

COMMISSION DECISION
of 6 November 2013
on the measures implemented by Germany in favour of HoKaWe Eberswalde GmbH SA.34721
(2012/C) (ex 2012/NN)

(notified under document C(2013) 7058)

(Only the German text is authentic)

(Text with EEA relevance)

(2014/206/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

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

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

Whereas:

1. PROCEDURE

- (1) On 30 April 2012, the Commission received a complaint by a wood-processing undertaking established in the Land Brandenburg alleging that a 15-year-framework agreement concluded between the German Land of Brandenburg and HoKaWe Eberswalde GmbH (HoKaWe) constitutes State aid within the meaning of Article 107(1) TFEU.
- (2) On 11 May 2012 the Commission submitted a non-confidential version of the complaint to Germany and requested additional information. By letter dated 6 June 2012 Germany provided comments on the complaint and submitted the additional information requested.
- (3) On 27 August 2012 the Commission sent a non-confidential version of the reply to the complainant, inquiring if the complainant wanted to pursue the matter further. The complainant replied on 4 September 2012 that the complaint would be upheld.
- (4) By letter of 19 December 2013, the Commission informed Germany that it had decided to initiate the procedure laid down in Article 108(2) TFEU in respect of the aid.
- (5) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* ⁽²⁾. The Commission invited interested parties to submit their comments on the measure.
- (6) By letter of 28 February 2013 Germany provided comments on the decision. The Commission received observations from two interested third parties on 30 April 2013 and from the complainant on 3 May 2013.
- (7) On 17 May 2013 non-confidential versions of these observations were sent to Germany. Germany commented on these observations on 11 June 2013 and completed these comments by letter of 13 June 2013.
- (8) The Commission sent further requests for information to Germany by letters of 2 August 2013, 17 September 2013 and 23 September 2013 to which Germany replied by letters of 15 August 2013, 20 September 2013 and 1 October 2013 respectively.

⁽¹⁾ OJ C 99, 5.4.2013, p. 79.

⁽²⁾ See footnote 1.

2. DESCRIPTION OF THE AID

2.1. The beneficiary

- (9) HoKaWe is a limited liability company that operates a wood-fired biomass power plant in Eberswalde in the Land Brandenburg. The power plant was built in 2005 and started operating in 2006. In June 2011 the county court of Frankfurt/Oder opened insolvency proceedings against HoKaWe. However, the company is still economically active.
- (10) The Landkreis Barnim (district of Barnim) was interested in purchasing HoKaWe's assets in order to continue operating the power plant; in May 2012 the asset transaction was approved in a meeting of HoKaWe's creditors and the sale was notarised. However, since the Land Brandenburg did not agree to transfer the framework agreement governing deliveries of wood from the Brandenburg State Forest (which is the subject of the present decision) to the new owner, the district of Barnim withdrew from the transaction.

2.2. Description of the measure

- (11) In June 2005 the Land Brandenburg and HoKaWe concluded a framework agreement for the delivery of wood from the Brandenburg State Forest. The agreement at stake stipulates the quantity and the terms and conditions of wood ⁽³⁾ deliveries to HoKaWe for a period of 15 years, from 1 June 2006 to 1 June 2021. The agreement concerns a yearly volume of 150 000 cubic meters of wood originating from forests located in a distance of not more than 70 km from Eberswalde.
- (12) In the agreement an initial reference price for the year 2004 of EUR 15,50/cubic meter was fixed. In addition, the text of the agreement foresaw that yearly price adjustments would be agreed between the parties on the basis of the development of the industrial wood price index of the German Federal Statistical Office ⁽⁴⁾; changes of the wood price compared to the initial reference price were to be borne 50 % by the seller and 50 % by the buyer (hereinafter: the '*price adjustment clause*').
- (13) For the purpose of the calculation of the corresponding price adjustment, the agreement furthermore laid down the following formula (hereinafter: the '*price adjustment formula*' or '*formula*'):

$$\text{ISE} = 15,50\text{€}/\text{rm} + \frac{\text{Index} - 135,89\%}{135,89\%} \text{€}/\text{rm} * 15,50 * 0,5$$

- (14) It is therefore necessary to distinguish between the price adjustment clause as laid down in the *text* of the agreement and the price adjustment *formula*.
- (15) According to the submissions by Germany, on the one hand, the *price adjustment clause* must be seen as the representation of the intentions of the parties to the agreement. This is supported by an internal note of the Ministry of Agriculture, Environment and Regional Planning of the Land Brandenburg of 1 October 2003 concerning a meeting between representatives of the Land Brandenburg and HoKaWe, which clearly shows that the price adjustment envisaged by the parties during the negotiations corresponded to the *price adjustment clause*. It is also supported by a note from the Ministry of Economic and European Affairs of the Land Brandenburg of 5 January 2011, which recommended to adjust or interpret the framework agreement in a way that would respect the text of the agreement in order to reflect the true intentions of the parties.
- (16) The *formula* on the other hand was flawed, as confirmed by Germany and by two expert opinions prepared in 2010 for the Land Brandenburg ⁽⁵⁾, and did not lead to a result that corresponded to the intentions of the parties as expressed in the *price adjustment clause*.

⁽³⁾ The agreement concerned transportable hardwood or softwood of a length of 3 m with a diameter from 3 cm to 70 cm. The purchase was carried out ex forest track. Rotten and curved wood was also acceptable.

⁽⁴⁾ See Federal Statistical Office (*Statistisches Bundesamt*): <https://www.destatis.de/DE/ZahlenFakten/GesamtwirtschaftUmwelt/Preise/PreisindizesLandForstwirtschaft/Tabellen/ErzeugerpreiseForstwirtschaft.html>.

⁽⁵⁾ An external expertise was provided by RAUE LP, an external legal counsel of the Land Brandenburg; an internal expertise was established by the Ministry for Economic and European Affairs.

- (17) After the agreement entered into force, the price was adjusted on the basis of the *formula*. Contrary to the intentions expressed in the *text* of the agreement, the price adjustments calculated in accordance with the *formula* did not follow the actual development of the industrial wood price index and led to prices that were significantly lower than the average price for wood from the Brandenburg State forests. Moreover, the *formula* did not lead to the envisioned result of sharing the risk of price fluctuations evenly between the State and HoKaWe.
- (18) This was due to fact that, as pointed out above in recital (16), the *formula* was flawed and did not mathematically reflect the intentions of the parties as laid down in the *price adjustment clause* ⁽⁶⁾.
- (19) In addition, the submission by Germany of 28 February 2013 shows that, during the course of the agreement the parties repeatedly exercised their discretion as regards the parameters actually used for the calculation of the price adjustment pursuant to the *formula* ⁽⁷⁾. The German authorities have informed the Commission that the reasons for this cannot be reconstructed from the files.
- (20) The two expert opinions carried out for the Land Brandenburg in 2010 (see paragraph (16)) pointed to possible State aid problems and recommended to amend the agreement by changing the *formula*. Following negotiations between HoKaWe and the Land Brandenburg, the parties therefore signed a modified version of the agreement on 26 August 2011, with effect from 1 July 2011. This modified version remedied the problems outlined in recitals (12) to (19) by laying down that from 1 July 2011 onwards prices had to be adjusted in accordance with the *price adjustment clause* and, thereby, in accordance with the original intentions of the parties. Thus, from that date onwards the *formula* ceased to be part of the agreement and could, therefore, not be applied anymore.
- (21) Furthermore, the Land Brandenburg decided not to continue the contract with future investors taking over HoKaWe's assets.

2.3. Grounds for initiating the procedure

- (22) On 19 December 2012 the Commission decided to open a formal investigation procedure in accordance with Article 108(2) TFEU ('the opening decision').
- (23) In the opening decision the Commission preliminarily considered that the implementation of the framework agreement entered into between the Land Brandenburg and HoKaWe involved State aid.
- (24) The Commission questioned whether, from an *ex ante* perspective, a private vendor on the market would have accepted a remuneration as that resulting from the application of the described *price adjustment formula*.
- (25) Moreover, even if the contracting parties would have been unaware of the flaws of the *formula*, the Commission expressed serious doubts as to whether Germany had acted in a market-conform manner during the implementation of the agreement. This followed from the price development for wood sold under the agreement, which showed that the price calculated on the basis of the *formula* led to significantly lower prices than the average wood price in the Land Brandenburg. A prudent private vendor placed in a similar situation would have immediately used all possibilities to modify the adjustment method. In contrast, Germany continued using the *formula* until 2011.
- (26) On the basis of these considerations the Commission came to the preliminary conclusion that an advantage in favour of HoKaWe and therefore the existence of State aid could not be excluded for the period from the date of coming into effect of the agreement (1 June 2006) until the amendment of the agreement (30 June 2011). Since a legal basis for compatibility of the aid was neither evident nor had been claimed by Germany, the Commission had further doubts as to whether the measure could be considered as being compatible with the internal market.

⁽⁶⁾ According to the expert opinion by RAUE LLP, the intentions of the parties as expressed in the *price adjustment clause* could have been represented by the following formula:

$$P = 15,50\text{€}/\text{rm} + \frac{\text{Index}_{n+1} - \text{Index}_n}{\text{Index}_n} \text{€}/\text{rm} * 15,50 * 0,5$$

⁽⁷⁾ For instance, for calculating the price applicable as from 1 July 2006 the index value of July 2006 was used instead of the index value of January 2005, as required by the agreement.

3. COMMENTS FROM INTERESTED PARTIES

- (27) In the course of the formal investigation procedure the Commission received observations from two interested third parties as well as from the complainant.
- (28) The complainant submitted internal notes of the Ministry of Agriculture, Environment and Regional Planning of the Land Brandenburg dated December 2003 and March 2004. According to the complainant, these notes expressed, already prior to the conclusion of the agreement, concerns regarding several aspects of the agreement: Assessing the consequences of an agreement at the time, the note from December 2003 observed that, already for the year 2004, it would lead to a price well below the price for industrial wood at the time. Likewise, the internal note from March 2004 pointed out that the price adaptation method would lead to inappropriate price concessions by the Land Brandenburg and explicitly recommended reconsidering or renegotiating the agreement.
- (29) The complainant argued that in such a situation no private vendor would have entered into such an agreement and, furthermore, that a private vendor would have reacted immediately when it became clear that the prices were below market prices and would not have waited for five years. As regards the price adaptation, the complainant alleges that the prices agreed did not reflect the actual development in the wood market and resulted in an undue advantage in favour of HoKaWe. The complainant estimates the amount of the aid between 2006 and 2011 at EUR 7,3 million (taking into account the average wood price as agreed between the complainant and other suppliers).
- (30) In addition, the Commission received observations from two wood-processing undertakings in the Land Brandenburg. These undertakings alleged that due to the long-term agreement, a significant part of the wood produced in the Brandenburg State forest was withdrawn from the regional wood market which led to undue distortions of competition and endangered the existence of small wood-processing undertakings in the Land Brandenburg.

4. COMMENTS FROM GERMANY

- (31) Germany maintained that the framework agreement was market-conform and therefore did not involve State aid.
- (32) Germany stated that, at the time of signing of the agreement, no market for wood to be used in energy production (energy wood, 'Energieholz') existed and that, consequently, the parties agreed to base the price to be paid by HoKaWe on the price for industrial wood and the price adjustments on the development of the index for industrial wood. Germany also submitted that the text of the agreement reflected the intended *modus operandi* for price adjustments but admitted that the application of the *formula* led to results that did not correspond to the intended sharing of the risk of price fluctuations between the parties.
- (33) Germany, therefore, argued that the initial reference price as well as the *price adjustment clause* laid down in the text of the agreement, with price adjustments based on the index for industrial wood in Germany and an equal sharing of the risk of price fluctuations between the parties, must be regarded as being market-conform at the time of signing the agreement.
- (34) According to Germany, it was only discovered in the course of a reorganisation of the forestry administration in the Land Brandenburg in January 2009 that the application of the *formula* had resulted in HoKaWe's paying lower prices than other companies. Therefore, in 2010 the responsible authorities of the Land Brandenburg requested an assessment of the agreement by an external legal expert, RAUE LLP, and also carried out an in-house legal assessment of the agreement. Both expertises pointed to possible State aid issues. Furthermore, the Ministry for Economic and European Affairs concluded in a written statement of 5 January 2011 that the *price adjustment clause* was market-conform but that a price adjustment on the basis of the *formula* constituted State aid and, therefore, recommended to amend the agreement in a way which would reflect the true intentions by, for example, modifying the *formula*. The Land Brandenburg followed this recommendation in August 2011.
- (35) In this regard Germany argued that the Land Brandenburg acted in a market-conform manner by adjusting the agreement in 2011 and that it could not react faster, as contracts have to be fulfilled and since the agreement could only be amended by agreement between the parties.
- (36) Moreover, according to Germany the agreement does neither distort competition nor affect trade between Member States.

5. ASSESSMENT

5.1. Existence of aid

- (37) Article 107(1) TFEU 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 shall, in so far as it affects trade between Member States, be incompatible with the internal market.
- (38) According to the settled practice of the Commission and as confirmed by the case law, the criterion for assessing whether a commercial transaction between a public body and an economic entity amounts to State aid is the market economy investor principle. It follows from this principle that, when the State acts in the market as a commercial operator, it must do so in a way comparable to a private operator. If the State does not do so, State aid could be involved. In other words, the benchmark for appreciating whether a transaction involves State aid is whether a private operator placed in a similar situation would have behaved in the same way, i.e. in the case at hand would have sold the assets, goods or service at the same price (private vendor test). In applying this principle, non-economic considerations cannot be taken into account as reasons for accepting a lower price. This principle has been repeatedly applied by the Commission and constantly confirmed by the Court ⁽⁸⁾.
- (39) The Commission, therefore, has to assess in the present case whether a private vendor would have entered into an agreement with a comparable duration, on the basis of a comparable initial reference price and with a similar price adjustment mechanism.
- (40) As stated in recitals (11) to (12), the framework agreement with a duration of 15 years stipulated that the prices should be adjusted yearly in accordance with the development of the industrial wood price index and that the corresponding changes to the initial reference price, which was set at EUR 15,50/cubic meter, should be borne 50 % by the State and 50 % by HoKaWe. In addition, the agreement laid down a *formula* to be used for the calculation of this price adjustment.

Long duration of the agreement

- (41) The complainant argued that the duration of the agreement, that is to say 15 years, was not customary on the market.
- (42) However, the Commission does not have any indication that would justify a conclusion that this duration was not market-conform. While a duration of 15 years appears rather long, it is not unreasonable for a vendor to bind itself to a buyer if this would guarantee to the vendor, as was the case under the agreement at stake, to sell steady volumes of wood which, in addition, at least partly did not fulfil the quality requirements for industrial wood.
- (43) In the light of this fact and the foreseen sharing of the risk of price fluctuations it cannot be excluded that a private vendor would have entered into an agreement of comparable duration.

Initial reference price agreed

- (44) Similarly, regarding the initial reference price of EUR 15,50/cubic meter, the Commission does not have any indications that this price was not market-conform.
- (45) As argued by Germany, at the time the agreement was signed, no established market price for energy wood existed. The contracting parties, therefore, based the framework agreement on the price for industrial wood. According to an overview of market prices for industrial wood submitted by the complainant, prices between EUR 15,50/cubic meter and EUR 17,50/cubic meter for the year 2004 and between EUR 15,00/cubic meter and EUR 17,00/cubic meter for the year 2005 can be regarded as market-conform. Also taking into account the fact that the agreement was a long-term contract, with the agreed price of EUR 15,50/cubic meter the initial reference price of the framework agreement stayed within the range of market-conform prices for industrial wood.

⁽⁸⁾ See, e.g., Case C-305/89 *Italy v Commission* ('ALFA Romeo') [1991] ECR I-1603, paragraphs 18 and 19; Case T-16/96 *Cityflyer Express v Commission* [1998] ECR II-757, paragraph 51; Joined Cases T-129/95, T-2/96 and T-97/96 *Neue Maxhütte Stahlwerke and Lech-Stahlwerke v Commission* [1999] ECR II-17, paragraph 104; Joined Cases T-268/08 and T-281/08 *Land Burgenland and Austria v Commission* [2012] ECR II-0000, paragraph 48.

- (46) Furthermore, an internal note from the Ministry of Agriculture, Environment and Regional Planning of the Land Brandenburg dated 1 October 2003 shows that during the negotiations the representatives of the Land Brandenburg suggested an initial reference price of EUR 15,50/cubic meter, whereas HoKaWe argued for a price of EUR 15,00/cubic meter. The parties finally agreed upon the higher price, namely EUR 15,50/cubic meter.
- (47) It follows that the initial reference price of EUR 15,50/cubic meter may be regarded as market-conform. Given the lack of an established market price for comparison, and the fact that the quality requirements of energy wood are at least not higher than industrial wood, it was reasonable for the Land Brandenburg to conclude an agreement according to which the price would be based on the price for industrial wood (reference price). The price agreed was the result of negotiations between the parties and was furthermore within the price range of market prices for industrial wood in the Land Brandenburg. It was agreed upon in knowledge of the quality of wood available to the State forests of the Land Brandenburg ⁽⁹⁾ and thus represents what a private vendor would have considered as being acceptable for the quality of wood to be delivered.

Price adjustment

- (48) Regarding the price adjustment, as pointed out in recital (14), it is necessary to distinguish between the *price adjustment clause* and the price adjustments actually applied on the basis of the *formula*.
- (49) With regard to the *price adjustment clause* the Commission does not have any indications that it was not market-conform. Similarly to what has been stated in recital (45) concerning the initial reference price, there was no index for price developments of energy wood. It was, therefore, not only reasonable to base the initial reference price on the price for industrial wood but also reasonable to agree upon a price adjustment in parallel to the index for industrial wood.
- (50) Furthermore, the text of the agreement foresaw that the parties should share price fluctuations at 50 %. Since the price development was, at the time of signing, not fully foreseeable, this mechanism had the effect that both parties shared both the risk and (potential) benefits, which could have also resulted in an advantage for the Land Brandenburg. In view of this uncertainty, also a private vendor could have agreed to such a clause. This clause must therefore be regarded as being market-conform.
- (51) It can be concluded that the *price adjustment clause*, foreseeing a development of the price in parallel with the index for industrial wood and an even sharing of the risk of price fluctuations between the parties, was market-conform and that a reasonable private vendor would have entered into such an agreement.
- (52) However, as already stated, the actual price adjustments were made by applying the *formula*. As can be seen from the overview in the following table, the prices that resulted from the application of this *formula* were significantly lower than the prices that would have resulted from the application of the *price adjustment clause*:

(in EUR per cubic meter)			
	Price actually paid (based on the application of the <i>formula</i>)	Price calculated (*) on the basis of the <i>price adjustment clause</i>	Average price for all wood in the Land Brandenburg
2006	13,00	15,42	17,72
2007	13,21	15,95	21,02
2008	16,55	20,96	22,76
2009	16,42	20,76	19,20

⁽⁹⁾ In the course of the formal investigation proceeding, third parties complained that due to the agreement with HoKaWe industrial wood is withdrawn from the market in large quantities. This suggests that the energy wood delivered to HoKaWe contained substantial quantities of industrial wood.

(in EUR per cubic meter)

	Price actually paid (based on the application of the <i>formula</i>)	Price calculated (*) on the basis of the <i>price adjustment clause</i>	Average price for all wood in the Land Brandenburg
2010	16,14	20,03	24,50
2011	15,79	19,33	n.a.

(*) calculation submitted by Germany

- (53) The table also clearly shows that the prices calculated on the basis of the *formula* were not only significantly lower than the prices that would have resulted from the application of the *price adjustment clause* but also significantly lower than the average prices in the Land Brandenburg.
- (54) Furthermore, these effects of the *formula* were already foreseeable before the signing of the agreement. This is of particular importance as, in order to assess whether a private market vendor would have acted in the same or a comparable way as the Land Brandenburg, it is necessary to carry out an *ex ante* assessment of the agreement ⁽¹⁰⁾.
- (55) As stated above in recitals (16) and (18), the *formula* was flawed and did not reflect the intentions as expressed in the *price adjustment clause*. These intentions could have been mathematically reflected, as also confirmed by the expert opinion of RAUE LLP, in the following formula:

$$P = 15,50\text{€}/\text{rm} + \frac{\text{Index}_{n+1} - \text{Index}_n}{\text{Index}_n} \text{€}/\text{rm} * 15,50 * 0,5$$

- (56) However, the parties to the agreement deducted a fixed amount instead of Index_n . While it may be justified, depending on the circumstances, to use a fixed deduction, such a deduction should at least result in the agreed initial reference price for the year in which the agreement is concluded. Yet, in the present case the parties chose a deduction that, already for the year of signing, led to a price significantly below the agreed initial and market-conform reference price of EUR 15,50/cubic meter.
- (57) Hence, the fact that the *formula* was flawed and did not lead to the prices agreed in the *price adjustment clause* was objectively foreseeable at the time of signing.
- (58) In this situation, a private vendor would have used a different formula or at least requested a change of the *formula*, especially since the parties had agreed in the text of the agreement that the price adjustment would be established in accordance with the index for industrial wood and with the risk of price fluctuations to be shared equally between the State and HoKaWe (as expressed in the *price adjustment clause*).
- (59) In this regard it also needs to be underlined that the price developments under the agreement were not simply the automatic result of a predetermined mathematical calculation laid down in the *formula*. As stated above in recital (19) it rather follows from the information provided by Germany in the formal investigation procedure that the *formula* was adjusted several times ⁽¹¹⁾ during the course of the duration of the agreement.
- (60) As can clearly be seen from the table shown in recital (52), these foreseeable negative effects of applying the *formula* also materialized, given that the price actually paid by HoKaWe was significantly lower than the price to be charged according to the *price adjustment clause*. It was also significantly lower than the average prices paid for wood from Brandenburg's State forest, that is to say the prices for which the Land Brandenburg sold wood to other companies ⁽¹²⁾.

⁽¹⁰⁾ See Case C-482/99 *France v Commission* [2002] ECR I-4397, paragraphs 70-72; Case C-124/10 P *Commission v EDF* [2012] ECR I-0000, paragraphs 83-85 and 105.

⁽¹¹⁾ This was done in addition to the adjustment of the *formula* reflecting the recalculation of the index for industrial wood on a new base year by the German Federal Statistical Office.

⁽¹²⁾ As can be seen from the table shown in recital (52), with the exception of the year 2009 the application of the *price adjustment clause* would also have led to prices below the average price in the Land Brandenburg, however to a significantly lesser extent. As already explained with regard to the market-conformity of the price adjustment clause, an arm's length transaction with a significant buyer assuring in the long-term large and steady purchase volumes may lead to prices below market average. See also Commission Decision C(2012) 834 final in the case SA.19045 (*Alleged aid of the Land Bavaria (Bavarian State Forest Enterprise) in form of long-term supply agreements for wood with the company Klausner*), points 47 et seq.

- (61) It follows that the fact that the application of the *formula* did not lead to the intended result of a price development based on the index for industrial wood, with the risk of price fluctuations being shared between the parties, was both known and accepted by the State.

Conclusion

- (62) As regards the *price adjustment clause*, it can be concluded that although it would have led to prices below the average price for the Land Brandenburg, these prices would have been market-conform. They were based on reasonable considerations and negotiations between the parties involved and, therefore, it cannot be excluded that also a private actor on the market would have entered into an agreement with the same or comparable conditions.
- (63) However, the actual price adjustment implemented by the parties on the basis of the *formula* did not reflect such market-conform conditions and led to significantly lower prices than the ones that would have resulted from the application of the *price adjustment clause* (and, even more so, the average price for wood in the Land Brandenburg).
- (64) While the price development on the basis of the *price adjustment clause* reflects a reasonable business decision and a fair balance of risks concerning price fluctuations between the contracting parties, the prices resulting from the application of the *formula* were significantly lower and, furthermore, also did not reflect that balance of risks. Contrary to the situation underlying the Commission decision in case SA.19045 (*Alleged aid of the Land Bavaria (Bavarian State Forest Enterprise) in form of long-term supply agreements for wood with the company Klausner*)⁽¹³⁾ in which prices below market average were held not to contain State aid as the market suffered from overcapacities and the Land Bavaria tried to attract a significant buyer that would guarantee in the long term large and steady volumes of purchase, nothing in the facts of the present case would justify prices below the ones that would have resulted from the application of the *price adjustment clause*. The price adjustment clause agreed between the parties took the nature of the long term contract and the quality of wood to be sold into account and already would have led to prices below the average price in the Land Brandenburg. There is nothing to indicate that a private actor on the market would have agreed to even lower prices than those.
- (65) This is furthermore confirmed by the submissions from Germany, which explicitly stated that the *price adjustment clause* represented the true intentions of the parties. Moreover, in 2011 the Land Brandenburg negotiated the amendment to the agreement which discarded the flawed *formula*, as a reaction to the two legal opinions from 2010 referred to above in recital (16) which had raised State aid concerns due to the application of the *formula*. Thus, the Land Brandenburg negotiated the amendment to the agreement without the *formula* specifically in order to implement the true intentions of the parties and to put an end to those State aid concerns.
- (66) It follows that the way the agreement was implemented, more specifically the price adjustments on the basis of the *formula*, fails the private vendor test and is not market-conform.
- (67) Germany argued that the regional government of the Land Brandenburg only became aware of the fact that the prices actually paid by HoKaWe did not follow the price development as intended by the *price adjustment clause* and led to significantly lower prices than the prices for which wood was delivered to other companies in the course of a reorganisation of the forest administration in 2009 and that the Land Brandenburg subsequently acted in a market-conform manner by ordering the two expert opinions mentioned in recital (16) and then by renegotiating the agreement, leading to the amendment of that agreement in 2011.
- (68) These arguments, however, do not appear plausible. First, as explained in recitals (55) to (55), the effects of the *formula* were foreseeable at the time of the signing of the agreement. Secondly, a private market vendor seeking to ensure the implementation of the agreed solution found in the *price adjustment clause* and therefore closely monitoring the price adjustments would have reacted immediately by requesting a renegotiation of the price. As indicated in recital (65), the successful renegotiation of the agreement by the Land Brandenburg rather confirms that the *formula* did not reflect the true intentions of the parties (as agreed in the *price adjustment clause*). It also shows that HoKaWe could not refuse to discard the *formula*.
- (69) Consequently, HoKaWe benefitted from an economic advantage in the period from the date of coming into effect of the agreement (1 June 2006) until the amendment of the agreement (30 June 2011).

⁽¹³⁾ Ibid.

- (70) Furthermore, all other criteria of Article 107(1) TFEU are fulfilled. The advantage was selective because the agreement specifically benefitted a certain company. The advantage was granted by the authorities of a Member State, i.e. the Land Brandenburg. The average volume of wood sold to HoKaWe under the terms of the agreement was significant; the wood supply at favourable terms improved the position of the recipient in relation to its competitors and therefore distorted competition. The market for wood is open to competition from other Member States. Even taking into account the fact that the supply agreement covers only wood originating from forests not further away than 70 km from Eberswalde, the Commission notes that Eberswalde is situated very close to the Polish border (only 30 km). Therefore, the aid also affects trade between Member States. Consequently, it can be concluded that the implementation of the agreement leading to the prices paid on the basis of the *formula* constituted State aid.
- (71) The amendment to the agreement, which entered into force on 1 July 2011, must be regarded as having brought the State aid measure to an end. This amendment provides that from 1 July 2011 onwards price adjustments had to be made in accordance with the *price adjustment clause* and, thereby, reconfirmed and correctly implemented the initial intentions of the parties. As the agreement in this form is market-conform, the Commission considers that after 30 June 2011 HoKaWe no longer received an economic advantage from payments under the agreement.

5.2. Compatibility with the internal market

- (72) A legal basis for compatibility of the aid is neither evident nor has one been claimed by the Member State. This leads to the conclusion that HoKaWe's advantage from the implementation of the agreement between June 2006 and June 2011 constitutes incompatible State aid.

5.3. Calculation of the aid element

- (73) As already explained in recitals (49) to (51), the *price adjustment clause* can be regarded as being market-conform. Therefore, the Commission considers that the aid element consists of the difference between the price actually paid ⁽¹⁴⁾ on the basis of the *formula* and the price to be paid in accordance with the *price adjustment clause*.

	(a) Price actually paid (in EUR per cubic metre) (*)	(b) Price calculated on the basis of the <i>price adjustment clause</i> (in EUR per cubic metre)	(c) Difference between (a) and (b) (*)	(d) Amount of wood actually delivered (in cubic metres)	(e) Aid element: (c) × (d) (in EUR) (*)
2006	13,00	15,42	2,42	13 115,73	31 794
2007	13,21	15,95	2,74	142 792,67	391 452
2008	16,55	20,96	4,41	137 683,00	607 291
2009	16,42	20,76	4,34	141 273,68	613 128
2010	16,14	20,03	3,89	139 045,38	540 699
2011	15,79	19,33	3,54	62 680,29	222 051
Total					2 406 415

(*) The figures in columns (a) and (c) have been rounded; column (e) has been calculated on the basis of the precise figures, with the final result rounded to the nearest EUR-amount.

- (74) The aid granted to HoKaWe therefore amounts to EUR 2 406 415.

⁽¹⁴⁾ The price actually paid as submitted by Germany in its submission from 1 October 2013.

6. RECOVERY

- (75) According to the TFEU and the Court of Justice's established case-law, the Commission is competent to decide that the Member State concerned must abolish or alter aid ⁽¹⁵⁾ when it has found that it is incompatible with the internal market. The Court has also consistently held that the obligation on a Member State to abolish aid regarded by the Commission as being incompatible with the internal market is designed to re-establish the previously existing situation. ⁽¹⁶⁾ In this context, the Court has established that this objective is attained once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage which it had enjoyed over its competitors on the market, and the situation prior to the payment of the aid is restored. ⁽¹⁷⁾
- (76) In line with the case-law, Article 14(1) of Council Regulation (EC) No 659/1999 ⁽¹⁸⁾ laid down that '*where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary [...]*'.
- (77) Thus, given that the measure at hand was not notified to the Commission in violation of Article 108 TFEU and is, therefore, to be considered as unlawful and incompatible aid, the aid must be recovered in order to re-establish the situation that existed on the market prior to the granting of the aid. Recovery should cover the time from when the advantage accrued to the beneficiary, that is to say when the aid was put at the disposal of the beneficiary, until effective recovery, and the sums to be recovered should bear interest until effective recovery.

7. CONCLUSION

- (78) The implementation of the framework agreement between the Land Brandenburg and HoKaWe from its signing (1 June 2006) until its amendment (30 June 2011) involved State aid not compatible with the internal market. Therefore, the State aid has to be recovered from HoKaWe together with recovery interest,

HAS ADOPTED THIS DECISION:

Article 1

The State aid amounting to EUR 2 406 415, unlawfully granted by Germany to HoKaWe Eberswalde GmbH in breach of Article 108(3) of the Treaty on the Functioning of the European Union, is incompatible with the internal market.

Article 2

1. Germany shall recover the aid referred to in Article 1 from the beneficiary.
2. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiary until their actual recovery.
3. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ⁽¹⁹⁾ and Commission Regulation (EC) No 271/2008 ⁽²⁰⁾ amending Regulation (EC) No 794/2004.

Article 3

1. Recovery of the aid referred to in Article 1 shall be immediate and effective.
2. Germany shall ensure that this Decision is implemented within four months following the date of notification of this Decision.

⁽¹⁵⁾ See Case C-70/72 *Commission v Germany* [1973] ECR 00813, paragraph 13.

⁽¹⁶⁾ See Joined Cases C-278/92, C-279/92 and C-280/92 *Spain v Commission* [1994] ECR I-4103, paragraph 75.

⁽¹⁷⁾ See Case C-75/97 *Belgium v Commission* [1999] ECR I-030671 paragraphs 64-65.

⁽¹⁸⁾ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 83, 27.3.1999, p. 1.

⁽¹⁹⁾ OJ L 140, 30.4.2004, p. 1.

⁽²⁰⁾ OJ L 82, 25.3.2008, p. 1.

Article 4

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

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

2. Germany 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 Article 1 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiary

Article 5

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 6 November 2013.

For the Commission
Joaquín ALMUNIA
Vice-President
