IV

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

COMMISSION DECISION

of 10 March 2009

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

(notified under document C(2009) 1480)

(Only the Polish text is authentic)

(Text with EEA relevance)

(2010/174/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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) thereof,

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

Whereas:

1. **PROCEDURE**

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

(2) The Commission requested Poland to provide further information by letters of 11 November 2004, 1 March 2005, 27 April 2005 and 26 July 2005, to which Poland replied, respectively, by letters of 31 January 2005, registered on 2 February 2005, of 4 April 2005, registered on 8 April 2005, of 7 June 2005, registered on 9 June 2005 and of 2 September 2005, registered on 6 September 2005.

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

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

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

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

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

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[1] OJ C 34, 10.2.2006, p. 5.

[2] OJ L 112, 30.4.2007, p. 67.

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

(8) The Commission had taken the decision of 20 December 2006 on the basis of a restructuring plan of HSW dated February 2006 (the 'February plan') and submitted by Poland on 9 March 2006. After the decision of 20 December 2006 had been adopted, Poland notified by letter of 2 February 2007 (registered on 4 February 2007) an updated version of the plan dated November 2006 ('November plan'). Poland argued that for internal administrative reasons it had been unable to notify the Commission of the modified plan earlier [4].

(9) The Commission requested additional information about the modifications of the February plan by letters of 29 March 2007 and 21 May 2007. The Polish authorities replied respectively by letters of 30 April 2007, registered on that day, and 5 June 2007, registered on that day. On 7 June 2007 a meeting was held between the Polish authorities, the Commission services and HSW's management. Following the meeting the Commission, by letter of 22 June 2007, requested further information. Poland replied by letter of 13 July 2007, registered on that day.

(10) On 10 October 2007, the Commission decided to initiate a formal investigation procedure on the basis of Article 88(2) of the EC Treaty owing to doubts as to whether the modified restructuring plan fulfilled all the conditions set out in the Community Guidelines on State aid for rescuing and restructuring firms in difficulty ('the 2004 Guidelines') [5]. In this decision the Commission also mentioned the possibility of revoking the decision of 20 December 2006 pursuant to Article 9 of Council Regulation (EC) No 659/1999 [6].

(11) The Commission's decision to initiate an investigation procedure under Article 88(2) of the EC Treaty was published in the *Official Journal of the European Union* [7]. The Commission invited interested parties to submit their comments on the measure.

(12) After being granted an extension of the deadline for the submission of its comments (requests of 30 October 2007 and 6 December 2007, to which the Commission replied in letters of 20 November 2007 and 19 December 2007 respectively), Poland submitted its comments by letter of 15 January 2008, registered on that day. The Commission has also received comments from 13 third parties, including the beneficiary. Comments were submitted by local authorities: the President of Stalowa Wola city by letter of 11 November 2008, the Starosta Powiatu Stalowa Wola by letter of 14 January 2008 and the Voivod of Podkarpackie Region by letter of 15 January 2008. The following suppliers of HSW submitted comments: Clak Hurtownia Artykołow Przemysłowych H. Adamski, J. Lach T. Knie s.j. by letter of 10 January 2008, Kwadrat Sp. z o.o. by letter of 10 January 2008, Odlewnia Staliwa 'Labedy' Sp. z o.o by letter of 10 January 2008, Fabryka Maszyn Lubaczow Sp. z o.o. by letter of 11 January 2008 and SigmaKalon Cieszyn SA by letter of 11 January 2008. The following banks cooperating with HSW submitted comments: Bank Pekao SA by letter of 11 January 2008 and BRE Bank S.A by letter of 14 January 2008. Finally comments were submitted by ENESTA Sp. z o.o. (energy supplier) by letter of 11 January 2008 and by the Social Insurance Fund by letter of 21 January 2008. The beneficiary submitted comments by letter of 14 January 2008.

(13) The Commission forwarded the comments received from third parties to Poland by letter of 28 January 2008.

(14) On 9 and 14 April 2008, the Polish authorities sent letters to Commissioner Neelie Kroes, to which the Commissioner replied on 28 April 2008, requesting additional information. Those letters were answered by letters of the Polish authorities dated 4 July 2008, registered on 9 July 2008.

(15) By letter of 7 November 2008, registered on that day, Poland submitted additional information. On 1 December 2008, the Commission sent a request for information to which Poland replied by letter of 22 December 2008, registered on that day.

2. DESCRIPTION

2.1. The Company

(16) HSW, the beneficiary of the aid and the parent company of the HSW group, is based in Stalowa Wola, which is situated in the Podkarpackie voivodship. This region is eligible for aid under Article 87(3)(a) of the EC Treaty. In February 2006, the group included eight companies in which HSW held at least 51 % of shares (thereby controlling these companies) and 10 in which it held less than 51 %. Companies belonging to the HSW capital group supply each other with materials and services. After the parent company, the companies with the highest share capital in the group are HSW-Zakład Zespołów Napędowych Sp. z o.o and HSW-Zakład Zespołów Mechanicznych Sp. z o.o. Sales to companies belonging to the capital group account for 20-30 % of HSW's total sales.

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

[5] OJ C 244, 1.10.2004, p. 2.

[6] OJ L 83, 27.3.1999, p. 1.

[7] OJ C 298, 11.12.2007, p. 10.

(17) HSW was created in 1937 and initially produced cannon and high alloy steel. Unlike its subsidiary HSW — Zakład Metalurgiczny, it is not a steel producer. In 1991 it became a joint-stock company. The State still owns 76 % of the shares, 9 % belong to employees, and the remaining public and private shareholders hold no more than 5 % each. HSW manufactures construction machinery and military equipment (cannon, howitzers etc.).

(18) In 2005 HSW had about 2 400 employees, down from 3 173 in 2002.

(19) One of the subsidiaries of HSW is the distribution company Dressta Sp. z o.o. (hereafter 'Dressta'). Since September 2006, the latter has been fully controlled by HSW. Previously, however, 51 % of the shares of Dressta were owned by Komatsu American International Company USA (hereinafter referred to as KAIC), a competitor of HSW. In 1995 HSW transferred licenses and assets relating to its sales on foreign markets to Dressta for a period of 12 years.

2.2. **Difficulties of the Company**

(20) The beneficiary's difficulties began in 2002, when its turnover dropped from PLN 494,9 million (EUR 117,3 million) in 2000 to PLN 352,6 million (EUR 83,5 million), a fall of 29 %. Its exports fell from PLN 505 million (EUR 119,7 million) to PLN 279 million (EUR 66,1 million). The fall in turnover on foreign markets was primarily attributable to the recession and to the fact that Dressta, under the influence of its principal shareholder (a major competitor of HSW), significantly reduced its sales of HSW's products on the North American market.

(21) In 2002 the beneficiary made an operating loss of PLN 33,9 million (EUR 8,03 million), mostly due to underuse of its production capacity. As most of the company's sales on foreign markets were realised in US dollars and most of its costs incurred in Polish zlotys, the rise in value of the latter currency adversely affected the beneficiary's sales and profitability.

(22) HSW was heavily indebted. Its debt in the period 2000-2002 averaged PLN 169,1 million (EUR 40,1 million).

(23) The company was also operating at a loss. The loss on sales rose from PLN 6,4 million (EUR 1,52 million) in 2000 to PLN 33,9 million (EUR 8,03 million) in 2002.

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

2.3. **The restructuring**

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

2.3.1. *February plan*

(26) One of the principal measures included in the February plan was the modification of the organisational structure of the beneficiary. The main idea of HSW's restructuring process was to separate that part of the company directly involved in production from the assets to be restructured. An independent company, HSW-Trading Sp. z o.o. (hereafter 'HSW-Trading'), was therefore created by HSW's majority shareholder — the State Treasury. The State Treasury gave HSW-Trading a capital injection of PLN 40 million (EUR 9,48 million), which was notified by Poland among the measures granted to HSW (item 16 in Table 2 below).

(27) While HSW-Trading was responsible for production and sales of industrial machinery, logistics, quality management and the supply of materials for the production of machinery, HSW retained research and development activities, the financing of productive assets, strategic marketing, sales of spare parts, repairs, and production and sales of military equipment. HSW was also responsible for the organisational restructuring. For the purpose of exercising its activities, HSW-Trading leased assets directly related to production from HSW. The necessary workforce was also temporarily transferred to HSW-Trading.

(28) This division was to last from 2004 to 2006, i.e. throughout the restructuring of HSW. HSW-Trading was to merge with HSW again at the end of 2006.

(29) The February plan provided for a major restructuring of employment. On completion of restructuring in 2007 HSW would employ 2 100 workers, down from 3 173 employees at the end of 2002.

(30) In order to enable the beneficiary to reach new markets, the organisation of the distribution network for construction machinery and spare parts on the world market was also to be restructured.

(31) The restructuring of HSW was also to include the sale of subsidiaries and the privatisation of departments operating in the service sector. By 2006 HSW had sold HSW — Zakład Kuźnia Matrycowa Sp. z o.o for PLN 38 million (EUR 9,0 million) and HSW — Zaklad Metalurgiczny (HSW-Walcownia Blach Sp. z o.o. and HSW-Huta Stali Jakosciowych). HSW generated a revenue of PLN 112,2 million (EUR 26,6 million) from this privatisation. The sale of two subsidiaries, HSW — Zakład Spreżynownia and HSW — Tlenownia, was to be finalised in 2006.

(32) The restructuring of assets involved reducing production capacity from 1 500 construction machines a year to 1 200 a year. HSW's assets were considered to exceed its needs. As HSW planned to focus on the production of construction machinery, a significant share of its assets were to be sold. The assets sold between January 2003 and December 2005 generated revenue of PLN 52,1 million (EUR 12,3 million), which far exceeded the forecast PLN 10,3 million (EUR 2,4 million). The following assets were sold: some 248,4 ha of land (including approximately 153 ha of woodland); 76 000 m^2 of real estate and 94 items of machinery and equipment.

(33) The overall restructuring costs, including restructuring costs before accession, totalled PLN 450,3 million (EUR 106,7 million) and consisted mainly of the restructuring of civil-law liabilities (PLN 95,6 million and PLN 113,2 million respectively), the cost of organising the supply and distribution system (PLN 151,2 million), the cost of ensuring continuity of supply (PLN 40,0 million) and modernisation (PLN 30,5 million).

2.3.2. *November plan*

(34) By letter of 2 February 2007 Poland informed the Commission of changes made to the restructuring plan in November 2006. Poland feels that these changes will not alter the amount of State aid and are in line with point 52 of the 2004 Guidelines.

(35) The principal change to the February plan concerned the financing of restructuring: rather than HSW reimbursing two loans granted to it before accession in 2003 and 2004 by the State-owned Industrial Development Agency (hereafter 'the ARP') and the interest on these loans ([8]), the ARP would swap the nominal value of the debt for equity and so become a shareholder of HSW. Other changes concern postponements of organisational restructuring.

(36) According to Poland, the debt-to-equity swap will allow HSW to gather the resources needed to function properly on the market and for future necessary investments. Poland has indicated that out of PLN 96,2 million (the original two loans totalling PLN 75 million plus PLN 21,2 million in accrued interest) ([9]):

— PLN [0-50] (*) million will be used for modernisation of equipment and for additional investments, which according to Poland, are necessary for the restoration of viability,

— PLN [0-50] million is necessary for the additional costs related to the postponed merger between HSW and HSW-Trading, which has increased the employment restructuring costs,

— PLN [50-100] million will be used to finance additional accumulation of stock, the increase in receivables due to the extension of payment deadlines for invoices to customers and the shortening of deadlines for payments to suppliers,

— PLN [0-10] million will be used to finance additional commercial credits.

(37) Poland claims that HSW needs additional cash-flow (the above-mentioned PLN [0-100] million) because the market for construction machinery has become more competitive: HSW's competitors are giving their clients longer invoice payment deadlines and agreeing shorter deadlines for paying their suppliers.

(38) The overall restructuring costs of the November plan, including restructuring costs prior to accession, total PLN 456,9 million (EUR 108,3 million) and are composed of the items summarised in Table 1:

([8]) I.e. the interest accrued on the loans so far and the interest to be accrued in the future until the original date set for the repayment of the loans.

([9]) The amount of interest is lower by PLN 1,7 million than presented in the opening decision. Poland explained that since the debt-to-equity swap was implemented slightly later than the date originally planned, HSW repaid a higher amount of interest due and the part remaining to be repaid is hence smaller.

(*) Information covered by professional secrecy.

Table 1

Summary of the restructuring costs as envisaged in the November Plan

(in PLN thousands)

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

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

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

3.1. Decision of 23 November 2005 initiating the investigation procedure

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

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

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

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

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

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

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

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

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

(48) The Commission initiated the formal investigation procedure on four grounds.

(49) First, the Commission had doubts as to whether the November plan was capable of restoring the long-term viability of HSW, as it seemed that the company was in need of additional cash-flow.

(50) Second, the Commission had doubts as to whether the aid was limited to the minimum necessary, as the use of surplus cash-flow generated by the debt-to-equity swap had not been sufficiently explained by the Polish authorities.

(51) Third, the Commission wondered whether the aid amount would not increase as a consequence of the swap.

(52) Finally, in addition to its doubts about the increase in the aid amount, the Commission doubted whether the effect of the aid granted to HSW remained unchanged and did not therefore unduly distort competition. In other words, the Commission had doubts as to whether the compensatory measures were sufficient, since, according to point 40 of the 2004 Guidelines, compensatory measures must be in proportion to the distortive effects of the aid.

(53) The Commission decided to re-initiate the investigation procedure with a view to possibly revoking the decision of 20 December 2006.

4. **COMMENTS OF THIRD PARTIES**

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

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

5. **COMMENTS FROM POLAND**

5.1. **Comments on the decision of 23 November 2005**

(56) First, the Polish authorities commented on the Commission's assessment of which measures had been granted before accession and which constituted unlawful or new aid. The Polish authorities maintained that aid granted on the basis of the amended Act of 30 October 2002 on State aid for enterprises of special significance for the labour market (see Table 3 below) had not been granted before accession, contesting the view taken by the Commission in the decision initiating the formal investigation procedure. The Polish authorities repeated their earlier submission that the decisive moment for granting State aid under this Act occurs when the beneficiary's public creditors give their consent (the 'administrative commitments'), not when the President of the ARP takes a restructuring decision. Since the public creditors of HSW whose receivables were restructured had given their consent vis-à-vis HSW prior to accession, the Polish authorities argue that this aid was granted before accession and the Commission is not therefore competent to assess its compatibility with the common market.

(57) Second, the Polish authorities identified two modifications to the aid as originally notified by letter of 8 October 2004. The first and most important modification was that part of the planned State aid (a total of PLN 43,5 million) had been partially withdrawn and replaced by two measures, which were claimed not to constitute State aid. The second modification was factual in nature, namely specifying the amounts of aid under three measures granted to HSW before accession. Tables 2 to 5 list all the measures granted and to be granted to HSW over the restructuring period, as corrected in the light of the Polish authorities' clarifications.

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

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

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

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

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

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

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

5.2. **Comments on the decision of 10 October 2007**

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

(65) Second, Poland emphasised that the scope of the investigation procedure initiated should encompass only the change to the restructuring plan on the basis of point 52 of the 2004 Guidelines and argued that the Commission should not take steps under Article 9 of Regulation (EC) No 659/1999 to revoke the decision of 20 December 2006. Poland invoked the principle of legal certainty in this respect.

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

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

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

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

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

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

5.2.1. *Restoration of viability*

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

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

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

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

5.2.2. *Own contribution to the restructuring*

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

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

5.2.3. *Avoidance of undue distortion of competition*

(78) Third, Poland claimed that the amount of aid had not increased, so there was no need for more extensive compensatory measures under point 52(b) of the 2004 Guidelines. Poland believes that the additional cash-flow generated by the debt-to-equity swap is being used by the company solely to maintain its position on the market. According to the Polish authorities, the company cannot even achieve a leading position on the domestic market, occupying […] and […] place depending on the product sold ([11]). According to Poland, the company's share of the world market does not exceed [0-5] %.

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

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

6. **THE AID MEASURES**

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

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

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

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

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

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

(85) The principal change in the November plan consisted of allowing the debt-to-equity swap: rather than HSW reimbursing two loans granted to it before accession in 2003 and 2004 by the ARP (see Table 2, items 8 and 15) and the interest on these loans, the ARP decided to swap the nominal value of the debt for equity (items 30 and 31 in Table 4). As a result HSW, rather than having to reimburse PLN 97,1 million (the original two loans totalling PLN 75 million plus PLN 22,1 million in non-reimbursed interest), issued shares worth PLN 75 million which were acquired by the ARP (according to Poland the swap was implemented on 2 July 2007).

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

Table 2

Aid granted before 30 April 2004

(in PLN thousands)

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

(in PLN thousands)

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

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

Table 3

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

(in PLN thousands)

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

(in PLN thousands)

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

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

Table 4

Aid granted after 30 April 2004

(in PLN thousands)

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

Table 5

Measures granted and planned

(in PLN thousands)

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

(*) Granted after December 2004.
(**) Granted in 2005.

7. ASSESSMENT OF THE MEASURES

7.1. Competence of the Commission

(87) As some of the events relevant for the present case took place before Poland's accession to the European Union on 1 May 2004, the Commission must first determine whether it is competent to act with regard to the measures in question.

(88) Measures that were put into effect before accession and are not applicable after accession cannot be examined by the Commission either under the interim mechanism procedure, governed by Annex IV, paragraph 3 of the Treaty of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia to the European Union, or under the procedures laid down in Article 88 of the EC Treaty. Neither the Accession Treaty nor the EC Treaty requires or empowers the Commission to review these measures.

(89) However, measures put into effect after accession constitute new aid and fall within the competence of the Commission under the procedure laid down in Article 88 of the EC Treaty. The criterion determining the moment at which a certain measure was put into effect is the legally binding act by which the competent national authorities undertake to grant aid ([12]).

(90) Individual aid granted prior to accession is considered inapplicable after accession if the exact amount of the State's financial exposure through that aid measure was known when the aid was granted.

(91) On the basis of the information provided by the Polish authorities, the Commission has been able to determine that the measures listed in Table 2 above were granted before accession and are not applicable thereafter. The Commission is not therefore competent to assess their compatibility with the common market. However, they have to be taken into account for determining the compatibility of aid measures granted or to be granted after accession. They amount to PLN 147 million (EUR 35 million) ([13]).

(92) With regard to the measures granted on the basis of the amended Act of 30 October 2002 on State aid for enterprises of special significance for the labour market, which are listed in Table 3, the Commission's doubts as to the point in time at which they were granted have not been allayed. The Polish authorities have not provided new arguments in this respect in their comments on the decision to initiate the formal investigation procedure. The consent of the individual granting authorities to restructure their claims under this legislation is necessary but not sufficient for such restructuring to take place. The decisive element of the procedure under this Act is the restructuring decision. The President of the ARP issued the restructuring decision on 29 April 2005 and the Commission therefore considers that these measures were granted after accession. The Commission is therefore competent to assess their compatibility with the common market. As these measures were granted in contravention of the standstill clause in Article 88(3) of the EC Treaty, they constitute unlawful aid amounting to PLN 27,897 million (EUR 6,61 million).

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

7.2. Justification of the revocation

(94) Article 9 of Regulation (EC) No 659/1999 provides that 'the Commission may revoke a decision […] after having given the Member State concerned the opportunity to submit its comments, where the decision was based on incorrect information provided during the procedure which was a determining factor for the decision. Before revoking a decision and taking a new decision, the Commission shall open the formal investigation procedure pursuant to Article 4(4).'

(95) As already mentioned, the decision of 20 December 2006 was based on incorrect information, namely the restructuring plan of February 2006, which was no longer valid at the time when the Commission took that decision. The Polish authorities did not submit the updated version of the restructuring plan while the investigation procedure initiated in November 2005 was still under way, even though the plan had already been approved by the relevant bodies of HSW. The restructuring plan is the most important source of information for the Commission to assess the compatibility of restructuring aid. Hence, though the February plan had not been a false source of information, it became one after the November plan was adopted. The February plan, on which the Commission based the decision of 20 December 2006, was therefore an incorrect source of information at the time the Commission adopted that decision.

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

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

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

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

(97) Article 87(1) of the EC Treaty provides that any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods and affects trade between Member States is incompatible with the common market.

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

7.3.1. *February plan*

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

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

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

(102) The Commission concludes that the measures listed in Table 3 and the deferrals listed in Table 4 as measures 28 and 29 are financed from State resources. They favour an individual undertaking by conferring on it an advantage not available to it on the market. HSW is active in the production of construction machinery, which is sold within the EC under conditions of intensive competition between operators from different Member States. These measures therefore constitute State aid within the meaning of Article 87(1) of the EC Treaty.

7.3.2. *November plan*

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

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

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

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

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

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

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

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

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

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

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

7.4.1. *Applicable legal basis*

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

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

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

(112) In order to assess the compatibility of the new restructuring aid, it is necessary to look at the restructuring as a whole. All the aid measures, not just the new aid, have to be taken into account to establish whether the plan will result in the restoration of viability, to establish that the aid is limited to the minimum necessary and to determine the appropriate compensatory measures to limit the distortion of competition.

7.4.2. *Eligibility of the firm*

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

7.4.3. *Restoration of viability*

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

Decision of 23 November 2005 initiating the formal investigation procedure

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

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

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

[17] OJ C 244, 1.10.2004, p. 2.
[18] OJ C 288, 9.10.1999, p. 2.
[19] See in particular points 85 *et seq.* of the initial opening decision.

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

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

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

Decision of 10 October 2007 re-initiating the investigation procedure

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

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

(123) There is nothing in the explanations provided by the Polish authorities to suggest that the additional cash-flow was anything other than a one-off aid measure granted in 2007, following a rather sudden and substantial change in marketing practices by HSW's competitors. The Polish authorities have demonstrated that in the future HSW will in all likelihood be able to generate sufficient cash-flow to offer competitive conditions to its clients and suppliers: the indicators for HSW's financial results after the implementation of various cost-reduction measures are satisfactory. The Commission is therefore satisfied that coverage of those additional cash-flow needs was necessary to keep HSW afloat pending the completion of its restructuring and that the restructuring plan is aimed at ensuring that such financial gaps do not reoccur.

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

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

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

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

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

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

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

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

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

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

7.4.4. *Avoidance of undue distortion of competition*

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

(134) According to point 56 of the Guidelines, the conditions for authorising aid are less stringent where compensatory measures are carried out in assisted areas. For the purposes of analysing the impact of the restructuring aid on the market and HSW's competitors, the Commission is taking account of the fact that HSW is located in an Article 87(3)(a) EC Treaty assisted area.

Compensatory measures implemented under the February plan

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

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

Compensatory measures under the November plan

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

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

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

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

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

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

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

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

7.4.5. *Aid limited to the minimum*

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

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

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

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

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

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

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

([22]) See point 40 of the 2004 Guidelines.

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

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

7.4.6. *'One time, last time' principle*

(151) The Commission noted, in the decision to initiate the formal investigation procedure, that HSW — Zakład Zespołów Mechanicznych received restructuring aid granted before accession for the period 2003-2007. It therefore had to be demonstrated that this restructuring aid had had no spillover effects on the parent company. The Polish authorities were also asked to assure the Commission that the restructuring aid to HSW, if approved by the Commission, would not have spillover effects on HSW — Zakład Zespołów Mechanicznych.

(152) The Polish authorities have assured the Commission that bilateral relations between HSW — Zakład Zespołów Mechanicznych and HSW are based on market terms (including terms of payment and of delivery) and that the companies, as distinct legal entities, keep separate accounts. HSW's sole consideration when choosing HSW — Zakład Zespołów Mechanicznych as a partner for supplying materials was its geographical proximity.

7.4.7. *Separation between subsidised special military production and civil production*

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

8. **CONCLUSION**

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

HAS ADOPTED THIS DECISION:

Article 1

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

Article 2

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

Article 3

This Decision is addressed to the Republic of Poland.

Done at Brussels, 10 March 2009.

For the Commission

Neelie KROES

Member of the Commission

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