter activities. The guarantees granted to Gdynia Shipyard Group, including those for the benefit of Gdańsk Shipyard, are part of the business re-guaranteed by the Treasury.
- (170) According to the information provided by Poland, the Export Credit Insurance Corporation granted advance payment guarantees against a fee which varied according to the amount of the guarantee. The fee amounts to 2 % per annum for guarantees not exceeding PLN 35 million and 1 % per annum for guarantees exceeding PLN 35 million. The Export Credit Insurance Corporation requires as collateral the transfer of ownership of the ship, the ship under construction or the construction materials.
- (171) Table 4 shows that Gdańsk Shipyard has benefited from aid with a total nominal value of PLN 405 030 629,80 (about EUR 90 million) since 1 May 2004.
- (172) The plan also provides for new State aid in the form of a PLN 46,7 million capital injection and a PLN 103,3 million loan. In total, the new aid would amount to PLN 150 million (nominal value).
- (173) Furthermore, the 2009 Restructuring Plan assumes that until the end of the restructuring period Gdańsk Shipyard will continue to benefit from Export Credit Insurance Corporation guarantees to a value of around PLN 180 million annually. It is assumed that the guarantee fees would be, in so far as possible, in line with the guarantee scheme approved by the Commission as free of State aid ⁽²⁶⁾. Pursuant to this scheme, the premium charged to companies in the highest risk category but still eligible for guarantees under the scheme, is [...] % for guarantees under 2 years and [...] % for guarantees above 2 years.
- (174) To conclude, the nominal value of all the restructuring aid measures is PLN 555 030 629,80 (PLN 405 million of aid already granted and PLN 150 million of planned aid) and the total nominal value of the Export Credit Insurance Corporation guarantees is approximately PLN 526 million (in nominal terms, PLN 346 million being the value of the guarantees already granted and PLN 180 million the maximum annual exposure of the Export Credit Insurance Corporation for these guarantees).

⁽²⁵⁾ See also Commission Decision of 18 July 2007 in case N 105/07, Guarantee scheme for export contracts, summary notice in OJ C 214, 13.9.2007. By this decision the Commission approved as free of State aid the guarantee scheme run by the Export Credit Insurance Corporation for companies which are not in financial difficulty.

⁽²⁶⁾ See also Decision of 18 July 2007 in case N 105/07.

Table 4

State aid granted to Gdańsk Shipyard after 1 May 2004, according to the information provided by the Polish authorities and ISD Polska (PLN)

No	Awarding body	Aid instrument	Legal basis	Number of decision or agreement	Date of award of aid	Date of entry into force	Period for which aid was awarded	Nominal value of aid
1.	2.	3.	4.	5.	6.	7.	8.	9.
1.	Social Insurance Fund	write-off	Act of 30.10.2002	Decision by the President of the ARP of 30.12.2004 No UPP/12/3/2004	30.12.2004	15.3.2005	one-off transaction	13 521 851,00 (*)
2.	Pomerania Tax Office	write-off	Act of 30.10.2002	Decision by the President of the ARP of 30.12.2004 No UPP/12/3/2004	30.12.2004	15.3.2005	one-off transaction	24 215 557,00 (*)
3.	Gdańsk I Tax Office	write-off	Act of 30.10.2002	Decision by the President of the ARP of 30.12.2004 No UPP/12/3/2004	30.12.2004	15.3.2005	one-off transaction	1 215 460,00 (*)
4.	Marshal of Pomerania Voivodship	write-off	Act of 30.10.2002	Decision by the President of the ARP of 30.12.2004 No UPP/12/3/2004	30.12.2004	15.3.2005	one-off transaction	698 462,00 (*)
5.	Social Insurance Fund	write-off	Act of 30.10.2002	Decision by the President of the ARP of 15.12.2005 No UPP/12/4/2005	15.12.2005	9.1.2006	one-off transaction	2 975 558,00 (*)
6.	Pomerania Tax Office	write-off	Act of 30.10.2002	Decision by the President of the ARP of 15.12.2005 No UPP/12/4/2005	15.12.2005	9.1.2006	one-off transaction	5 398 177,00 (*)
7.	Marshal of Pomerania Voivodship	write-off	Act of 30.10.2002	Decision by the President of the ARP of 15.12.2005 No UPP/12/4/2005	15.12.2005	9.1.2006	one-off transaction	138 531,00 (*)
8.	KPS	loan	statutory activity of KPS	loan agreement No 03/06.2005	6.6.2005	9.6.2005	26.8.2005	7 000 000,00
9.	KPS	loan	statutory activity of KPS	loan agreement No 02/10.2005	27.10.2005	28.10.2005	31.1.2006	6 000 000,00
10.	KPS	loan	statutory activity of KPS	loan agreement No 01/01.2006	11.1.2006	17.1.2006	30.6.2006	9 000 000,00
11.	KPS	loan	statutory activity of KPS	loan agreement No 03/07.2006	27.7.2006	7.8.2006	31.10.2006	4 000 000,00

1.	2.	3.	4.	5.	6.	7.	8.	9.
12.	KPS	loan	statutory activity of KPS	loan agreement No 03/07.2006	27.7.2006	22.9.2006	28.2.2007	8 000 000,00
13.	KPS	loan	statutory activity of KPS	loan agreement No 01/11.2006	8.11.2006	16.11.2006	20.7.2007	4 000 000,00
14.	PHZ Cenzin	capital injection	Polish Company Code of 15.9.2000	Act of 21.12.2006	21.12.2006	27.12.2006 (1st tranche of PLN 7 million) and 29.12.2006 (2nd tranche of PLN 13 million)	one-off capital injection	20 000 000,00
15.	Gdynia Shipyard	capital injection	Polish Company Code of 15.9.2000	Act of 27.6.2005	27.6.2005	July 2005 (1st tranche of PLN 12 million) and August 2005 (2nd tranche of PLN 8 million)	one-off capital injection	20 000 000,00
16.	Treasury	guarantee — vessels 8184/9-10, 8184/12-13 and 8184/18	Act of 8 May 1997 on guarantees granted by the Treasury and some legal persons (Journal of Laws 2003/174 item 1689 as amended)	Decree of the Council of Minister No 222/2004 of 21.9.2004	21.9.2004	1.10.2004	until 15.1.2008	161 285 903,00
17.	ARP	Guarantee for NORD/LB loan	statutory activity of ARP	Act of 17.8.2005	17.8.2005	17.8.2005	until 30.6.2000	20 000 000,00
18.	Social Insurance Fund	non-enforcement of liabilities	—	—	—	1.5.2004	31.9.2009 (**)	95 354 830,80 (***)
19.	Gdańsk municipality	non-enforcement of liabilities	—	—	—	1.5.2004	31.9.2009 (**)	
20.	Gdańsk municipality	write-off	Tax Act of 29.8.1997	not yet granted	—	—	—	2 226 300,00
							TOTAL	405 030 629,80

(*) Liabilities restructured under Chapter 5a. The table sets out the nominal value of the liabilities transferred to the Operator. According to the Polish authorities, assets equivalent to at least 45 % of the nominal value of the liabilities were also transferred to the Operator.

(**) The date of the planned repayment of the liabilities, as envisaged in the 2009 Restructuring Plan.

(***) According to the 2009 Restructuring Plan, the total level of non-enforced public liabilities amounts to PLN 63 013 631; however, according to the information submitted by the Polish authorities by letter of 9 January 2008 the accumulated public liabilities of Gdańsk Shipyard amounted to PLN 90 245 096,76 (including the interest accrued by that time). Furthermore, when quantifying the restructuring costs, the 2009 Restructuring Plan indicates that the yard will need to repay an amount of PLN 95 354 830,90 of accumulated public liabilities. On that basis the Commission considers that the total value of non-enforced public liabilities, with interest, amounts to PLN 95 354 830,90.

III. EVALUATION

1. Competence of the Commission

- (175) Point 3 of Annex IV to the Accession Treaty describes the interim mechanism procedure. It constitutes a legal framework for the assessment of aid schemes and individual aid measures which are put into effect in a new Member State before the date of its accession to the EU and are applicable after accession.
- (176) Measures that were put into effect before accession and are not applicable after accession cannot be examined by the Commission either under the interim mechanism procedure or under the procedure laid down in Article 88(2) of the EC Treaty.
- (177) However, measures that were not put into effect before accession will be assessed by the Commission as notified aid or as unlawful aid pursuant to the procedure laid down in Article 88(2) of the EC Treaty.
- (178) The criterion used to determine the point in time when a given measure was put into effect is the legally binding act by which the competent national authority undertakes to award aid ⁽²⁷⁾. Whether an administrative act is legally binding is a matter of national law. The Commission, however, must be able to review, especially in border-line cases, these administrative acts and, judging on their form and content, to assess whether they could have given rise to legitimate expectations on the part of the beneficiaries enforceable before a Polish court of law. This capacity to review national administrative acts is indispensable for the exercise of the Commission's exclusive competence to approve derogations from the general prohibition of State aid with regard to measures put into effect in Poland after 1 May 2004.
- (179) A measure put into effect prior to accession is applicable after accession if it can still give rise to the award of additional aid or to an increase in the amount of aid already granted, i.e. if the precise economic exposure of

the State is not known on the date on which the measure was put into effect and remains unknown on the date of accession.

- (180) In its decision to open the formal investigation, the Commission concluded, on the basis of the information provided by Poland, that a series of measures of which it had been notified on 8 October 2004 actually constituted new aid, either unlawful or notified, because it was granted after 1 May 2004, the date of Poland's accession to the EU. The comments provided by Poland and third parties after the investigation was opened did not lead the Commission to alter its conclusion. In particular, the Commission maintains that it is competent to assess whether the measures indicated in part B of Annex II to the decision to open the formal investigation are compatible with the common market. The Commission nevertheless notes that some of these measures have been abandoned (measures 23-25 of part B of Annex II to the decision to open the formal investigation).
- (181) Below the Commission indicates why it cannot accept the arguments put forward by Poland and the interested parties.
- (a) Restructuring of public-law debt under Chapter 5a
- (182) The Commission agrees with the comment of Gdynia Shipyard Group that the event which gave rise to the partial write-off of public-law liabilities under Chapter 5a was the adoption of the restructuring decision by the Chairman of the IDA. The Commission, however, cannot accept the statement that this decision was adopted on 30 April 2004, i.e. prior to Poland's accession to the EU. The Commission explained the reasons for its stance in the decision to open the formal investigation, and neither Poland nor the Gdynia Shipyard Group has submitted any further arguments which change this position. The Commission reiterates that the decision of 30 April 2004 merely approved the March 2004 Restructuring Plan, and did not agree to the restructuring of public-law liabilities pursuant to Chapter 5a. The Chairman of the IDA was not in a position to issue a complete restructuring decision before accession because, at that time, he did not possess, as required by Chapter 5a, either the agreement of all the relevant public-law creditors to the restructuring of their liabilities or the agreement of the Operator. The Commission notes that the Chairman of the IDA recognised this fact when he mentioned in his decision of 30 April 2004 that a further decision would be necessary to complete restructuring of public-law liabilities under Chapter 5a and when he eventually issued the restructuring decision on 30 December 2004, i.e. after Poland's accession to the EU.

⁽²⁷⁾ Judgment of the Court of First Instance of 14 January 2004 in Case T-109/01 *Fleuren Compost v Commission* [2004] ECR II-00127, point 74.

(183) The Commission cannot accept the argument of Gdynia Shipyard Group that the agreement of all the public-law creditors to the restructuring of their receivables under Chapter 5a constituted the legally binding act required by Polish law. Gdynia Shipyard Group argued that Chapter 5a was not *lex specialis* in relation to other laws permitting restructuring of public law liabilities and that the function of the Chairman of the Industrial Development Agency was to administer and facilitate the restructuring process, not to act for the relevant public-law creditors in respect of specific liabilities. The Commission notes that this interpretation of Polish law is at odds with all the submissions from Poland to date and with the text and logic of Chapter 5a itself. Admittedly, as Gdynia Shipyard Group argued, the Act of 30 October 2002 'does not prohibit the restructuring authorities from issuing any write-off decisions in so far as they are allowed to do so by general provisions'. Nevertheless, if they did so, those liabilities would no longer fall under Chapter 5a with all the advantages associated therewith: eligibility for a loan from the IDA, suspension of any ongoing enforcement proceedings, suspension of bankruptcy and non-accrual of interest on amounts due.

(184) The Commission cannot accept the argument of Gdynia Shipyard Group that no interest accrued after 30 June 2006 on the liabilities restructured under Chapter 5a. This interpretation of Polish law has been rejected by Poland.

(b) Measure 23 of part B of Annex II to the decision to open the formal investigation

(185) The Commission cannot accept Poland's argument that this aid was granted *de facto* by virtue of the fact that all the relevant awarding authorities made verbal statements at a meeting of the Government working group on the restructuring of shipyards in Poland (the shipbuilding industry team). Such statements, if any, were purely verbal and further implementing measures were clearly necessary to create legitimate expectations under Polish law.

(c) Measures 24-25 of part B of Annex II to the decision to open the formal investigation

(186) Lastly, the Commission notes that neither Poland nor Gdynia Shipyard Group has contested its conclusion that measures 24-25 of part B of Annex II to the decision to open the formal investigation constituted

new aid and thus fall under the remit of the Commission under Article 88 of the EC Treaty.

2. State aid within the meaning of Article 87(1) of the EC Treaty

2.1. Existence of State aid

(187) Article 87(1) of the EC Treaty states 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 and affects trade between Member States is incompatible with the common market.

(188) The Commission finds that all the aid described in recitals 105-170 and in Table 4 was granted by the State or through State resources and, being directed to one particular undertaking, was selective.

(189) Gdańsk Shipyard is a large European shipyard and a major competitor on the shipbuilding market. After 1 May 2004 the yard continued building container ships, competing with shipyards in Germany and Denmark in particular, as Poland and Gdynia Shipyard Group have acknowledged and as was noted by Denmark and the Danish shipbuilding association in their comments on the Commission's decision to open the formal investigation. Container vessels accounted for 26 % of European shipyards' order books at the end of 2006 ⁽²⁸⁾. The yard has been producing steel structures, blocks and sections, thereby competing with many other companies acting as subcontractors for other shipyards building complete vessels. In the last two years the yard has started to produce off-shore vessels, which is a segment in which other European shipyards, for example the Norwegian ones, are active.

(190) The continuous subsidising of Gdańsk Shipyard, for example via non-enforcement of public liabilities, production guarantees as well as numerous capital injections and loans, allowed the yard to conclude contracts without full recognition and remuneration of all the risks involved. Otherwise its competitors might have taken over at least part of its market share.

(191) On the basis of the above, the Commission concludes that the State aid granted to Gdańsk Shipyard affected trade between Member States.

⁽²⁸⁾ 2006-07 Annual Report of CESA, the Community of European Shipyards' Associations.

- (192) The Commission also needs to determine whether the measures granted to Gdańsk Shipyard conferred an undue advantage on it and thereby distorted or threatened to distort competition.
- (193) The Commission takes the view that reliance on State aid enabled Gdańsk Shipyard to engage in anti-competitive practice such as pricing below production costs without suffering the consequences that such practices normally entail, namely elimination from the market.
- (194) The Commission also notes that one of Gdańsk Shipyard's main long-term problems was the conclusion of contracts which proved to be loss-making as the zloty appreciated against the dollar, the dominant currency in the shipbuilding business, and the price of steel plates increased worldwide. These external factors were already identified as the main threats to the yard's continued operation in the Restructuring Plan for 2003-08, and then subsequently in the amended version of March 2004, in the new 2006 Restructuring Plan and, lastly, in the 2009 Restructuring Plan.
- (195) Despite the fact that the yard's management was aware of these threats, the yard continued to conclude contracts without taking any measures to mitigate the risk. This business practice continued during the unprecedented boom in the shipbuilding market between 2004 and 2008, when shipbuilding prices rose to record levels. As a result of this practice, the yard managed to maintain activity and employment, but at the cost of large losses on regular shipbuilding production.
- (196) On that basis, the Commission concludes that all the aid granted to Gdańsk Shipyard described in recitals 105-170 was such as to distort or threaten to distort competition on the shipbuilding market.
- (197) The Commission notes that the Polish authorities did not dispute the classification of the measures covered by the present decision as State aid, with two exceptions. Firstly, they claimed that the loans granted to Gdańsk Shipyard by KPS did not constitute aid. Second, they questioned the aid character of the guarantees provided by the Export Credit Insurance Corporation which were alleged to comply with the market economy operator principle. In addition, the Polish authorities did not give notification of the continuous non-enforcement of public-law liabilities as a separate State aid measure.
- (198) The Commission will explain below why it regards these three measures as constituting a competition-distorting advantage.
- (a) Continuous non-enforcement of public-law liabilities
- (199) According to established case-law⁽²⁹⁾, continuous non-enforcement of public-law debt can in itself constitute State aid. The information provided by the Polish authorities⁽³⁰⁾ clearly indicates that Gdańsk Shipyard has important public-law arrears dating back as far as 2004. These are presented in Table 4 as measures 18 and 19. As explained by the Polish authorities⁽³¹⁾, due to its precarious financial situation, after 1 May 2004 the yard was unable to pay its public-law liabilities on time and its outstanding debt was been continuously deferred without any formal decision on the part of the relevant public creditors.
- (200) The 2009 Restructuring Plan assumes that the accumulated public-law liabilities will be repaid in September 2009 after the yard receives new State aid. This shows that in practice the public-law liabilities accrued since 2004 were deferred for an unlimited or unspecified period of time, have been repaid only occasionally as permitted by the yard's cash flow and can now be fully repaid only thanks to additional State aid. The Commission considers that no market economy creditor would accept such an unlimited deferral of its liabilities. Furthermore, even after the yard's privatisation and the capital injection by ISD Polska of PLN 305 million, the Polish authorities have not undertaken measures to enforce repayment of liabilities. The information submitted by the Polish authorities contains no indication that public creditors have undertaken any action to enforce their public-law receivables from Gdańsk Shipyard, in particular by way of forced recovery or bankruptcy law. The Commission therefore concludes that continuous non-enforcement of public-law liabilities represents an advantage that the recipient would have not obtained from a market economy creditor and therefore constitutes State aid similar to an (interest-free) loan.

⁽²⁹⁾ Opinion of Advocate General Jacobs, Case C-256/97 *DM Transport* [1999] ECR I-3915, and in Case C-480/98 *Spain v Commission* [2000] ECR I-8717.

⁽³⁰⁾ In particular Annex 3 to the letter of 9 January 2008.

⁽³¹⁾ Submission of 9 January 2009.

(201) According to the 2009 Restructuring Plan the total amount of non-enforced public liabilities is PLN 63 013 631. However, according to the information submitted by the Polish authorities in their letter of 9 January 2008, the accumulated public liabilities of Gdańsk Shipyard at that time accounted to PLN 90 245 096,76 (including accrued interest). Furthermore, when quantifying the restructuring costs, the 2009 Restructuring Plan indicates that the yard will need to repay an amount of PLN 95 354 830,90 in accumulated public liabilities. On that basis the Commission considers that the total value of non-enforced public liabilities, with interest, amounts to PLN 95 354 830,90; that amount was indicated in Table 4 above.

(b) KPS loans

(202) The Commission cannot accept Poland's argument that aid in the form of working capital loans from KPS was free of State aid. The Commission observes that the interest rate charged by KPS was about 400 basis points above the reference rate. The Commission also notes that Gdańsk Shipyard has been in a very precarious financial situation for several years, making significant losses and accumulating debts. Gdańsk Shipyard has not been able to obtain funding for its production from any other external source. Its working capital was financed by advance payments fully covered by guarantees from the Export Credit Insurance Corporation, by loans fully covered by Treasury guarantees and by KPS loans. The interest rate charged by KPS therefore does not appear to correctly reflect the risk incurred. Although KPS did require collateral, its value remains questionable. It seems likely that KPS was not able to obtain first-rank collateral on the yard's assets. In any event, Poland has not provided detailed information enabling the Commission to determine the real value of the required collateral.

(203) Furthermore, the Commission notes that KPS was established as a government-controlled fund with public policy objectives, the funding of which was fully provided, or guaranteed, by the State via the IDA. According to the document 'A strategy for the shipbuilding sector (maritime construction shipyards) in Poland 2006-10', KPS was 'founded to organise the financing of shipyard production until such time as private investors took control'. The strategy, which is designed to achieve not only economic but also social and macroeconomic aims⁽³²⁾, mandates KPS with various powers, along with the IDA, the Treasury and other competent public bodies. The financial links of KPS to the IDA and the Treasury are clear and KPS acts rather like a vehicle for the transfer of assets earmarked by the State budget for shipyards in Poland, including Gdańsk Shipyard.

(204) Finally, the Commission notes that in the letter giving notification of the 2009 Restructuring Plan the Polish

authorities acknowledged that the KPS loans constituted State aid.

(205) In the light of the above, the Commission concludes that KPS did not act as a market economy investor when it granted working capital loans to Gdańsk Shipyard. These loans, listed in Table 4, therefore constitute State aid.

(c) Export Credit Insurance Corporation guarantees

(206) First, the Commission observes that the Export Credit Insurance Corporation production guarantees were formally granted to Gdynia Shipyard Group. Nevertheless, a certain number of these guarantees were used exclusively to finance shipbuilding at Gdańsk Shipyard, then a subsidiary of Gdynia Shipyard Group. It was thanks to these guarantees that Gdańsk Shipyard was able to attract new contracts and continue its shipbuilding activity.

(207) In its comments following the adoption of the decision to open the formal investigation, Poland argued that the guarantees granted by the Export Credit Insurance Corporation to Gdynia Shipyard Group did not constitute State aid. The Commission cannot accept this assertion.

(208) First, the Commission would point out that Export Credit Insurance Corporation advance payment guarantees are underwritten by the Treasury and that the related transactions are entered to a separate bank account in the name of 'Interes Narodowy'. If insufficient funds are available on that account, the Export Credit Insurance Corporation can either draw down loans from the Treasury or benefit from Treasury loan guarantees. This is a security that a market economy operator is unable to rely on.

(209) Second, the Commission recalls its decision of 18 July 2007 in Case N 105/07⁽³³⁾ in which it approved as free of State aid the scheme under which the Export Credit Insurance Corporation operated its programme of export insurance guaranteed by the Treasury. Among other measures, this scheme also covers the type of production guarantees that Gdańsk Shipyard has been receiving for the last few years. The Commission notes that the scheme explicitly excludes⁽³⁴⁾ companies in financial difficulties within the meaning of the Guidelines on State aid for rescuing and restructuring firms in difficulty⁽³⁵⁾. The main feature of the scheme is that the guarantee premia are determined on the basis of a risk assessment. For example, the guarantee premium for a company belonging to the highest risk category

⁽³²⁾ A strategy for the shipbuilding sector (maritime construction shipyards) in Poland 2006-10, adopted in August 2006, p. 7.

⁽³³⁾ Commission Decision of 18 July 2007 in Case N 105/07.

⁽³⁴⁾ Article 3(1)(1) of Resolution 111/2006 of the Export Insurance Policy Committee of 20 December 2006.

⁽³⁵⁾ OJ C 244, 1.10.2004, p. 2.

corresponds to [...] % p.a. for guarantees under two years and [...] % p.a. for guarantees above two years. The base premium equals 2,8 % p.a. By way of comparison, the guarantees to Gdańsk Shipyard were awarded by the Export Credit Insurance Corporation against a premium of 2 % p.a. if the guarantee did not exceed PLN 35 million and against a premium of 1 % p.a. if the guarantee exceeded that amount.

(210) It is therefore clear that Gdańsk Shipyard, being a company in difficulties, is not eligible for guarantees covered by the scheme described above and approved by the Commission as free of aid. Accordingly, the guarantees granted to Gdańsk Shipyard are not free of aid.

(211) Furthermore, it is obvious that the guarantee premium charged to the yard is well below the base premium used for guarantees to healthy companies and several times lower than the premium charged to high-risk companies which are eligible under the scheme described above. The Commission concludes that the guarantee premium applied to Gdańsk Shipyard does not correspond to a market premium and that therefore these guarantees constitute State aid.

(212) Third, pursuant to the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees ⁽³⁶⁾, in the case of an individual State guarantee which does not constitute State aid, the borrower must not be in financial difficulty. This is clearly not the case here. Pursuant to the same Notice, when the borrower is in financial difficulty the aid element of the guarantee may be as high as the amount covered by that guarantee.

(213) Lastly, the Commission notes that Gdańsk Shipyard relied exclusively on guarantees provided by the Export Credit Insurance Corporation and the Treasury and did not manage to obtain any guarantees on the market.

(214) In the light of the above, the Commission concludes that the Export Credit Insurance Corporation did not act as a market economy investor when it gave guarantees to Gdańsk Shipyard.

(215) The Commission notes that production guarantees of this type are a typical characteristic of the shipbuilding sector. The Export Credit Insurance Corporation providing the guarantees requires as collateral the transfer of ownership of the ship, the ship under construction and the construction materials.

(216) The Commission considers that the estimated aid element inherent in the guarantees granted to Gdańsk Shipyard after 1 May 2004 amounts to PLN 18,9 million. This amount was calculated by making a comparison between the fees paid by the yard and those that would normally be charged on the market. It is considered that the aid-free Export Credit Insurance Corporation scheme may serve as a reference for the fees charged on the market. This reference level was increased by 400 b.p. to reflect the additional risk involved when providing aid to a company in a difficult financial situation, as Gdańsk Shipyard was.

(217) The Commission also notes that, according to the 2009 Restructuring Plan, Gdańsk Shipyard intends to continue using production guarantees provided by the Export Credit Insurance Corporation. It will receive these guarantees on terms corresponding to those applied, under the aid-free scheme approved by the Commission ⁽³⁷⁾, to companies with the highest risk-profile. In particular, this means a premium of [...] % p.a. for guarantees under two years and of [...] % p.a. for guarantees exceeding two years. The Commission notes that companies in financial difficulties such as Gdańsk Shipyard are not eligible for measures under the said scheme. It follows that, during the restructuring of Gdańsk Shipyard, guarantees from the Export Credit Insurance Corporation will continue to constitute State aid.

(218) The Commission considers that the estimated aid component inherent in future production guarantees provided by the Export Credit Insurance Corporation amounts to the difference between the fees that would be charged on the market, plus 400 b.p. (to reflect the additional risk involved in providing guarantees to a company in difficulties) and the fees that the yard would actually have to pay. The estimated aid component calculated in this way amounts to PLN 28,8 million.

⁽³⁶⁾ OJ C 71, 11.3.2001, p. 14.

⁽³⁷⁾ Commission Decision of 18 July 2007 in Case N 105/07.

Conclusion

- (219) In conclusion, the Commission takes the view that all the measures granted to Gdańsk Shipyard and listed in Table 4, the planned measures mentioned in recital (168) and the production guarantees by the Export Credit Insurance Corporation, whether already granted or to be granted during the restructuring period constitute State aid within the meaning of Article 87(1) of the EC Treaty.

2.2. Possibility for Poland and third parties to submit comments

- (220) By its decision of 1 June 2005 the Commission opened a formal investigation into a series of measures, including debt restructuring (write-offs, deferrals, changes to the payment schedule) based on various legal grounds and concerning a certain number of public creditors, capital injections and Treasury guarantees.

- (221) The Commission clearly stated that Poland's argument that advance payments from shipowners should be considered as an own contribution could not be accepted. In that connection, the Commission expressed doubts as to whether the advance payment guarantees provided by the Export Credit Insurance Corporation constituted State aid and announced that it would investigate the nature of those advance payments.

- (222) Both Poland and the parent company of Gdańsk Shipyard submitted comments; however, whereas they disputed the competence of the Commission to assess the compatibility of some of the measures concerned, they did not contest the Commission's conclusion that, in so far as these measures had been granted after Poland's accession to the EU, they constituted new aid within the meaning of Article 87(1) of the EC Treaty. The sole exception was the nature of the guarantees provided by the Export Credit Insurance Corporation, which were alleged to be free of State aid. Poland subsequently also argued that the loans granted by KPS did not constitute State aid. The Commission has also identified additional non-notified aid in the form of continuous non-enforcement of public-law liabilities. The Commission has addressed the existence of State aid in the three measures indicated above.

- (223) In the course of the Commission's investigation, significant changes were made on several occasions to the Polish Government's strategy regarding Gdańsk Shipyard. The strategy of consolidating the shipbuilding sector changed into a strategy of separating Gdynia and Gdańsk shipyards and privatising Gdańsk Shipyard.

- (224) As indicated above, the Commission maintained regular contacts with the Polish authorities as the owner of Gdańsk Shipyard, with Gdańsk Shipyard itself and with the new owner of Gdańsk Shipyard, ISD Polska. The Commission systematically informed these stakeholders that all measures granted to the yard from State resources probably constituted State aid within the meaning of Article 87(1) of the EC Treaty, considering the yard's precarious financial situation and the absence of any external financing free of State aid. The Commission also warned that this State aid had been granted in breach of Article 88(3) of the EC Treaty and was incompatible with the common market. The Commission also pointed out on several occasions that the guarantees provided to Gdynia Shipyard Group by the Export Credit Insurance Corporation and used for shipbuilding at Gdańsk Shipyard constituted State aid.

- (225) In the course of its investigation, the Commission also collected details on the operations of KPS and the nature of the working capital loans which it granted to the yard. The Commission indicated to Poland that in all probability these loans constituted State aid within the meaning of Article 87(1) of the EC Treaty.

- (226) Lastly, the Commission noted in the course of its investigation that Gdańsk Shipyard was still accumulating public-law liabilities. The Commission collected information on that subject and informed Poland (in its capacity as the yard's creditor and, until a certain point in time, its owner as well) that non-enforcement of public-law debt or its restructuring could constitute State aid within the meaning of Article 87(1) of the EC Treaty.

3. Compatibility of aid with the single market — derogation under Article 87(3) of the EC Treaty

- (227) The primary objective of the measures is to assist a company in financial difficulty and to keep it afloat. In such cases, the exemption provided for in Article 87(3)(c) of the EC Treaty, which authorises State aid granted to facilitate the development of certain economic activities where such aid does not adversely affect trading conditions to an extent contrary to the public interest, can be applied if the relevant conditions are complied with. Rescue and restructuring aid to ailing companies is currently regulated by the Community Guidelines on State aid for rescuing and restructuring firms in difficulty⁽³⁸⁾ (the Guidelines), which replaced the previous text adopted in 1999⁽³⁹⁾ (the 1999 Guidelines).

⁽³⁸⁾ OJ C 244, 1.10.2004, p. 2.

⁽³⁹⁾ OJ C 288, 9.10.1999, p. 2.

- (228) The transitional provisions of the Guidelines stipulate that notifications registered prior to 10 October 2004 are examined in the light of the criteria applicable at the time of notification (point 103). In the present case, the Commission was notified of some of the measures on 8 October 2004, when the 1999 Guidelines were in force. However, the Guidelines also stipulate that they will apply for the assessment of any rescue or restructuring aid granted without the authorisation of the Commission (unlawful aid) if some of or all the aid is granted after 1 October 2004 (point 104, first subparagraph). Given that almost all the measures described in recitals 105-170 were granted unlawfully after that date, the Commission concludes that the 2004 Guidelines apply.
- (229) The Guidelines apply to firms in all sectors, apart from the exceptions listed in point 18 of the Guidelines. The Framework on State aid to shipbuilding⁽⁴⁰⁾, which is the legal framework for the assessment of State aid to this sector, refers to point 12 of the Guidelines as the relevant legal basis for assessing rescue and restructuring aid.
- (230) The definition contained in point 17 of the Guidelines indicates that restructuring aid is based on a feasible, coherent and far-reaching plan to restore the firm's long-term viability within a reasonable time frame. Restructuring usually involves the following elements: restructuring of all aspects of the company's activities, reorganisation and rationalisation of its business, including withdrawal from loss-making activities and financial restructuring. Restructuring operations, if benefiting from State aid, cannot however be limited to financial aid designed purely to make good past losses without tackling the reasons for those losses, i.e. without undertaking genuine restructuring. Furthermore, restructuring must be financed at least in part from the company's own resources or from external sources free of State aid, and State aid must be limited to the minimum necessary to restore viability. Lastly, compensatory measures must be adopted to mitigate the distortive effect of the aid.
- (231) In view of the very distortive nature of restructuring aid, the Commission considers that aid to firms in difficulty can contribute to the development of economic activities without adversely affecting trade to an extent contrary to the Community interest only if all the conditions set out in the Guidelines are met.
- (a) Eligibility
- (232) To be eligible for restructuring aid, the firm must qualify as a firm in difficulty within the meaning of the Guidelines. As presented in Table 1 above, the financial situation of Gdańsk Shipyard, at least since 2002, has been characterised by continuous illiquidity and increasing losses. Gdańsk Shipyard is therefore a firm in difficulty within the meaning of point 11 of the Guidelines.
- (233) According to point 73 of the Guidelines, if the firm concerned has already received rescue or restructuring aid in the past, including any unnotified aid, and where less than 10 years have elapsed since the rescue aid was granted, the restructuring period came to an end or implementation of the restructuring plan was halted (whichever is the latest), the Commission will not allow further rescue or restructuring aid (one time-last time principle).
- (234) In the decision to open the formal investigation the Commission noted that Gdańsk Shipyard underwent restructuring in 1998, which, according to the Polish authorities, was free of State aid. The Commission accepted the position of the Polish authorities on this matter. The investigation has not shown that this restructuring involved State aid.
- (235) In addition, the State aid granted to Gdańsk Shipyard since 2002 has served to support a single restructuring process.
- (236) The Commission therefore concludes that the 'one time-last time' principle has been respected.
- (b) Restoration of long-term viability
- (237) Pursuant to point 34 of the Guidelines, the granting of aid must be conditional on implementation of a restructuring plan, which must enable the company to restore viability within a reasonable time frame. Restoration of viability means that the company, after completing restructuring, is able to cover all its costs and generate a sufficient return on capital to compete on its own merits. Restructuring must be carried out as quickly as possible.

⁽⁴⁰⁾ OJ C 317, 30.12.2003, p. 11.

- (238) The Commission notes that, in the course of its investigation, it reviewed two restructuring plans (March 2004 and 2006) prepared by the yard's management and approved by its majority owner, the State. The Commission concluded that its serious concerns as to whether the two plans would restore the yard's viability had not been allayed. Next, the Commission assessed the joint restructuring plan prepared by ISD Polska in 2008 for a merged operation of Gdańsk Shipyard and Gdynia Shipyard. In its decision of 6 November 2008 concerning the investigation into State aid to Gdynia Shipyard⁽⁴¹⁾ the Commission concluded that it had not been demonstrated that the joint restructuring plan would ensure the restoration of long-term viability of both yards.
- (239) Lastly, in 2009 the Polish authorities submitted the restructuring plan prepared by the new owner of Gdańsk Shipyard, ISD Polska, which replaces all the restructuring plans previously submitted to the Commission. Therefore the Commission confines its assessment below to the 2009 Restructuring Plan.
- (240) The yard's difficulties were caused and exacerbated by years of neglected investments, mismanagement and lack of proper risk mitigating policies. These internal deficiencies when combined with the cyclical character of the shipbuilding market, increasing steel prices and the appreciation of the Polish zloty have led to significant losses at the yard, accumulation of liabilities, insufficient working capital and further inefficiencies and delays in the production process.
- (241) In the Commission's view, it has been demonstrated that the proposed restructuring measures adequately address the yard's problems and are sufficiently far-reaching, the chosen strategy of diversifying the company's activities is credible and the financial projections are based on realistic assumptions. Thus it has been shown that the 2009 Restructuring Plan will lead to the restoration of the yard's long-term viability.
- (242) The Commission notes that the 2009 Restructuring Plan was prepared by the new owner of the yard, who has already invested significant private funds for the acquisition of this company (PLN 305 million injected into the company plus PLN [...] million for the purchase of shares from existing shareholders) and has undertaken to fully implement the plan in the conviction that it will bring a reasonable return. The fact that a private company has invested significant funds in the yard and plans to finance the 2009 Restructuring Plan is, in the Commission's view, a sign that a market operator believes that Gdańsk Shipyard can be restored to viability. What is more, ISD Polska has demonstrated that it has valuable experience in the successful restructuring of companies in difficulties (Huta Częstochowa), which provides additional assurance as to the credibility of the plan.
- (243) As for the business strategy of the yard, the Commission considers that the planned diversification of activities will not only make the company less vulnerable to cyclical changes on the shipbuilding market but will also allow it to use its steel processing capacities more efficiently and to benefit from new market openings in wind tower production. Furthermore, diversification of activities will allow the company's fixed costs to be divided between various activities and will make the company more resistant to changing market conditions.
- (244) The Commission considers that the planned restructuring measures will adequately address the yard's deficiencies. The plan presents a detailed strategy for the implementation of all the restructuring measures, in particular in the area of organisation, planning, the production cycle, supplies, logistics and employment.
- (245) The Commission notes that the plan assumes far-reaching employment restructuring, involving a significant reduction in employment on the one hand and an increase in wages on the other. The restructuring plan recognises that high absenteeism, rotation and the inefficiency of the employment and wage structure are among the yard's main problems. The Commission considers that the planned measures, such as wage increases and the implementation of set career paths and loyalty systems will tackle the problems identified. The Commission notes that employment has already been reduced by [...] more than 20] % since 2006. The average monthly wage in 2008 in direct production has increased by [...] more than 20] % since 2005. The plan

⁽⁴¹⁾ Commission Decision C(2008) 6771 of 6 November 2008 in case C 17/05 Restructuring aid for Stocznia Gdynia, not yet published.

provides for further wage increases: by [...] % in 2009, [...] % in 2010, [...] % in 2011 and [...] % in 2012, while also recognising that, as a result of the economic downturn and the closures of shipyards in Gdynia and Szczecin, the financial expectations of workers have decreased.

- (246) The 2009 Restructuring Plan explains that an increase in production efficiency and more frequent cooperation with subcontractors will mean fewer workers are required at the yard. The plan also sets out the financial impact of the reduction in employment. On the basis of the above arguments the Commission takes the view that the proposed employment restructuring will be sufficiently far-reaching to tackle the yard's problems.
- (247) The Commission considers that the planned strategy of significantly reducing shipbuilding activity and specialising in the production of semi-equipped specialised vessels is reasonable. What is more, the investor has proved that the chosen strategy is realistic, given that in 2008 the yard delivered five hulls for off-shore vessels out of six vessels delivered in total.
- (248) With regard to shipbuilding activity, the plan provides for various measures to address the most important external causes of the yard's current difficulties. The plan provides for indexation clauses in shipbuilding contracts to transfer at least part of the risks associated with material and wage costs to the shipowner. The 2009 Restructuring Plan also envisages the implementation of a detailed hedging policy to mitigate currency-related risks. The Commission considers that the proposed measures are adequate. The sensitivity analysis presented demonstrates that the planned measures will render the company relatively resistant to changing market conditions, including the exchange-rate fluctuations.
- (249) As regards production of steel structures, the restructuring plan contains a separate business plan based on the market analysis prepared by an external consultant of ISD Polska. The plan states that the prospects for the development of this market segment in Poland are good and stresses the benefits of locating by the Baltic Sea. Furthermore, the experience of ISD Polska in the production and sale of steel structures should add to the company's strengths. The plan assumes a target output of around [...] more than 50 000 tonnes as of 2013, to be achieved by a gradual increase in the coming years. This level of production should give Gdańsk Shipyard a market share of [...] % on the Polish market.
- (250) It has been demonstrated that the plans to increase steel structure production are realistic, because as early as 2008, the first year of operations after the yard was taken over by ISD Polska, the company managed to produce and sell more than 10 000 tonnes of steel structures, largely exceeding the investor's original expectations. Furthermore, at Huta Częstochowa ISD Polska managed to increase sales from [...] more than 30 000 tonnes in 2004 to [...] more than 50 000 tonnes in 2006 and [...] more than 90 000 tonnes in 2008.
- (251) The production of steel structures in Poland has been increasing steadily since the 1990s. In 2003 Polish producers built steel structures worth PLN 6 million, while the corresponding figures for 2006 and 2007 were PLN 9,4 million and PLN 12,5 million respectively. This indicates that the market is on an upward trend. It is assumed that demand for steel structures will increase in Poland in the coming years. The business plan recognises that demand has fallen as a result of the current economic downturn, but it expected to be boosted by investments in Poland co-financed with EU structural funds and important infrastructure projects.
- (252) The investor has submitted copies of existing contracts for the delivery of steel structures, for example an order placed with ISD Trade, a subsidiary which is responsible for sales of steel structures in ISD Group, by [...] Sp. z o.o. for the delivery of steel structures with a total volume of 25-30 000 tonnes in 2008. Although it is not clear what proportion of the order is to be performed at Gdańsk Shipyard and at Huta Częstochowa respectively, this indicates that there is demand on the market and that ISD Polska is able to attract customers and find buyers for its products. Accordingly, the Commission considers that the steel structure sales provided for in the 2009 Restructuring Plan are realistic.
- (253) It has been demonstrated that the anticipated profit margins are realistic. The anticipated profit margins are smaller than those currently achieved by ISD Polska (margins on sales amounted to [...] more than 10] % in 2006, [...] between 10 and 20] % in 2007 and [...] more than 10] % in 2008), while the anticipated future margins on EBITDA at Gdańsk Shipyard amount to [...] not more than 10] %. The Commission therefore considers that the anticipated sales and financial results for steel structure production can be deemed prudent and credible.
- (254) The Commission notes that production of steel structures at Gdańsk Shipyard will be based on the existing steel processing capacity currently used for shipbuilding. Therefore the significant increase anticipated in production will be achieved with relative insignificant investments, reflected in a relatively high internal rate of return for steel structure activity.

- (255) On the basis of the information submitted, the Commission concludes that the steel construction business, which is to form an integral and significant part of the operations of the new yard, is based on a credible analysis of the competitive position of the company. The market analysis demonstrates that the anticipated sales and financial results are realistic. It has been shown that the plan is based on realistic assumptions.
- (256) The 2009 Restructuring Plan contains a separate business plan for Gdańsk Shipyard's wind tower production activities. This plan is based on an analysis of the market, which indicates good prospects for companies entering this market segment. The company will benefit from regular supplies from Huta Częstochowa, will have a good location allowing product distribution by sea and will benefit from ISD Polska's experience in producing wind tower components. The plan also shows that demand for wind towers will increase as a result of legislative incentives (to promote renewable sources of energy) and economic factors (e.g. fluctuating prices for raw materials). According to independent analyses, in 2010 wind towers will produce 172 million MW of energy worldwide, rising to 378 million MW in 2015 ⁽⁴²⁾.
- (257) The company has submitted evidence that in February and April 2009 it held discussions with potential builders of the wind tower plant ⁽⁴³⁾. These discussions confirmed the investor's assumptions regarding the cost and schedule of the project development.
- (258) The plan presents the assumptions underpinning financial projections in detail, e.g. revenue based on information from the potential buyers, costs based on forecasts for energy and steel prices, the employment of around [...] workers, etc. The Commission considers that it has been demonstrated that these assumptions are credible and that the anticipated financial results are therefore realistic.
- (259) The fact that two banks have shown an interest in financing the investment in the wind tower business is a further indication that the project is credible and that the market believes in its long-term viability.
- (260) The Commission considers that it has been demonstrated that the aggregate financial projections for all the three activities of the yard are credible and indicate that implementation of the plan will give rise to the restoration of the long-term viability of the yard.
- (261) The Commission considers that the assumptions underpinning the projections are reasonable. It has been demonstrated that they are based on credible sources and are realistic. The anticipated increase in consumer and energy prices and the forecast trends in inter-bank interest rates were based on independent analyses. The anticipated sales prices of vessels are based on the results achieved to date, existing contracted prices, letters of intent and market data.
- (262) As for wage trends, the Commission notes that the pay at the yard has already increased significantly. The financial model assumes that that average labour costs per hour will increase in 2009-18 by [... more than 40] %. Even though average pay at the yard in 2009 will be [... around 15] % higher than in 2007, the plan anticipates further wage increases. In the light of the above factors and taking into account the current economic crisis and tightening of the labour market in Poland, particularly in the shipbuilding sector, the Commission regards the assumptions for wage trends as correct.
- (263) Lastly, the sensitivity analysis shows that the plan will make Gdańsk Shipyard sufficiently robust to withstand the principal risk factors associated with its activities. The Commission concludes that the sensitivity analysis shows that the financial projections are relatively resistant to changes in the underlying assumptions.
- (264) On the basis of the above, the Commission concludes that the 2009 Restructuring Plan is sufficiently robust to ensure the restoration of viability to Gdańsk Shipyard.
- (c) Aid limited to the strict minimum
- (265) Pursuant to point 43 of the Guidelines, the amount of the aid must be limited to the strict minimum of the restructuring costs necessary to enable restructuring to be undertaken. The beneficiary is expected to make a significant contribution to the financing of restructuring from its own resources or from external financing at market conditions. This contribution is, on the one hand, a sign that the market believes that the company can be made viable and, on the other, a way of ensuring that State aid is limited to the minimum. In the case of large enterprises, such as Gdańsk Shipyard, this contribution should be at least 50 % of the restructuring costs. The own contribution must be real and actual, which excludes anticipated profits and cash flows (point 43 of the Guidelines).

⁽⁴²⁾ Forecast of the Global Wind Energy Association — base scenario, Annex 7 to 2009 Restructuring Plan, page 54.

⁽⁴³⁾ Annex 18 to the 2009 Restructuring Plan.

- (266) Restructuring costs and financing sources are described in recital 134 above. The Commission notes that financial costs relating to production guarantees subsidised by the State should also be taken into account. Thus total restructuring costs amount to PLN [... more than 1 000] million. This amount comprises costs of PLN [... more than 1 000] million as presented in recital 134 above, the aid component of the production guarantees which are a specific but normal feature of shipbuilding granted to the yard in the past in an amount of PLN 18,9 million, as described in recital 216 above, and the aid component of future production guarantees in an amount of PLN 28,8 million, as described in recital 218.
- (267) The Commission considers that the restructuring costs are limited to the minimum necessary and have been duly justified. The restructuring plan presents a clear and detailed investment plan. The outstanding civil and public liabilities that need to be repaid are well defined. The plan clearly presents and explains the costs of employment restructuring and indicates the capital necessary to improve the company's balance sheet. As regards the period after 1 May 2004 and before the current restructuring on the basis of the 2009 Restructuring Plan, the Commission notes that the State aid granted to the yard was used to cover losses and maintain the yard afloat and therefore can be considered as a proxy for the liquidity needs of the company in the period under review.
- (268) The restructuring plan assumes that the own contribution to cover the restructuring costs of Gdańsk Shipyard will be derived from the following sources: capital injection by ISD Polska (PLN 305 million), sale and leasing of redundant assets (PLN [...] million) and external financing on market terms, i.e. bank loans (PLN [...] million).
- (269) The Commission's assessment of the proposed elements of the own contribution is presented below.
- (270) First, the capital injection of PLN 305 million has already been provided by ISD Polska, which is a private company, and it has already been registered and paid. Therefore the Commission concludes that it should be regarded as a real and actual own contribution as required by the Guidelines.
- (271) Second, the Commission accepts, on the basis of the information available, revenue from the sale of some assets or their rental as an own contribution which is real and actual, since an evaluation of revenue was provided and substantiated. This sale/rental revenue represents an amount of around PLN [...] million.
- (272) As regards the financing of PLN [...] million which the company plans to obtain from external sources on market terms, the Commission notes that the company has submitted conditional undertakings from two banks to co-finance the development of the wind towers project for a total amount of PLN [...] million. The Commission considers that the banks' commitments are sufficient to consider the financing as free of State aid and real and actual within the meaning of the Guidelines. First, the banks' undertakings are based on their assessment of the business plan for the wind tower activity and they confirmed the credibility of the project and the anticipated financial results. Second, the fulfilment of the conditions imposed by the banks depends mainly on ISD Stocznia and not on external or unforeseeable circumstances. Lastly, the banks confirmed that financing will be provided at prevailing market conditions without any state guarantees.
- (273) The Commission notes that as regards the permits necessary to conduct the activity and the collateral required by the banks, ISD Stocznia has already taken steps to ensure the fulfilment of the banks' requirements. First, the company has applied to the harbour authorities and the Treasury for a permit to transfer land from Gdańsk Shipyard to a separate legal entity, ISD Energia Sp. z o.o., whose activities will include wind tower production. This permit is required by law, since the land is situated within the harbour area, but there are no indications that this permit might be refused. Second, as regards the required collateral in the form of a mortgage on the land in question, ISD Stocznia has provided the following explanation. The land is currently mortgaged to guarantee the yard's outstanding public liabilities. Once the restructuring plan of the yard has been approved and the planned aid has been granted, the yard, in line with the restructuring plan, will repay the outstanding liabilities and the land will be released from the mortgage. Therefore the Commission takes the view that in all probability ISD Stocznia will fulfil these two conditions. Once this decision has been adopted, approval by the banks' decision-making bodies will be the only remaining requirement. On the basis of the above the Commission considers that the planned external financing of PLN [...] million to finance the wind tower project can be regarded as an aid-free, real and actual own contribution to cover restructuring costs.

- (274) In total the Commission takes the view that financing of PLN [... around 500] million (305 million + [...] million + [...] million) can be considered as a real and actual own contribution to the financing of the restructuring costs. Since the total restructuring costs amount to PLN [... more than 1 000] million, the own contribution of the above amount constitutes 45 % of the total restructuring costs.
- (275) The Commission also notes that the yard commenced restructuring as early as 2002. In its decision to open the formal investigation, the Commission noted that aid granted to the yard before accession needed to be taken into account when assessing whether State aid granted after Poland's accession to the EU had been limited to the minimum necessary.
- (276) In 2002-04, as established in the decision to open the formal investigation, Gdańsk Shipyard received PLN 157 million of State aid. The Commission considers that this amount covers the costs needed to maintain the company's liquidity in that period. Consequently, the total restructuring costs since 2002 amount to PLN [...] million. As a result, the own contribution of PLN [... around 500] million would cover 40 % of these restructuring costs.
- (277) The Commission notes that the 40 % level, although significant, remains below the threshold of 50 % normally required by the Guidelines. However, according to point 44 of the Guidelines, in exceptional circumstances and in cases of particular hardship the Commission may accept a lower contribution. First, the level of 40 % is significant. Second, the company is situated in an area eligible for regional aid under Article 87(3)(a) EC Treaty, which may justify, according to point 56 of the guidelines, a lower level of own contribution⁽⁴⁴⁾. Third, the Commission notes that Gdańsk Shipyard has been in financial difficulty for a long period of time. Despite its bankruptcy in 1996 and the takeover by Gdynia Shipyard in 1998, the yard (and its parent company) failed to make appropriate structural changes to gradually adjust to the market economy and international competition. Following Poland's accession to the EU, the yard remained State-owned for more than three years and any support from the yard's shareholders in that time constituted State aid. Since privatisation did not take place until 2007, it would be difficult for the current private owner to match the significant amounts of aid granted to the yard with an own contribution without endangering a reasonable return on his investment and the restoration of the yard's viability.
- (278) The Commission also appreciates that the Polish authorities have managed to privatise the yard and for this reason it takes the view that the own contribution is as high as possible in these circumstances. The Commission notes that unsuccessful attempts to privatise and restructure the other two Polish shipyards in Gdynia and Szczecin indicate that it is difficult to attract private investors who would be willing to make a significant financial contribution to restructuring to a sector with such a bad track record. Therefore the significant involvement by ISD Polska in Gdańsk Shipyard can be regarded as the maximum attainable.
- (279) Lastly, the Commission notes that, taking into account only restructuring costs incurred after 2004 (including liquidity needs financed by State aid), the own contribution amounts to 45 %. The State aid granted to the yard between 2002 and 2004 reduces this contribution to 40 %, which the Commission regards as acceptable for the reasons mentioned above and the following reasons. In the period prior to 2004, when this aid was granted, the 1999 Guidelines applied and those Guidelines did not prescribe a threshold of 50 % for own contributions. In light of those Guidelines and of the Commission's decision-making practice at that time, an own contribution of 40 % would in all probability have been deemed sufficient.
- (280) To conclude, the Commission takes the view that in this case, considering the long history of attempting to maintain the company's financial liquidity under State ownership and the fact that the yard was eventually privatised, an own contribution of 40 % is sufficiently significant and ensures that the aid is limited to the minimum necessary to enable restructuring of Gdańsk Shipyard and its return to viability.
- (281) The Commission notes that in addition to the aid to finance restructuring costs Gdańsk Shipyard will continue to finance its working capital needs with State aid in the form of production guarantees provided by the Export Credit Insurance Corporation. It will receive these guarantees on terms corresponding to those applied, under the aid-free scheme approved by the Commission⁽⁴⁵⁾, to companies with the highest risk profile. The Commission notes that these guarantees

⁽⁴⁴⁾ Commission Decision of 22 February 2006 on restructuring aid N 464/05 in favour of AB Kauno ketaus liejykla (OJ C 270, 7.11.2006, p. 2).

⁽⁴⁵⁾ Commission Decision of 18 July 2007 in Case N 105/07, Guarantee scheme for export contracts, summary notice in OJ C 214, 13.9.2007.

constitute State aid, as explained in recital 214. However the Commission considers that the terms of these guarantees, in particular the pricing, are aligned with the conditions of the above guarantee scheme, which ensures that the aid is limited to the minimum necessary. The Commission also recognises the need for these guarantees, which are generally used in the sector and not specific to companies in financial difficulty.

(d) Avoidance of undue distortion of competition

- (282) Pursuant to points 38-42 of the Guidelines, measures must be taken to mitigate as far as possible any adverse effects of the aid on competitors. The aid should not unduly distort competition. This usually means limiting the company's market share after the end of the restructuring period. The compulsory limitation or reduction of the company's presence on the relevant market represents a compensatory measure in favour of its competitors. It should be in proportion to the distortive effects of the aid and to the relative importance of the firm on its market or markets.
- (283) The Commission notes that since 2002 Gdańsk Shipyard has benefitted from significant amounts of aid and in fact since that time its presence on the market has been possible thanks to constant State aid provided in different forms: non-enforcement of public liabilities, loans, capital injections and advance payment guarantees on advantageous terms, without which the yard would not have been able to conclude contracts. Furthermore, the Commission notes that the yard is one of three biggest shipyards in Poland and among the important producers in Europe, which reinforces the distortion of competition created by the aid. Therefore, in line with point 40 of the Guidelines, the measures must be sufficiently far-reaching to be in proportion with the distortive effects of the aid. The Commission considers that the proposed compensatory measures sufficiently limit the distortion of competition created by the aid awarded to Gdańsk Shipyard.
- (284) First, the Commission notes that the yard will significantly reduce its shipbuilding capacity by closing production assets indispensable to shipbuilding and which to date have constituted bottlenecks: two out of three slipways.
- (285) The Commission considers that the closure of two slipways is sufficient for the following reasons. When determining the scope of the necessary capacity reduction the Commission assessed the current technical capacity of the yard and compared it with the potential attainable capacity that the yard could achieve following the restructuring process and improvements in production efficiency. The capacity closure was designed to ensure that the technical capacity of the yard after restructuring was lower than its capacity before the State aid supported restructuring.
- (286) According to the consultant of Gdańsk Shipyard, the current capacity of the yard before implementation of any restructuring measures amounts to 165 thousand CGT. The 2009 Restructuring Plan ensures that the future capacity of the remaining slipway or of any other launching facility that the yard would be using is limited to approximately 100 thousand CGT. Thus there is clearly a reduction of the yard's capacity of approximately 39 %.
- (287) Furthermore, the yard has undertaken not to use more than one launching facility at any given time, either the existing B1 slipway or any other launching facility the yard may acquire or otherwise have at its disposal. Indeed, should the yard start using a new launching facility, the Commission notes that it has undertaken to immediately discontinue the renting agreement concerning slipway B1.
- (288) The closure of two slipways out of three and the undertaking not to use more than one launching facility while limiting technical capacity to around 100 000 CGT allay the Commission's doubts in this respect and ensure that the capacity reduction is sufficiently far-reaching to provide meaningful compensation for the yard's competitors.
- (289) In addition, the Commission notes that the 2009 Restructuring Plan envisages that the company will significantly reduce its shipbuilding activities. The company will to a large extent cease to build complete vessels. Therefore the yard's presence on the markets where the distortion of competition took place will be significantly reduced.
- (290) The Commission notes that the compensatory measures should be implemented as soon as possible after the State aid is granted. In this case, the company has demonstrated that the closure of the two slipways will be implemented as quickly as possible taking into account the need to deliver vessels as contracted in existing binding contracts with shipowners. An earlier closure of the slipways would lead to serious disruptions in the production cycle and would make the delivery of contracted vessels impossible. The Commission thus concludes that the proposed timing of the closures is justified. The Commission notes that provision has already been made for two slipways to be closed in due time since, in April 2009, the company signed an agreement with the owner of the slipways according to which the rental agreement comes to an end on 1 July 2009 for slipway B5 and on 1 January 2010 for slipway B3.

(291) The Commission also considers that the distortion of competition will be further limited by the fact that the yard has undertaken to respect an annual production cap of 100 000 CGT for 10 years as of the date of adoption of this decision. Therefore provision has been made to ensure that, for the next ten years, State aid awarded to the company cannot be used to expand its shipbuilding activities.

(292) On the basis of the above the Commission concludes that the proposed compensatory measures are meaningful and sufficiently far-reaching to avoid undue distortions of competition as a result of the aid.

IV. CONCLUSION

(293) The Commission finds that the State aid in favour of Gdańsk Shipyard described in recitals 105 to 170 and in Table 4 of this Decision, both the aid unlawfully granted in breach of Article 88(3) of the EC Treaty and the notified aid not granted to date is compatible with the common market under the Community Guidelines on State aid for rescuing and restructuring firms in difficulty.

(294) The Commission notes that Gdańsk Shipyard must implement the restructuring plan in full and must discharge any other undertakings underpinning this decision (point 47 of the Guidelines). The Commission must be able to make certain that the restructuring plan is being implemented properly by way of regular, detailed reports provided by Poland (point 49 et seq. of the Guidelines). In the case of Gdańsk Shipyard, being a large firm, the first of these reports will normally have to be submitted to the Commission not later than six months after the date of this decision. Reports will subsequently have to be sent to the Commission at least once a year, on the anniversary of this decision, until the objectives of the restructuring plan can be deemed to have been achieved. They must contain all the information the Commission needs in order to be able to monitor implementation of the restructuring plan and its financing (which must be carried out in accordance with the criteria presented to the Commission), the schedule for payments to the company and its financial position and compliance with any conditions or undertakings laid down in this decision. They must in particular include all relevant information on any aid for any purpose which the company has received, either on an individual basis or under a general scheme, during the restructuring period (see points 68 to 71 of the Guidelines). Where the Commission needs prompt confirmation of certain key items of information, for example, on capacity reductions, it may require more frequent reports (point 48 of the Guidelines). Any amendment of the restructuring plan has to be notified pursuant to point 52 et seq. of the Guidelines. The Commission should verify, if

need be with the support of an external consultant, that the reports provide comprehensive and accurate information in accordance with the present decision.

(295) The Commission also notes that the one time-last time principle applies in line with point 72 et seq. of the Guidelines,

HAS ADOPTED THIS DECISION:

Article 1

1. The State aid which Poland has partially implemented and which it plans to grant in favour of Gdańsk Shipyard for the implementation of its restructuring plan of May 2009, described in recitals 105 to 170 and in Table 4 of this Decision, amounting to PLN 555 030 629,80, is compatible with the common market within the meaning of Article 87(3)(c) of the EC Treaty.

2. In addition, the State aid in the form of Export Credit Insurance Corporation guarantees that has partially been implemented (nominal value of PLN 346 million) and that is to be granted in favour of Gdańsk Shipyard for the implementation of the 2009 Restructuring Plan (nominal value of PLN 180 million as the maximum annual exposure of the Export Credit Insurance Corporation) is compatible with the common market within the meaning of Article 87(3)(c) of the EC Treaty.

3. Implementation of the State aid referred to in Article 1(1) and (2) is accordingly authorised under the condition that the 2009 Restructuring Plan and the envisaged compensatory measures are duly implemented and that the envisaged ratio of own contribution free of State aid to the restructuring costs is respected. Poland shall submit to the Commission regular, detailed reports enabling it to monitor implementation of the restructuring plan and its financing, as well as the compliance with the arrangements for the capacity reduction and production restrictions described in recitals 284 and 291 of this decision. The reports shall contain all the information described in recital 294 of this Decision and shall be submitted in accordance with the timetable indicated in that recital.

Article 2

This Decision is addressed to the Republic of Poland.

Done at Brussels, 22 July 2009.

For the Commission

Neelie KROES

Member of the Commission

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