

COMMISSION

COMMISSION DECISION

of 23 October 2007

on State Aid C 23/06 (ex NN 35/06) which Poland has implemented for steel producer Technologie Buczek Group

(notified under document number C(2007) 5087)

(Only the Polish version is authentic)

(Text with EEA relevance)

(2008/344/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

Having regard to Protocol No 8 of the Accession Treaty on the restructuring of the Polish steel industry ⁽¹⁾ (hereinafter referred to as 'Protocol No 8'),

Having called on interested parties to submit their comments pursuant to the provisions cited above ⁽²⁾,

Whereas:

(2) On 5 November 2002 the Polish Council of Ministers approved the Restructuring and Development Programme for the Polish Iron and Steel Industry until 2006 (hereinafter referred to as 'the National Restructuring Programme' or 'NRP'). This plan essentially allows for State Aid to be awarded to the Polish steel industry for restructuring in the period from 1997 to 2006 of up to PLN 3 387 billion (EUR 846 million) ⁽³⁾.

(3) The NRP was submitted to the EU. On 25 March 2003 it was assessed by the Commission. On this basis the Commission made a proposal for a Council Decision to extend the grace period for the granting of state aid in the Polish steel sector under the Europe Agreement (which initially lasted only until 1997) until Poland's accession to the EU, subject to the recipients achieving viability by 2006; this was approved by the Council in July 2003 ⁽⁴⁾.

(4) The EU thus allowed Poland, notwithstanding its rules ⁽⁵⁾, to grant restructuring aid to the steel industry. This was finally laid down in a Protocol to the Accession Treaty, Protocol No 8 on the restructuring of the Polish steel industry ⁽⁶⁾. It confirms the acceptance of the award of state aid to eight companies listed in Annex 1 to Protocol No 8, including TB-HB, of not more than PLN 3,387 billion before end-2003.

I. PROCEDURE

(1) In March 2002 a restructuring programme was presented by Huta Buczek (hereinafter 'TB-HB'), to the Polish authorities. TB-HB was as of 7 May 2003 renamed Technologie Buczek S.A. (hereinafter 'TB').

⁽¹⁾ OJ L 236, 23.9.2003, p. 948.

⁽²⁾ OJ C 196, 19.8.2006, p. 23.

⁽³⁾ Assuming that EUR 1 = PLN 4.

⁽⁴⁾ See for details Decision 2006/937/EC of 5.7.2005 in case C-20/04 *Huta Częstochowa*, (OJ L 366, 21.12.2006, p. 1, points 23 *et seq.*)

⁽⁵⁾ State Aid to the steel sector is not allowed in the EU; see Communication from the Commission — Rescue and restructuring aid and closure aid for the steel sector (OJ C 70, 19.3.2002, p. 21).

⁽⁶⁾ See Protocol No 8 to the Accession Treaty on the restructuring of the Polish steel industry (OJ L 236, 23.9.2003, p. 948).

(5) In order to ensure that the conditions laid down in the Protocol are complied with, Protocol No 8 sets out detailed provisions for implementation and monitoring. One requirement is that Poland has to provide bi-annual monitoring reports, and evaluations were carried out by an independent consultant in 2003, 2004, 2005 and 2006⁽⁷⁾. Company reports for TB were presented in February 2004 and April 2005. They were discussed with the Polish authorities and the recipients and approved by the Commission and the Polish authorities.

(6) In September 2005 TB modified its IBP (hereinafter referred to as '2005 IBP') and later submitted it to the Commission with a request for approval under point 10 of Protocol No 8. However, the fact that the company modified this plan several times subsequently and has been in liquidation since 2006 made this request redundant.

(7) After the independent evaluation in 2005 indicated that TB had an increasing debt to public creditors and was not achieving viability, the Commission requested additional information from Poland by letters of 29 March 2005, 1 August 2005 and 2 December 2005. Poland replied by letters of 23 June 2005, 28 September 2005 and 14 February 2006.

(8) By letter dated 7 June 2006 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 the aid.

(9) The Commission Decision to initiate the procedure was published in the *Official Journal of the European Union*⁽⁸⁾. The Commission invited interested parties to submit their comments on the aid/measure.

(10) The Commission received no comments from third parties.

(11) The Polish authorities replied by letters of 18 September 2006, 2 October 2006 and 20 October 2006. The Commission asked Poland for additional information by letters of 6 November 2006, 18 December 2006 and 15 March 2007. Poland replied by letters of

24 November 2006, 23 January 2007 and 23 May 2007. On 13 December 2006 a meeting took place between the Polish authorities and the Commission.

II. DETAILED DESCRIPTION OF THE AID

1. The TB group

(12) TB is a Polish tube producer located in the city of Sosnowiec in Silesia Province. Until 2006 it produced steel tubes in a welded tube rolling shop and a high alloy steel tube rolling shop. These are considered steel products under the EC State Aid rules⁽⁹⁾. It has a total capacity of about 60 thousand tonnes⁽¹⁰⁾. The welded tube mill consists of four welding lines (W1.5, W2, which was upgraded in 1993 and 2001, W3, put into service in 1999, and W4, put into service in 2003) and two slitting lines (one put into service in 2004). TB also operated a rolling mill facility until 2005.

(13) TB is a joint stock company which in 2004 had own capital of around PLN 20 million (EUR 5 million). The majority shareholder of TB, with about 78,1 %, is Górnośląski Fundusz Restrukturyzacyjny S.A. (Upper Silesian Restructuring Fund, hereinafter 'GFR'), whose main shareholder, with 51,3 %, was, until 30 December 2005, Eurofaktor SA (hereinafter 'EF'). EF's shareholders are private investors, such as Bonum Sp. z o.o. (37,25 %), ING TFI (13,40 %), Polmetal Sp. z o.o. (11,31 %) and Stabilo Group Sp. z o.o. (10,93 %). EF subsequently sold its shares to Stabilo Group Sp. z o.o. The Treasury was a minority shareholder in GFR.

(14) TB currently has four subsidiaries with significant business activity:

(a) Buczek Automotive Sp. z o.o. (hereinafter 'BA', originally named P.U.R.M. (Przedsiębiorstwo Usług Remontowo Mechanicznych) 'REMEBUD' Sp. z o.o.), is today 51 % owned by TB. It originally provided machinery and equipment maintenance services to TB. In December 2005 TB also transferred

⁽⁷⁾ Hereinafter 'independent monitoring reports' referring to the year monitored.

⁽⁸⁾ See footnote 2.

⁽⁹⁾ See Annex B of the Multisectoral framework (OJ C 70, 19.3.2002, p. 8), which was replaced by Annex I to the Guidelines on national regional aid for 2007-2013 (OJ C 54, 4.3.2006, p. 13).

⁽¹⁰⁾ Information on TB is taken from Huta Buczek's restructuring programme for 2002-2006 (hereinafter '2002 IBP') of March 2002, which was the basis for approving aid following adoption of the NRP. For more information see the decision to initiate the procedure (footnote 2).

its main business for the automotive sector to BA (at that time 100 % owned by TB) and renamed it BA. In addition to the 76 employees in the original company, a further 227 employees were transferred to BA on 1 December 2005. On 1 January 2006 TB and BA signed a lease agreement, of unlimited duration, on the basis of which BA operates TB's automotive assets. In November 2006 EF executed the pledge on the shares of BA because of TB's unpaid debts and acquired a 49 % stake in BA. BA is a steel producer within the meaning of the EU State Aid rules.

(b) Huta Buczek Sp. z o.o. (hereinafter 'HB', 100 % owned by TB) is TB's spun-off rolling mill facility. It has 227 employees. HB was created on 3 December 2004 with PLN 100 000 (around EUR 25 000) share capital. In 2005 and the first half of 2006 TB increased the HB's capital through several capital injections totalling PLN 14 811 600. HB is not a steel producer within the meaning of the EU State Aid rules.

(c) Buczek — HB — Zakład Produkcji Rur Sp. z o.o. (hereinafter 'ZPR', 18 % owned by TB, with the remaining shares held by the company's employees) which manufactures drawn tubes and provides tube cutting and processing services, with 100 employees. It was taken over by TB's employees in 2001 to prevent its closure. TB still owns TB-ZPR's production equipment, which is leased to it.

(d) SAMKOL (100 % owned by TB) is a transport service provider, which was founded in 1997 and whose capital was last increased in 2001. It used to provide 80 % of its services to TB but currently only 20 % of its revenue is derived from work for TB.

2. The original restructuring plan

(15) In 2002, TB-HB prepared an individual business plan (hereinafter referred to as '2002 IBP') in order to overcome financial difficulties. As indicated in the

decision to initiate the procedure, the operational restructuring plan involved focusing on manufacturing of welded calibrated tubes for special applications made of ALU-coated or galvanised steel strip. To this end, more production equipment was to be acquired ⁽¹¹⁾.

(16) The business plan indicated the total cost of the potential investments as PLN 25 million. In addition to the main investments in production and processing of pipes for automotive applications and welded tube manufacturing lines, this included projects such as computerisation, modernisation of other minor projects and purchase of fixed assets. Investments in the rolling department were also desired but were judged unrealistic and therefore postponed.

(17) The plan also included a cost reduction programme involving a cut in the number of employees from 532 to 407. To this end, provision was made for total costs for 2002-2006 of PLN 2 910 000. In particular, for the 161 job cuts, external public aid of PLN 823 000 with a net grant equivalent of PLN 597 000 was envisaged. In addition, aid of PLN 2,754 million was envisaged for research and development (hereinafter referred to as 'R&D') with PLN 1 250 000 for 2002, representing a net grant equivalent of PLN 900 000 in 2002, and PLN 2 540 000 for 2003 (net grant equivalent PLN 1 854 000) ⁽¹²⁾.

(18) Lastly, financial restructuring of PLN 8,411 million net grant equivalent was planned aiming at a debt waiver of about PLN 3,392 million (this mainly involved real estate tax debt to the local authority and smaller amounts owed to the Tax Office and the social insurance institution (Zakład Ubezpieczeń Społecznych, hereinafter referred to as 'ZUS') and debt rescheduling of PLN 6,014 million to ZUS and the State Fund for Rehabilitation of Disabled Persons (Państwowy Fundusz Rehabilitacji Osób Niepełnosprawnych, hereinafter 'PFRON') with a net grant equivalent of PLN 5,019 million (PLN 5,001 million (ZUS) + 18 000 (PFRON)). The purpose of financial restructuring was to purchase materials and to maintain continuity of production ⁽¹³⁾.

⁽¹¹⁾ See 2002 IBP, p. 57.

⁽¹²⁾ See 2002 IBP, p. 74.

⁽¹³⁾ See 2002 IBP, p. 74.

3. State Aid

(a) *Aid envisaged under the restructuring plan*

(19) The restructuring programme essentially envisaged the following aid:

Table 1

Planned State Aid for TB for 2002-2003

Institution	Nature of Aid	PLN thousand	PLN thousand (NGE)
FGSP (2002) ⁽¹⁾	Payment in instalments	136	3
FGSP (2003)	Payment in instalments	270	15
<i>Sub-total instalments</i>		406	18
Sosnowiec local authority	Debt write-off	2 964	2 964
Tax Office	Debt write-off	163	163
ZUS	Debt write-off	265	265
<i>Sub-total write-offs</i>		3 392	3 392
ZUS	Payment in instalments	6 014	5 001
Total	Financial restructuring	9 812	8 411
	Employment restructuring	823	597
	R&D	3 790	2 754
	Total aid	14 425	11 762

(¹) Fundusz Gwarantowanych Świadczeń Pracowniczych (Wage Guarantee Fund) is designed to ensure the payment of employees' claims in the event of an employer going bankrupt.

(20) The restructuring plan also mentioned that in 1997–2001 HB-TB had received State Aid amounting to PLN 4 422 411 (net grant equivalent). Most of this was R&D aid (PLN 3 243 626). PLN 196 800 was aid for environmental protection, PLN 132 240 for training aid and the remaining PLN 849 746 was aid for the 'restructuring process' or 'ad-hoc aid' (¹⁴).

(b) *Aid received*

(22) According to the independent consultant, in 2002-2003 the company received only PLN 2,235 million (net grant equivalent) in State Aid (¹⁵). PLN 2,045 million of this aid was set aside for R&D and PLN 190 400 for employment restructuring (¹⁶).

(21) Thus altogether aid of PLN 16 184 411 was earmarked for TB and subsequently approved under the NRP and Protocol No 8.

(¹⁴) See 2002 IBP, p. 30.

(¹⁵) 2004 Independent Monitoring Report, April 2005, p. 14.

(¹⁶) This was confirmed by the figures provided by Poland in its bi-annual monitoring report, e.g. for 2003, see OCCP Report No 2, Annex 5, p. 5. The fact that TB's 2005 business plan indicates a smaller amount which clearly excludes R&D is not acceptable.

- (23) In addition, the 2005 IBP indicated that TB had obtained a budget grant for employment restructuring from 2004 to 2006 of PLN 877 000 ⁽¹⁷⁾. The Polish authorities have explained that the government provided funds to help redundant steel workers re-enter the labour market through training to improve their qualifications or to encourage them to take early retirement by compensating them in part for the low income they would receive while on early retirement. It is based on the December 2003 amendment of the Iron and Steel Industry (Restructuring) Act of 24 August 2001 and stipulated that the sole recipients are the employees (the employer is merely an intermediary which transfers budget funds to redundant workers).

4. Failure of restructuring — developments between 2003 and 2006

- (24) The restructuring of TB did not develop as envisaged in the restructuring plan but resulted in bankruptcy in 2006 for several reasons:

(a) *Waiver of debt*

- (25) TB was not able to obtain the debt waivers planned in the IBP.

- (26) Cancellation of debts to ZUS, Sosnowiec local authority and the Tax Office amounting to PLN 3 392 000 was supposed to be awarded on the basis of the Act of 30 August 2002 on the restructuring of some corporate public debt (hereinafter referred to as 'the Act of 30 August 2002' ⁽¹⁸⁾). This Act made it possible for companies in financial difficulties to restructure public-law liabilities in the form of waivers. The company concerned had to lodge an application and restructuring plan with each public authority whose receivables were to be restructured (hereinafter also referred to as 'the restructuring authority').

- (27) The restructuring authority, after reaching the conclusion that the proposed restructuring plan could improve the company's financial situation, issued a 'decision on restructuring conditions' listing the liabilities covered by restructuring. If the company fulfilled all the conditions imposed by the decision, i.e. paid a restructuring fee,

presented a restructuring plan and had no other arrears, the restructuring authority was obliged to issue a 'final' decision to waive the liabilities listed in the decision on restructuring conditions (the 'decision on completion of restructuring').

- (28) This final decision could, however, be issued at the earliest one year after the adoption of the decision on restructuring conditions and had to be endorsed by the President of the Office for Competition and Consumer Protection (the Polish competition authority, hereinafter 'OCCP') as regards the compatibility of the waivers with the State Aid rules. In the period after the adoption of the decision on restructuring conditions and before the decision on completion of restructuring, companies had to register future waivers as arrears. In addition, penalty interest accrued. The Commission understands that the rationale of this was to allow debt waivers to take place only after it had been shown that the company really was implementing a restructuring programme.

- (29) The Commission was informed that ZUS, Sosnowiec local authority and the Tax Office had not implemented such waivers.

- (30) Plans to waive TB's debts to Sosnowiec local authority (real estate tax liability of PLN 2 964 000), were rejected by the OCCP because the application had been lodged after 31 December 2003, whereas Protocol No 8 prohibited the granting of State Aid to steel companies after that date. Therefore, on 28 April 2004 the OCCP stated that the planned waiver could not be granted as it would breach the provisions of Protocol No 8. For the same reasons, on 6 February 2004, the OCCP issued a negative opinion concerning the planned cancellation of TB's debts to PFRON.

- (31) TB's application for the cancellation of its debts to the Tax Office (PLN 163 000) was rejected by the Tax Office. According to the Act of 30 August 2002, this could happen only if the company did not pay the 'restructuring fee' (amounting to 15 % of the value of debts to be waived) or if the company had other arrears to the Tax Office.

⁽¹⁷⁾ Letter of 2 October 2006.

⁽¹⁸⁾ See 2002 IBP, p. 73.

(32) Lastly, as shown by the 2005 business plan, restructuring of the debt to ZUS (PLN 265 000) failed for financial reasons. As explained above (recital (26)) in order to obtain debt cancellation under the Act of 30 August 2002, the company should have repaid, or rescheduled repayment of, all the other public liabilities not subject to restructuring under the Act of 30 August 2002. That is why the 2002 IBP assumed that debt amounting to PLN 6 420 000 would be repaid in instalments. Hence, the Commission concludes that TB either reached no agreement with ZUS on repayment in instalments or ZUS issued such a decision but TB did not abide by it.

(b) *Increase in debt*

(33) Between 2001 and 2006 TB accrued public debts vis-à-vis ZUS, Sosnowiec local authority, the Tax Office and

PFRON. The debt began to increase in 2001, rising steadily until December 2002. After a short respite, debt continued to accrue between February 2002 and November 2003. Only between November 2003 and October 2004 was the company in a position to service its debt, probably with a view to meeting the debt cancellation requirements set out in the Act of 30 August 2002. However, as of November 2004 the company's debt started rising again.

(34) As a result of its failure to secure waivers, TB had outstanding debts of around PLN 20 million by autumn 2004. This was confirmed in the fourth Polish monitoring report for 2004 of 8 March 2005 which contained a detailed breakdown of the following outstanding liabilities:

Table 2

Debt of TB as indicated in Polish monitoring report of March 2005

Public creditors (PLN thousand)	Liabilities at end-2003	Liabilities at end-2004	Liabilities at end-January 2005
ZUS	14 956	13 916	14 510
Sosnowiec Local authority	7 411	5 118	5 371
PFRON	480	678	704
Sosnowiec Tax Office	269	555	524
Other	115	0	0
Total	23 231	20 267	21 108

(35) Accordingly, by end-2004, TB's debts vis-à-vis public creditors amounted to about PLN 20 million. The Polish authorities indicated that in 2004 TB had managed to repay about PLN 5 million (PLN 1,2 million to ZUS and PLN 3,8 million to the local authority) from the sale of idle assets. This notwithstanding, the report indicated that the debt had started to increase again after 2004 and by January 2005 it amounted to PLN 21,1 million.

(36) The Polish authorities subsequently corrected the amount to PLN 20,761 million at end-2004. By 31 March 2005 it had increased to PLN 22,43 million and by 30 June 2005 to PLN 22,91 million. Thereafter the company apparently managed to sell some assets and reduced the debt by end-2005 to PLN 20,87 million. However

in mid-2006 it increased again to PLN 22,11 million, reaching PLN 22,67 million in August 2006, when bankruptcy was declared.

(37) According to the information available to the Commission, TB did not present a comprehensive restructuring plan in 2004 with a view to rescheduling the debt.

(38) As creditors, the public authorities have taken steps to enforce their claims, as required by law. For example, Sosnowiec local authority and ZUS froze the company's bank accounts to enforce their claims. However, this was not effective as all funds paid into the accounts are earmarked for payment of salaries.

- (39) Therefore the outstanding debt is being enforced mainly by realising charges against real estate and acquiring permanent usufruct. In addition, the local authority has apparently obtained the transfer of several assets under Article 66 of the Tax Ordinance.
- (40) In particular, repayment of the debt to ZUS was enforced by obtaining mortgages of PLN 25 million. ZUS also has pledges on production assets of around PLN 12 million, of which approximately PLN 9,5 million constitutes first-rank pledges (this includes a first-rank pledge on welding line W-3, worth more than PLN 7 million).
- (41) In May 2007 the receiver published the list of the acknowledged debts of the bankrupt TB with a total value of PLN 63 million. This amount includes public-law debts, the main creditor being EF, whose liability amounts to PLN 35,9 million.
- (c) *Investments*
- (42) TB did not fully implement its investment programme of PLN 25 million as envisaged but spent about PLN 10 million in investments and earmarked some additional funds for R&D.
- (43) TB implemented some investments on the basis of its IBP. In 2003 and 2004 investments were focused on developing the production of tubes for automotive applications. In 2003 it commissioned a line for welding ALU coated tubes (PLN 3 207 000) and in 2004 a slitting line for manufacturing short pipes (PLN 733 000). In addition, the existing welding lines (PLN 1 063 000) and some buildings (PLN 1 379 000, including a heating system) which were necessary for the automotive business were modernised. In total PLN 6,383 million was invested in the automotive business between 2002 and 2005. The Polish authorities have confirmed that all the investments concern assets which have been leased to BA in the meantime ⁽¹⁹⁾.
- (44) Some PLN 3,5 million was earmarked for other investments concerning IT systems, purchases of other capital goods and other projects ⁽²⁰⁾.
- (45) Provision was also made for an additional PLN 12 to 13 million for 2005 and 2006, including the bringing forward of the launch of production of chromium pipe elements, with a new welding line due to be purchased in 2006 (about PLN 6 000 000). As far as the Commission is aware, however, this was not built.
- (d) *Overall performance of the company*
- (46) TB has not overcome its financial difficulties and has not obtained any bank loans.
- (47) Throughout the restructuring period TB was unable to obtain financial support from creditors and local financial institutions ⁽²¹⁾. In fact, TB's bank reduced its credit facilities as early as 2003. This situation was resolved only by the involvement of a financial investor, GFR, which took over a significant number of debts which were converted into long-term loans. Despite this, by 2004 TB was once again unable to obtain credit from banks ⁽²²⁾.
- (48) This is mainly due to the fact that at no point during the restructuring period was TB able to achieve profitability, despite very positive market trends.
- (49) In fact, in 2003, as the independent monitoring reports show, TB remained far below its sales target of 48 thousand tonnes of tubes, selling only 30 thousand tonnes ⁽²³⁾. In addition, it was struggling with tariffs imposed on wide hot rolled strip, its main feedstock and an unsuccessful price promotion strategy which resulted in reduced revenue. It therefore ended 2004 with a negative operating margin of PLN 5 million (turnover was PLN 92 million). Consequently, it failed to pass the Commission's viability test. In its January 2004 summary report, the Commission's independent consultant concluded that TB 'is effectively trading while being insolvent' ⁽²⁴⁾.

⁽²⁰⁾ See 2005 IBP, p. 69.

⁽²¹⁾ See 2003 Independent Monitoring Report, January 2004, p. 7.

⁽²²⁾ See fourth Polish report for 2004, March 2005, p. 168.

⁽²³⁾ See 2003 Independent Monitoring Report, January 2004.

⁽²⁴⁾ See 2003 Independent Monitoring Report, January 2004, p. 16. In its 2004 report, it was even noted that the 2003 performance was significantly worse than that estimated after 10 months (from the date of the first monitoring exercise).

⁽¹⁹⁾ Letter from the Polish authorities of 23.1.2007.

- (50) In 2004, the third Polish monitoring report of September 2004 also indicated that TB had low financial liquidity and that its financial surplus did not cover repayment of loan instalments with interest, which meant there was a high risk of defaulting ⁽²⁵⁾. The fourth Polish report for 2004 contained detailed data on arrears (see recital (34) above) and indicated that the company had not received any support from financial institutions, implemented its planned job cuts or reached forecast productivity levels. As regards the company's financial standing, it concluded that, 'of all the group companies, Technologie Buczek Sp. z o.o. was most at risk of losing financial liquidity. This risk was not mitigated by net profits on business activity, because this did not result in additional revenue. [...] The existence of the risk was demonstrated by the high level of financing assets by debt, including a significant share of arrears to public-law institutions. This situation dissuaded investors from investing in the company, as evidenced by the company's difficulties in obtaining bank loans.'
- (51) The Polish view was confirmed by the independent monitoring report of May 2005 ⁽²⁶⁾. It stated that in 2004, despite the upturn on the steel market and rising steel prices (30 % higher than forecast) TB recorded a negative operating margin and sales were 20 % below forecasts. Therefore the consultant concluded that, 'on the basis of its performance in 2003 and 2004, there was a significant risk that the company would not achieve viability by end-2006' ⁽²⁷⁾.
- (52) In September 2005 the fifth Polish report confirmed that TB had lost financial liquidity. It also stated that this was due to the spinning-off of the rolls business ⁽²⁸⁾.
- (e) *Changes in strategy*
- (53) TB has changed its management and its business strategy several times.
- (54) TB has attempted to implement various structural changes. The board was dismissed several times, in 2003, 2005 (February and October) and 2006.
- (55) At end-2003, in September 2005 and at the beginning of 2006 TB changed its restructuring strategy. The 2005 IBP clearly changed the strategy by narrowing down TB's activity to ALU coated steel tubes and tubes made from chromium steel. To this end, manpower was to be reduced to 267 employees. The updated IBP apparently imposed an obligation on TB to discontinue production of unprofitable high alloy seamless and welded tubes. The company also stopped production of welded tubes from HR strip.
- (56) As indicated by Poland in a letter of 14 February 2006, as of 2006 TB intended to terminate production in 2007 and wanted to continue as a purely management company. It planned to set up a new company with the intention of creating a leading Polish company specialising in the production of aluminium and chrome pipes for the motor vehicle industry. To this end a separate company was to be set up as the 'ongoing restructuring of TB's assets and finances [...] precludes financial stabilisation, the repayment of budget arrears and the obtaining of loans giving access to cheaper sources of financing' ⁽²⁹⁾. It was to use the welding lines W-4 and W-2, leasing them from TB while the entire workforce was transferred to it (with the exception of a few workers left to run TB). The necessary infrastructure had clearly been hived off from TB's assets. The remaining welding machines were to be sold for reasons of asset restructuring. Given that production was to cease by end-2006 the Commission concludes that the new restructuring strategy implied the *de facto* winding-up of TB.
- (57) TB has since filed for bankruptcy (15 September 2006). The bankrupt TB Group has been allowed to continue its business activity. This now consists in leasing assets to its subsidiaries. The administrator in bankruptcy plans to sell off the organised parts of the company and to continue leasing activity until that time.
- (f) *Corporate restructuring*
- (58) TB has restructured its group and spun off two profitable activities, rolls production (to HB) and the aluminium and chrome pipe business (to BA) (see recital (14) above).

⁽²⁵⁾ See the third Polish report for January to June 2004, January 2004.

⁽²⁶⁾ See 2004 Independent Monitoring Report, May 2005.

⁽²⁷⁾ See 2004 Independent Monitoring Report, May 2005, p. 1.

⁽²⁸⁾ See fifth Polish report, 9.9.2005, p. 18.

⁽²⁹⁾ The plan was never submitted to the Commission but was reproduced in the letter from the Polish authorities of 14.2.2006.

(59) TB's rolls production activities were not considered part of its core business. As early as 2002 the IBP indicated that no further investments should be made in HB and that it should be spun off.

(60) HB was founded in December 2004 with initial capital of PLN 100 000. The following year its value was increased to PLN 14 911 600 by a way of an asset injection of PLN 3 330 900 on 17 January 2005, capital injections of PLN 3 850 000 and PLN 1 830 700 in February/March and November 2005 respectively and an injection of intangible assets with a value of PLN 5 800 000 on 13 July 2006.

(61) The overall value of HB was estimated at PLN 38 million on the basis of the Swiss method. Hence its market value is much higher than its share value of PLN 14,9 million. In fact HB is recording profits. It has no arrears with public bodies. In June/July 2005 HB purchased real estate and machinery from TB for PLN 9 450 013 with an estimated value of PLN 10 430 194. The pledges on the assets remained and, in accordance with Polish law (Article 112 of the Tax Act), HB even became a joint and several debtor with TB for some of TB's debts vis-à-vis ZUS.

(62) BA was revived in 2005 to receive the aluminium and chrome pipe business. To that end, TB's workforce was transferred to BA and, in July 2006, capital of PLN 1 550 000 was injected. BA leases production assets for the automotive exhaust pipes business from TB (including welding lines W2 and W4 and a slitting line). Under the lease agreement, which is of unlimited duration, BA pays PLN 258 000 per month + VAT. On this basis BA is clearly benefiting from the investments made in these assets. In fact the seventh Polish report confirms that TB has transferred 20 thousand tonnes of production capacity to BA ⁽³⁰⁾.

(63) In February 2004 EF signed a factoring service contract with TB. Pledges on the shares of HB and BA were registered in order to ensure compliance with the contract. EF thus became TB's biggest creditor. As EF was only a shareholder of GFR, EF's claims are not deemed to constitute capital investment in TB.

(64) TB is currently the owner of 51,2 % of BA shares. The remaining shares in BA were taken over by EF when a pledge was enforced on 20 July 2006 as debt settlement. Settlement was effected at the nominal value of shares (PLN 7,2 million).

(65) As a creditor, EF also lodged an application with the administrator for 48,8 % of HB shares to be excluded from the bankruptcy proceedings. This application was, however, dismissed by the judge in September 2006.

III. GROUNDS FOR INITIATING THE PROCEDURE

(66) In its decision to initiate the procedure the Commission found that the restructuring of TB was incompatible with Protocol No 8 and raised three issues:

(a) given that the restructuring plan had not been implemented, it had decided to investigate whether there had been misuse of restructuring aid;

(b) whether the non-enforcement of the outstanding public debt constituted State Aid within the meaning of Article 87(1) of the EC Treaty;

(c) whether additional budgetary support had been awarded for employment restructuring after 2003, possibly constituting State Aid under Article 87(1) TEC.

(67) The Commission indicated that it would consider the whole group as the recipient.

IV. COMMENTS FROM POLAND

(68) First, the Polish authorities dispute that restructuring aid was misused. Poland argues that the aid was not in its entirety restructuring aid.

(a) This mainly concerns R&D aid provided between 2002 and 2003. TB used most of the aid it was awarded under the restructuring plan for R&D. Poland has confirmed that the aid was used for that purpose. The Polish authorities have provided information on the Ordinance of the Chairman of the Committee for Scientific Research of 30 November 2001 on the criteria and methods used to award and calculate state funding for science. Accordingly, R&D expenditure was monitored on the basis of invoices submitted and detailed annual reports which indicated that no misuse of aid had occurred.

⁽³⁰⁾ See seventh Polish report, 10.9.2006, p. 15.

- (b) The employment aid awarded before 2004 was deemed compatible given that its approval had been linked to other factors in the accession negotiations. The Polish authorities do not, however, maintain that this aid is compatible on grounds other than for restructuring purposes.
- (c) Poland also argues that some of the aid awarded before 2002 was actually used for R&D, environmental protection and training purposes and was spent for its designated purpose.
- (69) Second, the Polish authorities have forwarded some explanations by the relevant institutional creditors, ZUS, Sosnowiec local authority and PFRON concerning their enforcement action, so as to underline that they behaved like private creditors.
- (a) In the course of its enforcement action ZUS seized the company's accounts and claims and managed to enforce PLN 2,3 million in 2005. It also has a mortgage on TB's real estate worth more than PLN 25 million and has taken out a fiscal pledge on the company's assets to the value of PLN 12,2 million. According to ZUS, however, there were no grounds to conclude that, in the event of TB being declared bankrupt, a higher proportion of its claims would be settled than in the event of intensified enforcement proceedings being taken against TB. Instead, it was likely that the sales price obtained for the assets would be significantly lower than for most liabilities secured by pledge. In addition, the majority of forced mortgages encumbering TB's assets which had been set up for ZUS had been preceded by securities set up for other creditors which, in the event of the real estate being sold off within the context of bankruptcy proceedings, would have priority for the settlement of existing claims.
- (b) Sosnowiec local authority conducted enforcement proceedings, seizing bank accounts (the amount of enforced claims is about PLN 1,7 million) and seizing claims in the form of rent (revenue equivalent to PLN 0,5 million). The local authority's claims were also secured by registering forced mortgages to a total amount of PLN 3,2 million, plus interest.
- (c) PFRON indicated that it conducted enforcement proceedings against TB in 2005, issuing six enforceable titles which led to partial repayment in July 2006.
- (70) Third, Poland responded to the European Commission's doubts regarding aid for employment restructuring after 2003. It explained that the Iron and Steel Industry (Restructuring) Act of 24 August 2001 had been amended in December 2003 so that aid was earmarked solely for redundant workers; the steelworks were used purely as intermediaries to transfer funds (see recital (20) above).
- (71) Lastly, the Polish authorities take the view that TB's subsidiaries can be held liable only if they actually benefited from the aid. They also claim that capital and asset injections were carried out in a proper manner. The Polish authorities also note that HB is not a steel producer and is therefore not caught by Protocol No 8.

V. ASSESSMENT OF THE AID

1. Applicable law

- (72) Point 1 of Protocol No 8 states that 'notwithstanding Articles 87 and 88 of the EC Treaty, State Aid awarded by Poland for restructuring purposes to specified parts of the Polish steel industry shall be deemed to be compatible with the common market' if, *inter alia*, the conditions laid down in the Protocol are met.
- (73) The grace period for granting restructuring aid to the Polish steel industry under the Europe Agreement was extended by the Council until the accession of Poland to the EU. This arrangement was included in Protocol No 8 to the Treaty of Accession to the European Union. In order to achieve that objective, it covers a time-frame extending before and after accession. More precisely, it authorises the award of a limited amount of restructuring aid from 1997 to 2003 and forbids any further State Aid for restructuring purposes to the Polish steel industry between 1997 and 2006. In that respect, it clearly differs from other provisions of the Accession Treaty such as the interim mechanism set out in Annex IV (the 'existing aid procedure'), which only concerns State Aid awarded before accession in so far as it is 'still applicable after' the date of accession. Protocol No 8 can therefore be regarded as *lex specialis* which, for the matters that it covers, supersedes any other provision of the Act of Accession ⁽³¹⁾.

⁽³¹⁾ See Decision 2006/937/EC.

- (74) The Commission also notes that the scope of the Polish NRP and Protocol No 8 is not limited to that of Annex 1 of the ECSC Treaty. Instead, Protocol No 8 also covers certain steel sectors not covered by the ECSC Treaty ⁽³²⁾, in particular seamless tubes and large welded tubes. This is in line with the definition of steel under the EC State Aid rules ⁽³³⁾, which applied when Protocol No 8 came into effect. Above all, it follows from the scope of the NRP, which Protocol No 8 implements. In fact, half of the recipients under the last NRP are tube producers, namely Huta Andrzej S.A. (bankrupt), Huta Batory S.A. (bankrupt), Huta Pokój, a subsidiary of Mittal Steel Poland (former PHS) and TB. Therefore, Protocol No 8 also applies to tube producers, in particular to TB.
- (75) Consequently, while Articles 87 and 88 TEC would normally not apply to aid awarded before accession and not applicable after accession, Protocol No 8 extends State Aid monitoring under the EC Treaty to cover any aid awarded for the restructuring of the Polish steel industry between 1997 and 2006.
- (76) Decisions may be taken after Poland's accession under Article 88(2) TEC because, in the absence of specific provisions in Protocol No 8, the normal rules and principles should apply. Consequently, Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 (hereinafter 'the Procedural Regulation') ⁽³⁴⁾ will also apply.
- (77) According to Article 87(1) TEC, State Aid is any aid awarded by a Member State or through state resources in any form whatsoever which distorts, or threatens to distort, competition by favouring certain undertakings, in so far as it affects trade between Member States, and is thereby incompatible with the common market.
- (78) Poland was authorised by Protocol No 8 to grant restructuring aid to TB in order to implement its restructuring plan.
- (79) However, the granting of aid was limited by a grace period which expired at end-2003. Thereafter, Poland was no longer authorised to grant restructuring aid under Protocol No 8. Any aid would then be in breach of Point 18(c) of Protocol No 8 prohibiting any granting of additional State Aid to the steel industry and to the benefiting companies indicated in the Protocol in particular.
- (80) Notwithstanding this, the Polish authorities continued to give or prolong outstanding loans to TB after 2003 which has to be considered as State Aid within the meaning of Article 87(1) TEC.
- (81) The Commission points out that Article 87(1) TEC covers interventions in various forms which reduce a company's normal costs and which, without therefore being subsidies in the strict sense of the word, are similar in character and have the same effect. This has been confirmed on numerous occasions in cases where a public body responsible for collecting social security contributions tolerates non-payment or late payment of such contributions, as its conduct undoubtedly gives the recipient a significant competitive advantage by reducing, for that company, the burden associated with the normal operation of the social security system ⁽³⁵⁾. Instead of a deferral of payments the public creditor could have demanded immediate repayment of the total amount owed, if necessary by relying on the mortgage in its favour ⁽³⁶⁾.
- (82) In order to establish that there is an advantage which can be classified as State Aid for the purposes of Article 87(1) TEC, the Commission needs to demonstrate that the public authorities acted differently from a hypothetical private creditor, who would, in so far as possible, be in the same situation vis-à-vis his debtor ⁽³⁷⁾.

2. Existence of aid

⁽³²⁾ See OJ C 320, 17.10.1998, p. 3.
⁽³³⁾ See Annex B to the Multisectoral framework (OJ C 70, 19.3.2002, p. 8), which was replaced by Annex I to the Guidelines on national regional aid for 2007-2013 (OJ C 54, 4.3.2006, p. 13).
⁽³⁴⁾ OJ L 83, 27.3.1999, p. 1.

⁽³⁵⁾ Case C-256/97 DMT [1999] ECR I-3913, point 21.
⁽³⁶⁾ Case T-36/99 Lenzing [2004] ECR II-3597, point 146.
⁽³⁷⁾ See C-342/96 Tubacex [1999] ECR I-2459, point 46, C-256/97 DMT [1999] ECR I-3913, point 21, C-480/98 Magefesa [2000] ECR I-8717, T-152/99 HAMSA [2002] ECR II-3049 point 167.

- (83) As a preliminary remark, the Commission notes that the very existence of previous aid to a company prevents it on the basis of established European case-law from viewing the case from the perspective of a hypothetical private creditor, since a creditor of that type would obviously not have tolerated the original waiver, as it would otherwise not have been aid⁽³⁸⁾. This is particularly true in a restructuring scenario, where both measures fall within the restructuring period.
- (84) The non-existence of an updated restructuring plan also prevents an assessment of a hypothetical private creditor. In this case too, according to established case-law, when considering a rescheduling agreement from a market economy investor perspective, such an investor would have required a comprehensive update of the original restructuring plan. No private creditor or investor would accept restructuring without such a plan⁽³⁹⁾, as was the case here.
- (85) Furthermore, even on the basis of a hypothetical restructuring plan, no hypothetical private creditor would have entered into an additional restructuring agreement.
- (86) The Commission does not dispute that non-enforcement of the public debts which were eligible for waivers under the IBP/NRP was justified for a certain period of time under the mechanism envisaged in the Act of 30 August 2002. Indeed, enforcement of the liabilities subject to restructuring on the basis of the Act of 30 August 2002 was prohibited pending the completion of restructuring proceedings or discontinuance of proceedings on the grounds enumerated in the Act. Moreover, the Commission notes that as regards additional debts which were not subject to rescheduling, creditors could have counted on an improvement in TB's financial situation following the planned waiver, and therefore might have had reason to suspend debt enforcement until aid was awarded pursuant to the Act of 30 August 2002.
- (87) However, it is evident that restructuring on the basis of the Act of 30 August 2002 failed, at least partly because of non-compliance with Protocol No 8 as manifested in the negative opinion of the OCCP (the first, dated 6 February 2004), and partly because of the company's financial problems which prevented TB from complying with national law. The Commission considers that such failure must have come to the knowledge of the main public creditors such as ZUS, the local authority and the Tax Office, as they all were involved in the original debt restructuring. Similarly, PFRON should have been alerted by the OCCP's opinion on TB's debt to PFRON.
- (88) Following the failure of the previous restructuring agreement, particular alertness can be expected from private creditors, who would scrutinise the economic situation of their debtor⁽⁴⁰⁾. Accordingly, careful consideration of the advantage derived from rescheduling the debt would have shown that the potential recovery would not have exceeded the safe return inherent in the firm's liquidation⁽⁴¹⁾. In fact, a new rescheduling agreement would require restructuring to restore viability to the company in all cases and to prevent increases in arrears, so that the creditor could anticipate recovery of the loans within a reasonable time.
- (89) In the case of TB, a return to viability by end-2004 was highly doubtful, as the company had had a negative operating margin throughout 2003 and 2004 as indicated in recitals (49) to (51). Its turnover was not sufficient to cover its costs. TB did not even benefit from the upturn in the steel sector in 2004. As such, all indications regarding the prospects for TB's future viability were negative.
- ⁽³⁸⁾ Case T-11/95 *BP Chemicals* [1998] ECR II-3235, points 170 and 179, in which the Court held that a capital injection cannot be regarded in isolation from an ongoing restructuring. In other words, it held that where restructuring aid has already been provided to a company in difficulty, other financial support should not normally pass the private investor test.
- ⁽³⁹⁾ See Case T-126/96 and T-127/96 *BFM and EFIM* [1998] ECR II-3437, point 86. Also Case T- 318/00 *Freistaat Thüringen v. Commission* (CDA Alrechts) [2005] ECR II-4179, points 200 and 248: 'Given the disastrous situation of PA when the restructuring agreement was concluded, any reasonably diligent investor acting in a market economy would first have made an in-depth study of the undertaking's financial situation and required a viable restructuring plan to be drawn up before granting it such sizeable loans and a fortiori before acquiring it.'
- ⁽⁴⁰⁾ Similarly: case T-36/99 *Lenzing* [2004] ECR II-3597 points 140 *et seq.*
- ⁽⁴¹⁾ Case T-152/99 *HAMSA* [2002] ECR II-3049 point 170.

- (90) In addition, given that TB was no longer creditworthy, its debts were steadily rising. As of November 2004, TB was no longer able to pay its current debts, despite being in restructuring. As such, there was no reasonable possibility of recovering the past debt as a result of any hypothetical new restructuring of the debt.
- (91) Given that the public creditors, i.e. the local authority, ZUS, PFRON and the Tax Office all had good securities, they had a good chance of transforming them into cash in collective insolvency proceedings under Polish insolvency law. The Commission cannot accept ZUS's argument that it did not have good securities, since the Polish authorities have indicated that first-rank pledges accounted for a significant part, if not all, of the securities (see recital (40) above). In view of the deterioration of the company and its assets, making use of these securities appeared to make more economic sense than restructuring ⁽⁴²⁾.
- (92) Furthermore, even if a hypothetical restructuring plan proposed some hypothetical asset restructuring, this proposal should not have reduced private creditors' resistance to restructuring. This is because all the assets of a firm as indebted as TB are normally pledged and thus promise hardly any return if sold off. Indeed, although the company announced asset restructuring on several occasions in 2005, it was not able to obtain more than PLN 5 million in cash from the sale of assets.
- (93) The Commission understands that in 2004 and subsequently TB made attempts to repay some of the debt but notes that these repayments barely covered the amounts of interest accrued (see the table in recital (34) for the effect of the PLN 5 million repaid in 2004).
- (94) Lastly, with a view to providing a complete picture, it should be noted that the September 2005 plan was by no means a proper basis for further rescheduling. Given that the company was to be wound up, it is clear that its business activities would not generate any more profits and that liquidation would be the only solution. Indeed, the plan indicated that ZUS could count on only partial repayment. This was to be generated by the restructuring of assets worth about PLN 20 million up to end-2005, which proved unrealistic for the reasons stated in the previous paragraph. The proposed monthly payments after 2005 of PLN 100 000, subject to TB's ability to pay, were not feasible either as TB was no longer operating.
- (95) Instead, as TB admitted in its 2005 IBP, it saw spinning off its assets into BA as its only hope of restoring the business's viability. That did not just entail the spinning-off of its only profitable business (BA) but also determined TB's fate, i.e. its liquidation.
- (96) In short, the Commission finds that any hypothetical private creditor would have opted for enforcement of his claims as early as end-2004. At that time it became clear that TB was not able to honour its previous rescheduling agreements and would not be able to meet its current engagements. No updated plan had been presented and nor was there any perspective of the company becoming profitable.
- (97) Thus Poland failed to enforce PLN 20,761 million (PLN 20,267 million was indicated in the fourth Polish restructuring report, but that amount was later rectified by the Polish authorities). This constitutes operating support for the firm to continue its inefficient business and is therefore an advantage granted through state resources which threatens to distort competition in so far as it affects trade between Member States, and is thereby incompatible with the common market in the sense of Article 87 of the EC Treaty.

⁽⁴²⁾ Similarly, case T-36/99 *Lenzing* [2004] ECR II-3597, point 160, in which the CFI held that a public creditor with good securities has no reason to delay too long before applying collective enforcement measures.

(98) In order to quantify the aid amount, the hypothetical effect of non-enforcement of debt must be simulated. Given that a private creditor would have preferred to enforce its claims, the advantage that the firm derives from non-enforcement is the full amount of the claims which it does not have to reimburse. In other words, the firm has at its disposal an amount which, due to its financial situation, it would not be able to obtain on the market. In particular, if the State had enforced its claims the firm would not have been able to pay the amount due and would most probably have gone bankrupt. Failure to enforce the claims therefore had the same effect as granting the recipient the entire non-enforced amount⁽⁴³⁾. Hence the advantage obtained concerns an amount of PLN 20,761 million obtained as of 1 January 2005. However, given that a market economy operator would have enforced the original debt, this debt should hypothetically no longer exist and should not therefore be counted twice.

(99) As regards the budgetary funds indicated as employment restructuring and awarded after 2004, the Commission's doubts have been allayed. Indeed they cannot be considered State Aid as the Polish authorities have explained that they are provided for the sole benefit of redundant workers, who cannot be considered as an undertaking; equally, such payments cannot be related to the employer as they are provided after the workers are laid off and do not diminish any other charges which the company would have to bear if no such aid were provided.

3. Misuse of aid

(100) Point 18(a) of Protocol No 8 gives the Commission the power to take 'appropriate steps requiring any company concerned to reimburse any aid awarded in breach of the conditions laid down in this Protocol [...] if monitoring of the restructuring shows that the commitments for the

transitional arrangements contained in this Protocol have not been fulfilled.'

(101) The Commission finds that TB did not fully implement its restructuring plan as explicitly stipulated in point 9 of Protocol No 8 and contributed to its bankruptcy with the various measures indicated in recital (56) above. Poland has not disputed this finding.

(102) TB also failed to comply with several benchmarks set out in point 9 of Protocol No 8:

(a) TB was not able to obtain financial support from creditors and local financial institutions as stipulated in point 9(c) of Protocol No 8;

(b) TB only partially reduced its costs as stipulated in point 9(c) of Protocol No 8. The consultant confirmed that this obligation was met only in part⁽⁴⁴⁾;

(c) TB managed only partially to implement employment restructuring as parts of its cost savings programme. The number of workers was cut from 550 to 294 only thanks to the spinning-off of the rolls department into HB, not because of reductions in the core business⁽⁴⁵⁾;

(d) TB was not able to improve the efficiency and effectiveness of its business management as stipulated in the second recital of point 9(a) of Protocol No 8. In fact, TB's management board has been replaced several times since 2002.

(103) Since TB failed to meet the conditions set out in Protocol No 8 and did not properly implement its IBP, the restructuring aid has been misused and must be repaid.

⁽⁴³⁾ The same conclusions should be reached when considering that the non-enforcement of debt is a debt deferral, which has an effect equivalent to a loan, given that the recipient would normally need to borrow money on the capital market to prevent enforcement of the debt. However, because TB had lost its creditworthiness, such a loan would have had an aid element of 100 % (see the Communication on public undertakings in the manufacturing sector, OJ C 307, 13.11.1993, p. 3, point 41, applied in the Commission Decision of 7.7.2004 in case C-58/2003 *Alstom*, OJ L 150, 10.6.2005, p. 24, points 132 and 133). It should also be noted that the assumption of a 100 % subsidy does not require a concrete transfer of state resources but is an assumption from an *ex ante* perspective. It is thus irrelevant if a loan is later repaid contrary to the original assumption. This is also true in the event of non-enforcement of debt, where the question of what a hypothetical private creditor is able to enforce should not be relevant.

⁽⁴⁴⁾ See 2004 Independent Monitoring Report, April 2005, p. 13.

⁽⁴⁵⁾ See 2004 Independent Monitoring Report, April 2005, p. 15.

4. Compatibility of aid

(a) On the basis of the NRP between 1997 and 2003

(104) The Commission indicated in the decision to initiate the procedure that other reasons of compatibility might take precedence over the fact that restructuring aid was not used in line with the restructuring plan. To that end the Commission observed that under the NRP not only restructuring aid but also other types of State Aid had been awarded. As such, the failure of the restructuring does not necessarily imply that all this aid was misused⁽⁴⁶⁾, if it can be proven to be compatible with the single market under other State Aid rules⁽⁴⁷⁾.

(105) The Commission notes that until 23 July 2002 the State Aid rules for the steel sector were contained in Commission Decision No 2496/96/ECSC of 18 December 1996 establishing Community rules for State Aid to the steel industry⁽⁴⁸⁾ (hereinafter 'the Steel Aid Code')⁽⁴⁹⁾. Commission practice in implementing Protocol No 8 shows that in principle it takes the view that aid awarded under other frameworks such as the R&D framework can be deemed compatible if the Commission has no serious doubts as to its compatibility under Annex IV(3)(2) of the Accession Treaty⁽⁵⁰⁾.

(106) First, Article 2 of the Steel Aid Code and the EC State Aid rules authorise aid which is compatible with the EC R&D framework. The R&D subsidies given in the context of the NRP were awarded by KBN and were covered by the Programme of the Chairman of KBN on the Criteria

and Arrangements for Awarding and Calculating Financial Support for Science dated 30 November 2001, which was accepted by the Commission as existing aid under Measure PL 6 of Annex IV to the Accession Treaty. The NRP identified the 'KBN's resources' as 'authorised State Aid instruments in the form of subsidies for R&D', which it clearly distinguished from 'restructuring instruments'⁽⁵¹⁾. This NRP was approved by a Council decision in July 2003. The Commission has therefore decided not to raise objections to KBN's aid measure between 1997 and 2003 under Annex IV to the Accession Treaty and considers this aid as compatible R&D aid⁽⁵²⁾.

(107) As the aid classified as R&D in the IBP was provided by KBN it can be regarded as compatible aid. In addition, the Commission notes that Poland was able to demonstrate that the aid was paid out only in connection with the performance of R&D activities. This is true for aid awarded in 2002 and 2003 as well as R&D aid awarded between 1997 and 2000.

(108) However, in the case of the remaining training, employment restructuring and other restructuring aid, the Commission does not see under which provisions of the Steel Aid Code and the EC State Aid rules this aid could be deemed compatible.

⁽⁴⁶⁾ This can be inferred from the Commission's practice under the 1999 rescue and restructuring guidelines which were applicable when Protocol No 8 came into effect (Community Guidelines on State Aid for rescuing and restructuring firms in difficulty, OJ C 288, 9.10.1999, p. 2). This would not be allowed any longer under point 20 of the 2004 Community Guidelines on State Aid for rescuing and restructuring firms in difficulty (OJ C 244, 1.10.2004, p. 2). Although they do not apply directly as steel is in principle excluded, the Commission may in the exceptional case that restructuring aid is allowed at least draw inspiration from these guidelines.

⁽⁴⁷⁾ See Decision 2006/937/EC.

⁽⁴⁸⁾ Official Journal L 338, 28.12.1996 p. 42.

⁽⁴⁹⁾ According to point 44 of the Communication from the Commission concerning certain aspects of the treatment of competition cases resulting from the expiry of the ECSC Treaty (OJ C 152, 26.6.2002, p. 5) 'when taking decisions after 23 July 2002 in respect of State Aid put into effect on or before that date without prior Commission approval, the Commission will proceed in accordance with the Commission notice on the determination of the applicable rules for the assessment of unlawful State Aid.' This Communication (see OJ C 119, 22.5.2002, p. 22), stipulates that unlawful aid must be assessed in accordance with the text in force at the time when the aid was awarded.

⁽⁵⁰⁾ See Decision 2006/937/EC.

(109) First none of the aid is aid for environmental protection in line with the Community guidelines⁽⁵³⁾. Poland argued that aid designated as environmental aid in 1997 was awarded for the purpose of environmental protection, but without providing any details of the objectives in question. Also, the fact that the aid was provided by the Provincial Funds for Environmental Protection and Water Management does not suffice to demonstrate compatibility, as this fund is explicitly mentioned in the NRP

⁽⁵¹⁾ Page 38.

⁽⁵²⁾ See Decision 2006/937/EC.

⁽⁵³⁾ OJ C 72, 10.3.1994, p. 3, applied in accordance with Article 3 of the Steel Aid Code (since replaced, OJ C 37 of 3.2.2001, p. 3).

as an example of a 'restructuring instrument' and, unlike R&D, it is not distinguished from restructuring instruments (see recital (106) above). Second, the aid was not used for closures (Article 4 of the Steel Aid Code), as TB did not close any facilities. In any event, apart from the aid from environmental funds, the Polish authorities did not invoke any derogation under either the Steel Aid Code or the EC rules whereby the aid could be regarded as compatible with the common market.

(110) Lastly, the Commission would point out that, even if certain measures were deemed to constitute compatible restructuring aid within the context of a comprehensive restructuring project ensuring the restoration of viability, the failure to implement the entire restructuring plan successfully and to restore viability means in principle that the whole restructuring project failed and that any aid awarded to that end no longer serves any purpose. Consequently aid awarded previously according to the plan is no longer justified either and must consequently be considered *ex post* as incompatible.

(111) In fact, Poland argues that the employment aid was compatible with the common market because its approval had been linked to other factors in the accession negotiations. This is not disputed by the Commission. Nevertheless, the Commission notes that the compatibility argument does not mean that the aid would be compatible in the absence of the restructuring project. Therefore, if the restructuring fails, individual measures such as employment restructuring must also be regarded as having been misused. In the absence of any indication that such aid was compatible under other grounds the Commission must conclude that it is incompatible.

(112) To sum up, in view of the fact that the remaining training, employment restructuring and other restructuring aid is not covered by any other exception under the ECSC Steel Aid Code or the EC State Aid rules, the Commission takes the view that it constitutes unauthorised restructuring aid which, under Protocol No 8, is deemed incompatible with the common market. The Commission therefore concludes that aid designated as restructuring aid of PLN 849 746, as training aid of PLN 132 240, as environmental aid of PLN 196 800 and as employment aid of PLN 190 400, i.e. PLN 1 369 186 in total, has been misused.

(b) *Aid outside the NRP and after accession*

(113) The non-enforcement of debts at end-2004 constitutes operating aid and is as such clearly incompatible with the common market. It is not acceptable as restructuring aid either under Protocol No 8, which categorically prohibits any aid after 2003, or under any other provisions of Article 87(3) TEC. Indeed, the Commission notes that the Polish authorities have not even claimed the contrary. Therefore, any aid awarded to TB, BA and HB after Poland's accession to the EU is incompatible regardless of whether the recipient (here HB) is a steel producer or not.

5. Aid recipient

(114) The Commission expressed its opinion in the decision to initiate the procedure that the aid recipient is the TB group, including all its subsidiaries with the possible exception of TB-ZPR. This is because HB and BA are clearly part of the same business entity, i.e. the TB group.

(115) As regards the non-enforcement of debt, which amounted to PLN 20 761 643 million, the present investigation confirms that parts of the group benefited from it. The Commission could not, however, establish such benefits in the case of ZPR and SAMKOL:

(a) ZPR is not majority owned by TB but by ZPR's employees; under Polish law it is thus not part of the group. Furthermore, no investments were made in the company and nor were any assets or capital transferred to it from TB between 2003 and 2006 (and probably not before then either).

(b) SAMKOL, while part of the group, is not a steel producer. No investments were made in the company and nor were any assets or capital transferred to it between 2003 and 2006 (and probably not before then either).

(116) On the other hand, the investigation showed that BA and HB profited from the aid. The operating aid did not remain within TB because non-enforcement allowed it to proceed with its business activity and organise its internal restructuring.

- (117) The restructuring and the operating aid allowed TB first to complete investments in automotive exhaust production of around PLN 6,383 million (see recital (43) above) ⁽⁵⁴⁾ initiated between 2003 and 2005 and which would not have been possible if TB had had to service its debt properly or to file for bankruptcy earlier. These assets, essential to automotive production, are today operated by BA. Although BA merely leases these assets from TB it would, had these investments not been realised, have needed to make similar investments itself. Moreover, by leasing these assets BA avoids exposure to enforcement of the associated pledges while enjoying similar rights to those of an owner, given that the lease period is unlimited. Moreover, BA is clearly continuing TB's core activity developed within the framework of TB's restructuring plan with TB's productive assets and workforce as part of the TB group.
- (118) Second, transferring assets, workers and capital to its subsidiaries (PLN 14,81 million to HB and PLN 1,55 million to BA, see recitals (60) and (62)) was possible only because the operating aid saved TB from bankruptcy. Without this aid, the two subsidiaries would most probably not have been set up in the first place and would definitely not have been able to operate.
- (119) Despite the fact that BA, HB and TB are different legal persons, the Commission considers that economic continuity exists and, in the light of the ownership structure, deems the three companies to form together a single undertaking ⁽⁵⁵⁾ which should therefore be regarded as the aid recipient ⁽⁵⁶⁾.
- (120) This assessment of whether the company received an advantage is not altered by the fact that TB received some consideration in exchange for the benefits (i.e. shares for the capital injections and rent under the lease agreement) because it remained the ultimate owner (directly or indirectly) of all the assets and the transaction was not profit-orientated but carried out for reasons of internal organisation. The main issue is that the benefit is relocated within the group, i.e. the competitive position of TB which was created by the distortive aid was transferred. The fact that TB holds the shares in its subsidiaries does not alter this ⁽⁵⁷⁾. However, the Commission would not go so far as to consider the sale of assets by TB to HB as an advantage, in so far as it was properly remunerated ⁽⁵⁸⁾.
- (121) On the basis of this assessment of the facts, and in view of the case-law of the European courts, the Commission considers that the incompatible aid should be recovered from the TB group bearing in mind the actual benefit derived from the aid ⁽⁵⁹⁾.
- (122) The Commission does not, however, agree with the Polish authorities that the case solely concerns the initial addressee of the claims, which were not enforced and therefore constituted aid. In this case recovery of the aid could be carried out by registering the claim to the assets of the bankrupt TB. This option could be implemented on the basis of established case-law which
- ⁽⁵⁴⁾ If more investments were made in 2005 and 2006 as indicated in recital (45) these should also be considered.
- ⁽⁵⁵⁾ See Case 323/82 *Intermills*, point 11, where the court stated: '[...] it must therefore be accepted that, in spite of the fact that the three manufacturing companies each has a legal personality separate from the former SA Intermills, all those undertakings together form a single group, at least as far as the aid awarded by the Belgian authorities is concerned.' A similar approach is also suggested by Advocate General Geelhoed in Joined Cases C-328/99 and C-399/00 *Seleco* [2003] ECR I-4035, despite the fact that the Commission had argued that the recovery claim should be extended to the hived-off entity (and did not raise the economic continuity argument).
- ⁽⁵⁶⁾ It is established case-law that aid must, in principle, be recovered from the undertaking which has had the actual use thereof, in order to eliminate the distortion of competition caused by the competitive advantage afforded by that aid, see Joined Cases T-111/01 and T-133/01 *Saxonia Edelmetalle* [2005] II-1579, point 115.
- ⁽⁵⁷⁾ This argument is also put forward by Advocate General Geelhoed in Joined Cases C-328/99 and C-399/00 *Seleco* [2003] ECR I-4035, points 79 and 84.
- ⁽⁵⁸⁾ This applies irrespective of the fact that some debt was passed on to HB following the sale of TB's assets to HB as described in recital (61) above. In any event, the price paid for the assets was clearly not reduced in so far as the transfer of the claims is concerned, given that HB paid almost the market value of the assets.
- ⁽⁵⁹⁾ The Commission is aware of the fact that it is 'not required to determine [...] to what extent each undertaking had benefited from the [aid], but could merely instruct [the Member State] to recover that aid from the recipient or recipients thereof, that is, from the undertaking or undertakings which had had actual use thereof,' see Joined Cases T-111/01 and T-133/01 *Saxonia Edelmetalle*, point 124. However, while the Commission may limit itself to instructing the Member State to indicate the company from which the aid is to be recovered, nothing prevents the Commission from determining who actually benefited from the aid.

recognises that liquidation of a company is considered as an acceptable alternative to full recovery since the objective is to abolish the aid, and that objective can be attained by way of proceedings to wind up the company ⁽⁶⁰⁾.

regards the extension of recovery is whether a hive-off removed resources from the bankrupt undertaking's assets ⁽⁶²⁾, this is irrelevant in an intra-group scenario as indicated above.

- (123) However, the Commission finds that winding up the original aid recipient is unsatisfactory from a competition perspective where the actual benefit of the aid has been passed on. In this case, registration of the claim to the assets of the bankrupt TB would not allow the competitive advantage resulting from the actual benefit derived from the aid, which was passed on to TB's subsidiaries, to be offset. Targeting TB alone would result in the sale of the subsidiaries as legal persons, but would not affect their economic activity as such, because the sale would not have an impact on the activity itself, the subsidiaries' accounts or their operations.

- (125) In any event, the European courts accept that recovery can be demanded from a subsidiary if it was the actual recipient of the aid ⁽⁶³⁾, which is the case here. Moreover, the Court of Justice has also accepted that the Commission should be allowed to seek recovery outside the liquidation procedure to avoid the risk of recovery being deprived of its effect ⁽⁶⁴⁾. As explained in recital (56) above, TB deliberately hived off the automotive steel business into BA in order to continue the activity that benefited from the aid ⁽⁶⁵⁾. However, the Commission considers this as simply an additional reason for recovering the aid from the actual recipient.

- (126) On the other hand, the Commission is not able to establish that the misused restructuring aid awarded before 2004 was used for the benefit of any of TB's subsidiaries. It must therefore be recovered from TB.

- (124) Therefore, from a competition perspective, recovery from the actual recipients is the only appropriate option. Accordingly, the Polish authorities should primarily target the subsidiaries (reverting to the group only if recovery from the subsidiaries is no longer possible). This solution is in line with established case-law ⁽⁶¹⁾ on bankrupt undertakings and, in particular, with the *Seleco* case, which is based on similar facts but in which the Commission argued that the recovery claim should be extended to the hived-off entity. Contrary to the *Seleco* case, the Commission does not, however, want to extend recovery but has simply opted for recovering the actual benefit within the group. While the crucial issue as

⁽⁶²⁾ Case 277/00 *SMI* [2004] ECR I - 4355 point 86, read in conjunction with point 92. This is the case if the assets have not been transferred at the market price or if the transaction is motivated by the intention to evade recovery.

⁽⁶³⁾ See point 86 of Case 277/00 *SMI* [2004] ECR I-4355, in which the Court ruled that 'it is certainly possible that, in the event that hive-off companies are created in order to continue some of the activities of the undertaking that received the aid, where that undertaking has gone bankrupt, those companies may also, if necessary, be required to repay the aid in question, where it is established that they actually continue to benefit from the competitive advantage linked with the receipt of the aid.'

⁽⁶⁴⁾ Indeed, the Court had clarified that 'if it were permissible, without any condition, for an undertaking experiencing difficulties and on the point of being declared bankrupt to create, during the formal inquiry into the aid granted it, a subsidiary to which it then transfers its most profitable assets before the conclusion of the inquiry, that would amount to accepting that any company may remove such assets from the parent undertaking when aid is recovered, which would risk depriving the recovery of that aid of its effect in whole or in part.' C-328/99 and C-399/00 *Seleco* [2003] ECR I-4035, point 77. A similar rationale was applied in Case C-415/03 *Commission vs. Greece (Olympic)* [2005] ECR I-3875.

⁽⁶⁵⁾ As regards HB the hive-off was already envisaged in the original IBP, see recital (59) above.

⁽⁶⁰⁾ Case 277/00 *SMI* [2004] ECR I - 4355 point 85, Case 52/84 *Commission v Belgium* [1986] ECR 89, point 14, and Case C-142/87 *Tubemeuse* [1990] ECR I-959, points 60 to 62.

⁽⁶¹⁾ Joined cases C-328/99 and C-399/00 *Seleco* [2003] ECR I-4035, Case 277/00 *SMI* [2004] ECR I - 4355, case T-318/00 and T-324/00 *CDA Albrechts II* [2005] ECR II-4179.

VI. CONCLUSIONS

- (127) The Commission concludes that the restructuring of TB was not properly implemented and failed, and that all restructuring aid awarded to TB during the restructuring period must therefore be deemed to have been misused. However, any aid which is compatible because it was awarded for R&D, and which was spent for that purpose, was not misused.
- (128) Accordingly, the restructuring aid of PLN 1 369 186 received by the TB group between 1997 and 2003 is incompatible with points 9 and 18 of Protocol No 8 to the Accession Treaty and must be repaid pursuant to point 18 of Protocol No 8.
- (129) Moreover, the restructuring aid received as of end-2004 of PLN 20 761 643 is incompatible with the common market within the meaning of Article 87(1) TEC and points 6 and 18 of Protocol No 8.
- (130) As indicated above this aid is regarded as a grant received as of 1 January 2005 which should, as such, be recovered with interest as specified in recital (133) below. Given that this aid had similar effects to a debt waiver, the Commission could, however, accept that the Polish authorities proceed with recovery as if the original debt had been waived. The Commission would also find it acceptable, for the purpose of recovery, for any new debts of TB arising after 2004 to be disregarded, because some repayments were made by TB between the beginning of 2005 and August 2006 to public creditors which more or less neutralised the debts which arose after 2004⁽⁶⁶⁾. As indicated in recital (36) above, TB's total public debts after January 2005 never amounted to less than PLN 20,76 million and by August 2005 they had risen to PLN 22,7 million.
- (131) As discussed above, repayment of the aid should take into account which companies actually benefited from it. As regards the amount of PLN 20 761 643, it should be borne in mind that PLN 7,833 million was passed on to BA and PLN 14,81 million to HB (see recitals (117)-(118) above). As the sum of these amounts (PLN 22,643 million) exceeds the amount of

aid received, recovery should be limited to the total amount of the aid. This limitation should be proportionate, i.e. BA, which received 34,6 % of the total identified benefit, should also pay 34,6 % of the amount to be recovered (PLN 7 183 528); the remaining 65,4 % (PLN 13 578 115) should be recovered from HB.

- (132) Furthermore, the misused aid of PLN 1 369 186 received before 2002 should be recovered from TB, as there is no indication that this aid was passed on to other members of the TB group.
- (133) The amounts to be recovered shall bear interest calculated in accordance with the provisions of the Implementing Regulation. In particular, under Article 9(4) of the Implementing Regulation, when five-year inter-bank swap rates are not available, the Commission may, in close cooperation with the Member State concerned, fix a State Aid recovery interest rate using a different method and on the basis of the information available to it. As five-year inter-bank swap rates were not available to Poland for the period when the incompatible aid was awarded, the recovery interest rate to be applied should be based on the available interest rate deemed appropriate for that period. To that end, reference may be made to the practice already established between Poland and the Commission⁽⁶⁷⁾,

HAS ADOPTED THIS DECISION:

Article 1

The State Aid of PLN 20 761 643 unlawfully awarded by Poland to Technologie Buczek Group is in breach of Article 88(3) of the Treaty and is incompatible with the common market.

Article 2

The State Aid of PLN 1 369 186 awarded by Poland to Technologie Buczek Group between 1997 and 2003 has not been used in accordance with the conditions stipulated in Protocol No 8 to the Accession Treaty and is therefore incompatible with the common market.

⁽⁶⁶⁾ However, the proceeds from enforcement of claims after August 2006 may be taken into consideration when the amounts to be recovered are established.

⁽⁶⁷⁾ Further to the Commission Decision 2006/937/EC.

Article 3

1. Poland shall recover the aid referred to in Article 1 unlawfully made available to Technologie Buczek Group in particular from the subsidiaries Huta Buczek Sp. z o.o and Buczek Automotive Sp. z o.o, in proportion to the benefit actually obtained by them. Accordingly, Poland shall recover PLN 13 578 115 from Huta Buczek Sp. z o.o and PLN 7 183 528 from Buczek Automotive Sp. z o.o.

2. Poland shall recover the misused aid referred to in Article 2 awarded to Technologie Buczek Group from Technologie Buczek S.A.

3. The amounts to be recovered shall bear interest from the date on which they were made available to the recipient until their actual recovery.

4. Interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty ⁽⁶⁸⁾.

Article 4

1. Recovery of the aid referred to in Articles 1 and 2 shall be immediate and effective.

2. Poland shall ensure that this Decision is implemented within four months of the date of notification thereof.

Article 5

1. Within two months of notification of this Decision, Poland shall submit the following information to the Commission:

- (a) the total amount (principal and interest) to be recovered from the recipients;
- (b) a detailed description of the measures already taken and planned with a view to complying with this Decision;
- (c) documents demonstrating that the recipients have been ordered to repay the aid.

2. Poland shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Articles 1 and 2 has been completed in full. It shall immediately submit, at the request of the Commission, information on the measures already taken and planned with a view to complying with this Decision. It shall also provide detailed information concerning the amounts of aid and interest already recovered from the recipient.

Article 6

This Decision is addressed to Poland.

Done at Brussels, 23 October 2007.

For the Commission

Neelie KROES

Member of the Commission

⁽⁶⁸⁾ OJ L 140, 30.4.2004, p. 1. Regulation as last amended by Commission Regulation (EC) No 1935/2006 of 20 December 2006 (OJ L 407, 30.12.2006, p. 1).