

Commission Decision of 5 July 2005 on State aid C 20/04 (ex NN 25/04) in favour of Huta Częstochowa SA (notified under document number C(2005) 1962) (Only the Polish version is authentic) (Text with EEA relevance) (2006/937/EC)

COMMISSION DECISION

of 5 July 2005

on State aid C 20/04 (ex NN 25/04) in favour of Huta Częstochowa SA

(notified under document number C(2005) 1962)

(Only the Polish version is authentic)

(Text with EEA relevance)

(2006/937/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 Protocol No 8 of the Accession Treaty on the restructuring of the Polish steel industry<sup>(1)</sup> (hereinafter referred to as 'Protocol No 8').

Having called on interested parties to submit their comments pursuant to the provisions cited above<sup>(2)</sup> and having regard to their comments.

Whereas:

I. PROCEDURE

- (1) By letter dated 4 August 2003 the Commission requested information on the control of state aid in Poland including, if applicable, measures to restructure the recipient. Thereafter the matter was discussed by the Commission and the Polish authorities at various technical meetings and formed the subject of intensive correspondence between the Commission and Poland.
- (2) On 23 January 2004 the consultant in charge of the independent evaluation of the restructuring programme in Poland under Protocol No 8 submitted his assessment of the case to the Commission.
- (3) By letter dated 19 May 2004 the Commission informed Poland that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the measures and asked for information to be provided on a number of matters.

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- (4) The Commission decision to initiate the procedure was published in the Official Journal of the European Union<sup>(2)</sup>. The Commission invited interested parties to submit their comments on the measure.
- (5) By letter of 26 June 2004, Poland replied to the questions raised. Poland also requested a Commission decision under point 10 of Protocol No 8 obtaining agreement to amend the Polish national iron and steel restructuring programme.
- (6) The Commission received comments from interested parties and forwarded them to Poland by letter of 27 September 2004.
- (7) By letter dated 22 November 2004, Poland replied to the comments from interested parties. The Commission subsequently met the Polish authorities on several occasions. Additional information was eventually provided by letter of 8 June 2005.

## II. DETAILED DESCRIPTION OF THE MEASURES

### 1. Introduction

- (8) The recipient is a company in difficulties, namely steel producer Huta Częstochowa S.A (hereinafter referred to as 'HCz'; see point 2 a). In October 2002, HCz leased its production assets to a new company, Huta Stali Częstochowa Sp z o.o. (hereinafter referred to as 'HSCz'; see point 2 b).
- (9) Two types of measure are concerned: the financial restructuring of HCz (see point 3) and several other direct measures (see point 4).
- (10) The 'restructuring' took place in three phases, of which only the last one is of interest for the purposes of monitoring state aid: A first attempt in November 2001 under a court-led conciliation procedure ended in a fiasco. As a result, HCz was obliged to file for bankruptcy in October 2002. In February 2003 HCz was accepted for restructuring under a new law, as a result of which the bankruptcy procedure was suspended. Under the restructuring plan the assets are to be split between various companies and the companies or assets will be sold off. One company will get the steel production assets in order to pay off the debts vis-à-vis commercial creditors (banks and public service providers) and another company will mainly receive land in order to pay off debts vis-à-vis public creditors (debts to public institutions, such as tax). In addition, the remaining subsidiaries of HCz will be sold to service the non-restructurable public and commercial debts.

### 2. The recipient

- a) Huta Częstochowa

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- (11) HCz is the second biggest steel producer in Poland. It produces mainly quarto plate<sup>(3)</sup>, a type of finished steel that accounts for more than 60 % of its sales. The product is used in shipbuilding and for construction purposes.
  - (12) HCz's first plant was set up between 1896 and 1902. Currently HCz consists of a relatively modern steel plant and a plate mill comprising an electric arc furnace, a continuous caster and a heavy plate mill with finishing facilities. The nominal capacity of the steelmaking shop (which produces semi-finished products, i.e. slabs) is 700,0 tonnes and that of the plate mill (which converts the semi-finished products into finished products) is about 780,0 tonnes.
  - (13) HCz owns 14 subsidiaries which provide it with additional services. Among them are tube producer Rurexpol Sp. z o.o.<sup>(4)</sup>, coking plant Koksownia Sp. z o.o. and electricity company Elsen Sp. z o.o. Together with its subsidiaries HCz employed about 5,0 workers in 2002.
  - (14) HCz is 100 % owned by the Polish Treasury. Its share capital amounts to PLN 370 million (about EUR 70 million)<sup>(5)</sup>. The book value of the company assets on 31 December 2003 was PLN 768,5 million (about EUR 160 million).
  - (15) Since summer 2001 HCz has been in serious financial difficulties. Because it was unable to service its debt (which at the end of 2003 was around PLN 1,4 billion, about EUR 310 million) most of its assets, including all steel assets, have been pledged to major creditors.
  - (16) On 11 November 2001 HCz applied for a court-led conciliation procedure, further to which payment of its debts was suspended. The conciliation process is designed to allow the company to restructure through a partial debt write-off by its creditors. In October 2002 the court cancelled the conciliation process because the creditors had failed to agree to a restructuring package. According to the Polish authorities, the conciliatory process failed because the creditors demanded that HCz should use aid provided by the state to repay its debts in full.
  - (17) On 28 October 2002 HCz filed for bankruptcy. Under Polish law HCz was obliged to apply for bankruptcy after the conciliation procedure was terminated because it was not able to pay its debts, which became payable once the conciliation procedure was abandoned. On that date HCz leased its production assets and ceased steel production and since then it has acted only as a holding company for its subsidiaries; today it consists purely of a management body consisting of about 40 persons..
- b) Huta Stali Częstochowa
- (18) In view of HCz's bankruptcy proceedings, and in order to ensure continuity of production without the risk of the receiver suspending operations in the course of the proceedings, a new business, HSCz, was set up under the control of Towarzystwo Finansowe Silesia Sp. z o.o. (hereinafter referred to as 'TFS',

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- a limited liability company operating in the steel industry which is majority owned by the Treasury).
- (19) On 28 October 2002, HSCz leased HCz's steel production facilities (including the steel plant, the plate mill, the coking plant and some essential services). The lease agreement stipulates that HSCz has to pay PLN [...] <sup>(6)</sup> million per month for the lease and take over 2 057 employees from HCz (currently 1 950).
- (20) The lease agreement granted HSCz a 14-month postponement of payment of the leasing fee. Although the agreement does not explicitly provide for interest to be paid for the deferral, statutory interest for delayed payments was calculated on 30 November 2004, resulting in an amount of PLN [...], which HSCz paid to HCz.
- (21) TFS provided HSCz only with the minimum capital of PLN 50 000. In order to operate on the market without working capital, HSCz therefore shortened the payment deadline for receivables to about 15 days while lengthening the payment deadline for payables to over 50 days. This was possible as, with one exception, all key suppliers were ready to accept such credit terms in order to keep HSCz as a major client. In practice, many suppliers concluded so-called barter arrangements whereby the raw materials, in particular scrap, were paid with end products such as steel sheet destined for resale to specific end users. The companies monitored the production and accounts of HSCz closely and demanded significant profits on the operations in return for the risk incurred.
- (22) Additional security was requested only for the liabilities deriving from energy supplied by the Polish electricity operator Polskie Sieci Energetyczne S.A. (hereinafter referred to as 'PSE'). TFS was asked to sign three guarantee agreements for PLN [...] million each. They comprise, on the one hand, security consisting of three notes promising payment of the amount of PLN [...] million each and, on the other hand, three declarations of consent to immediate enforcement under the Polish Code of Civil Procedures (Article 777), thus providing PSE with sureties to the tune of PLN [...] million. On 28 November 2002 two notes/guarantees were issued for PLN [...] million each and valid until 30 June 2003, while another guarantee for PLN [...] million, valid until 31 March 2005, was issued on 30 December 2002. For all the promissory notes and the guarantee HSCz paid a fixed premium of PLN [...], and for the guarantee of PLN [...] million, an amount equivalent to approximately 0,8 %. However, the outstanding electricity bills never exceeded PLN [...] million, because the guarantee agreement contained a mechanism which obliged HSCz to repay any amounts outstanding within 5 weeks.
3. The restructuring of Huta Częstochowa
- a) The restructuring of the Polish steel sector

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- (23) In June 1998 the Polish Council of Ministers adopted a First Restructuring Programme for the Polish Iron and Steel Industry. This was updated in 2001 and the Restructuring (Iron and Steel Industry) Act of 24 August 2001<sup>(7)</sup>, which was the legal basis for the restructuring of the Polish steel industry, was attached to it.
- (24) On 5 November 2002, the Polish Council of Ministers approved an amendment to the First Restructuring Programme, which was eventually named Restructuring and Development Programme for the Polish Iron and Steel Industry until 2006 (hereinafter referred to as the National Restructuring Programme or ‘NRP’). This plan essentially allows for state aid to be awarded to the Polish steel industry for restructuring in the period from 1997 to 2006 of up to PLN 3,387 billion (EUR 713 million).
- (25) The NRP indicates that 17 steel companies exist in Poland, broken down between three groups. The first group comprises eight companies which receive state aid under the NRP. The majority of aid was allotted for the consolidation of the main four steel production sites in Poland, which have been merged into Poland's biggest steel producer, Polskie Huty Stali S.A (hereinafter ‘PHS’), currently named Mittal Steel Poland (hereinafter ‘MSP’), following its sale to LNM<sup>(8)</sup> holdings, which was recently transformed into Mittal Steel<sup>(9)</sup>. The second group covers six companies, which were not included in the restructuring programme because their main business activity was not related to steel production or because they had not received aid. The third group includes three companies which had received aid but for which bankruptcy proceedings had been commenced in the meantime.
- (26) HCz was listed in the third group. In view of HCz's application for bankruptcy proceedings, the NRP concluded as regards HCz that ‘[f]urther restructuring of the mill will carry on through its liquidation’ (section 3.1.2 and point 5.1). In fact, point 3.1.3.3 indicates HCz as one of the mills ‘to which bankruptcy procedures were started’ and indicates that the mill is now administered ‘by the Official Receiver of Bankrupts assets.’ The NRP explains in point 5.4.2 that ‘in order to make restructuring of HCz, it would be necessary to grant it with state aid to an amount of PLN 1 billion. Still the results would be not as expected. In such a circumstance the company shall be restructured by means of liquidation and its production assets shall be administered by HSCz, [which] shall continue the production activity of HCz without state aid for restructuring. The assets of HCz shall not be taken over by any recipient of state aid (section 3.1.3.1.)’.
- (27) The NRP was submitted to the EU. It was finalised on 25 March 2003 following intensive dialogue with the Commission. After its assessment the Commission made a proposal for a Council Decision to extend the grace period for the granting of state aid in the Polish steel sector under the Europe Agreement (which initially lasted only until 1997) until the end of 2003

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subject to viability being achieved by 2006, which was approved by the Council in July 2003<sup>(10)</sup>.

- (28) The EU thus allowed Poland, in derogation from its rules, to grant restructuring aid to the steel industry<sup>(11)</sup>. The main findings of the NRP were transformed into a Protocol to the Accession Treaty, Protocol No 8 on the restructuring of the Polish iron and steel industry. Protocol No 8 endorses the granting of state aid to the eight companies indicated (not HCz) of up to PLN 3,387 billion. On the other hand, Protocol No 8 emphasises that no additional restructuring aid for the Polish steel industry is allowed.
- b) The Act of 30 October 2002
- (29) On 30 October 2002, shortly after HCZ had filed for bankruptcy, the State Aid to Enterprises of Special Significance to the Labour Market Act was passed (it was amended in November 2003<sup>(12)</sup> and is hereinafter referred to as ‘the Act of 30.10.2002’)<sup>(13)</sup>. This Act allows companies to conduct a restructuring procedure in order to avoid liquidation. To this end the law introduced a new approach to restructuring as it provides for the restructuring (i.e. a partial write-off) of public debt, which until then could only be rescheduled or deferred.
- (30) Pursuant to Article 7(1) of the Act of 30.10.2002, an enterprise undergoing restructuring is entitled to bankruptcy protection from the commencement of restructuring until restructuring has been completed or discontinued. Restructuring must be completed no more than 24 months after the restructuring decision was taken (Article 19(2) of the Act of 30.10.2002).
- (31) The Act of 30.10.2002 provides for financial restructuring of commercial liabilities generated before July 2002 and of public liabilities generated before June 2002 (Article 3 of the Act of 30.10.2002, which extended the latter period by one year). While the private financial restructuring of commercial liabilities is based on a restructuring agreement to which at least 50 % of the creditors must agree (under Chapter 4 of the Act of 30.10.2002), public liabilities can be partially written off on the basis of a decision by the Chairman of the Polish Industrial Development Agency (Agencja Rozwoju Przemysłu S.A., hereinafter referred to as ‘ARP’), the body responsible for supervising restructuring of companies under the Act of 30.10.2002 (according to Chapter 5).
- (32) In addition, the amendment of 14 November 2003 introduced in Chapter 5a of the Act of 30.10.2002 the possibility of recovering some money from public claims on the basis of a special restructuring scheme whereby the recipient transfers ownership of assets which are free of sureties to a subsidiary of the ARP (‘the Operator’) with a value equivalent to at least 25 % of the total debt. These assets are subsequently sold to pay off the public creditors (Article 32d of the Act of 30.10.2002). However the public creditors must endorse the special restructuring scheme (Article 32h of the Act of 30 October 2002).

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- (33) Chapter 5a and the special restructuring scheme also extend the temporary and material scope of restructurable claims. Claims are subject to restructuring for one more year (until 30 June 2003) and may comprise more different types of public debt pursuant to Article 32a(1) of the Act of 30.10.2002<sup>(14)</sup>.
- c) The restructuring process of Huta Częstochowa
- (34) On 21 January 2003 HCz applied with the ARP for restructuring under the Act of 30.10.2002. On 21 February 2003 the Chairman of the ARP accepted the application and ordered restructuring procedures to be instituted pursuant to Article 10(1) of the Act of 30.10.2002, which provided bankruptcy protection for HCz.
- (35) On 18 April 2003 HCz submitted a restructuring plan to the ARP. The basic idea of the plan was to divide HCz's assets into productive and other assets and to sell the productive assets as a going concern to a private investor. On 2 July 2003 the restructuring plan was endorsed by the ARP. The plan was then submitted to the Office for Competition and Consumer Protection (hereinafter 'OCCP'), which accepted it on 25 July 2003 on condition that no state aid would be provided<sup>(15)</sup>.
- (36) On 7 August 2003 the Chairman of the ARP took the restructuring decision pursuant to Article 10(4) of the Act of 30.10.2002. In October 2003 the restructuring plan was amended to reflect the requirements laid down by the OCCP. On 1 December 2003 it was endorsed by the ARP, which modified the original restructuring decision.
- (37) On 30 April 2004 the Chairman of the ARP issued a further decision amending the restructuring decision. It was based on an updated business plan dated 26 April 2004. It was necessary to amend the plan to take account of the changes in the Act of 30.10.2002; the new version also described the division of the assets in greater detail<sup>(16)</sup>.
- d) Huta Częstochowa's creditors
- (38) The restructuring plan identified several groups of creditors on the basis of the legal nature of the liabilities:
- (39) The first group contains public institutional debts (amounts as at 30 June 2003), comprising:
- social insurance contributions (to Zakład Ubezpieczeń Społecznych (hereinafter referred to as 'ZUS')) of around PLN [...] million ([...] million restructurable, and [...] million non-restructurable);
- tax on property (to the municipality of Częstochowa) of PLN [...] million;
  - environmental fee (to Silesia Province (regional entity) of PLN [...] million;

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- a loan from Fundusz Gwarantowanych Świadczeń Pracowniczych (Fund for Guaranteed Employee Benefits, hereinafter referred to as ‘FGSP’) of PLN [...] million;
- payments to Państwowy Fundusz Rehabilitacji Osób Niepełnosprawnych (State Fund for Rehabilitation of Disabled Persons, hereinafter referred to as ‘PFRON’) of PLN [...] million;
- liabilities vis-à-vis Częstochowa City Council of PLN [...] million; and
- VAT and other taxes (Urząd Skarbowy (hereinafter referred to as the ‘Tax Office’)) of PLN [...] million.

Therefore the ‘public institutional creditors’ are: ZUS, FGSP and PFRON, which are answerable to the Ministry of Economy and Labour, the Municipality of Częstochowa including its Tax Office and the City Council and Silesia Province. In addition, various other municipalities, such as Poraj, hold smaller claims.

- (40) The second group consists of commercial claims (amounts as at 30 September 2003), which can be subdivided into claims by public and private creditors. The first subgroup (hereinafter referred to as ‘public commercial creditors’) consists of:
- the PSE (PLN [...] million);
  - Zakład Energetyczny Częstochowa S.A (hereinafter referred to as ‘Zakład Energetyczny’ (PLN [...] million);
  - the ARP (PLN [...] million);
  - Polish State Railways (PKP Dyrekcja Generalna S.A.), hereinafter referred to as ‘PKP’ (PLN [...] million);
  - the Polish oil and gas mining company (Polskie Górnictwo Naftowe i Gazownictwo S.A.), hereinafter referred to as ‘PGNiG’ (PLN [...] million);
  - the coal trading company (Centrala Zbytu Węgla Węglózbyt S.A), hereinafter referred to as ‘CZW Węglózbyt’ (PLN [...] million); and
  - the coal company (Kompania Węglowa Sp. z o.o.) (PLN [...] million).
- (41) The second subgroup and the third group include the following private creditors (amounts as at 30 September 2003):
- Kredyt Bank S.A. ([...] mln PLN);
  - ING Bank Śląski S.A. (hereinafter referred to as ‘ING BSK’) (PLN [...] million);
  - BPK Logo (PLN [...] million);
  - Bank Przemysłowo Handlowy S.A. (hereinafter referred to as ‘BPH’, [...] mln PLN);
  - Citybank Handlowy S.A (PLN [...] million); and
  - Bank Millennium S.A. ([...] mln PLN).
- e) Arrangements for financial restructuring



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- (42) The restructuring plan provides for financial restructuring of these liabilities whereby the assets will be divided between three companies.
- (1) Majątek Hutniczy Sp. z o.o. (hereinafter referred to as ‘MH’) will obtain the steel assets. Company shares will be issued in exchange for commercial receivables and will subsequently be sold by the creditors (possibly together with the sale of HSCz by TFS) to a strategic investor.
- (2) Operator Sp. z o.o. (hereinafter ‘Operator’) will be provided with certain non-productive assets (i.e. non-steel assets) in order to pay off restructurable public receivables.
- (3) Regionalny Fundusz Gospodarczy (Regional Economic Fund, hereinafter referred to as ‘RFG’) will be HCz's successor under a new name. In order to pay off the remaining debts (mainly non-restructurable receivables) it will sell most subsidiaries, together with the tube maker and the coking plant, to the strategic investor.
- (1) *MH — and the satisfaction of commercial claims*
- (43) The restructuring plan indicates that creditors with commercial claims are to be offered steel production assets in exchange for their claims. They are to swap debts for shares in a newly-established subsidiary, MH, which will own all steelmaking equipment, namely all the fittings of the steelmaking shop, the plate mill and the administration building.
- (44) The value of the assets was established in accordance with Polish legislation on state-owned enterprises, which requires an asset evaluation to be made before the sale. Accordingly, in August 2003 a valuation of the blast furnace (foundry)<sup>(17)</sup> was carried out by ATEST, which produced a figure of PLN [...] million. In addition, the rolling mill was valued by PROFCEN in Częstochowa at PLN [...] million. However, given that these valuations were questioned by the commercial creditors who claimed that they were too optimistic in view of the method used, in December 2003 ATEST carried out a further valuation based on the discounted cash flow of the combined rolling mill and foundry, resulting in a figure of PLN [...] million. In addition, a valuation using the Swiss Method (2/3 DCF, 1/3 asset valuation) resulted in PLN [...] million. This value was more or less confirmed by LNM's bid in December 2003 which valued these assets at PLN [...] million, corrected to PLN [...] million at the end of 2003 (however, by March 2005, given the significant increase in steel prices, this value had almost doubled to PLN [...](between 600 and 650)] million).
- (45) On 13 October 2003, the commercial creditors signed an agreement for the restructuring of their debt predating June 2002 (hereinafter ‘the restructuring agreement’), which entered into force on 9 December 2003. On the basis of the book value of MH's company assets, i.e. PLN 320 million, this agreement stipulated first that the claims of those commercial creditors as at 30 June 2002

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would be settled through partial conversion into 80,44 % of the shares of MH. Of these, 72,47 % were paid in proportion to the commercial creditors' existing claims, and 7,97 % were allotted, on a proportional basis, to the creditors' existing sureties. This resulted in a debt write-off of around 60 % in 2003 and around 30 % in 2005.

- (46) Second, the Creditor Agreement stipulated that RFG should use the remaining 19,56 % of shares in MH to repay — in full — the interest on liabilities existing prior to June 2002 until the date on which the agreement came into force, i.e. 9 December 2003 (thereafter it is superseded by the Creditor Agreement) and the liabilities arising after June 2002 as well as the applicable interest.
- (47) The Creditor Agreement was subsequently amended several times in order to change the deadline by which the participating creditors should receive MH shares and to amend the timetable for bids from strategic investors for MH.
- (48) The Creditor Agreement was initially concluded by creditors representing 54 % of the required amount of debt, comprising the following commercial public creditors: PSE, Zakład Energetyczny, the ARP, the PKP and the PGNiG and the following private creditors: BPH Bank and BPK Logo. Kredyt Bank, ING BSK, Citibank Handlowy, Bank Millenium, CZW Węglózbyt and Kompania Węglowa did not originally give their agreement. However, according to Article 23(2) of the Act of 30.10.2002 the agreement is binding on all creditors holding commercial claims.
- (49) In March 2004 Bank Millenium, CZW Węglózbyt and Kompania Węglowa indicated their consent to the Creditor Agreement. Since then, Kredyt Bank, ING BSK and Citibank Handlowy have also endorsed the economic rationale of the restructuring programme.
- (50) The Commission understands that MH will be sold together with the remaining pledges on the company's assets, as the funds from the sale will be used to pay off the remaining commercial and non-restructurable public debts; only after this will sureties be released.
- (2) *Operator — and the satisfaction of restructurable public institutional claims*
- (51) Under the restructuring plan as approved by the restructuring decision, Operator assumes liability for all public institutional claims as at 30 June 2003 which are subject to restructuring.
- (52) In exchange, pursuant to Article 32d of the Act of 30.10.2002, HCz will transfer to Operator assets — free of sureties — worth at least 25 % of the claims transferred to Operator. These assets have been identified in the restructuring plan and comprise land, parts of which will form an industrial park, the energy company Elsen, and PLN 10 million in receivables. Operator will attempt to make as much cash as possible on these assets. Completion of the sale of most of the assets is not expected before December 2005.

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- (53) The value of the land the Operator will receive has been estimated by an independent auditor at PLN 120,6 million. Together with shares in Elsen valued at approximately PLN 25,4 million and receivables to the value of PLN 10 million, Operator's assets should amount to PLN 156 million<sup>(18)</sup>. This evaluation was performed on behalf of ARP by BRE Corporate Finance, the investment banking arm of Commerzbank in Poland<sup>(19)</sup>.
- (54) The transfer of the receivables to Operator results automatically in the release of the sureties for these liabilities. However, due to the existence of non-restructurable receivables, some public creditors will still retain collaterals, which will remain in place until HCz/RFG is able to clear its liabilities after the sale of MH.
- (55) Consent to the special restructuring scheme has been signalled by ZUS, the municipality of Częstochowa, PFRON and Silesia Province. Poland has indicated that the Częstochowa Tax office, FGŚP and Poraj municipal authorities rejected the special restructuring scheme at the beginning of June 2005 because they took the view that bankruptcy would achieve better results. Their debts are therefore regarded as non-restructurable and must be paid by HCz/RFG. The Polish authorities have given assurances that these claims will be repaid in full.
- (3) *RFG — Satisfaction of non-restructurable commercial and public claims*
- (56) HCz is to be renamed RFG. RFG will own several of the remaining assets, in particular most of HCz' subsidiaries, such as Rurexpol and the coking plant, most of which will be sold to the strategic investor. In addition, several assets which were leased by HSCz will be transferred to another subsidiary of HCz named Majątek Hutniczy Plus (hereinafter 'MH Plus') with a view to resale to the strategic investor for the benefit of RFG.
- (57) RFG's assets were first estimated at end-2003 by consultants working for the company PROFCEN in Częstochowa and were incorporated into the subsequent valuations of the subsidiary companies carried out by ATEST. The value of MH and MH Plus was substantiated further by bids from strategic investors. The second valuation basis was fixed at the beginning of 2005 after the purchase bid for shares in various subsidiaries was received (see point 62) and reflects the significant upturn in the steel market. The value of the subsidiaries is given below:

TABLE 1

Value estimates for the subsidiaries to be sold by RFG

*figures in PLN*

<b>Subsidiaries</b>	<b>2003</b>	<b>2005</b>
<b>a</b>	This figure does not include three companies which are not being sold to the strategic investor. Their value is estimated at between 0 and PLN 15 million.	

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19,6 % of MH.	[...]	[...]
MH Plus	[...]	[...]
Koksownia Częstochowa Sp. z o.o.	[...]	[...]
Remaining subsidiaries of Huty Częstochowa <sup>a</sup>	[...]	[...]
Total	[...]	[...]

**a** This figure does not include three companies which are not being sold to the strategic investor. Their value is estimated at between 0 and PLN 15 million.

- (58) RFG will have to repay all non-restructurable public institutional debt (about PLN [...] million)<sup>(20)</sup>. It will also have to pay interest on commercial liabilities restructured in the form of conversion into MH shares for the period from 1 July 2002 to 9 December 2003 (PLN [...] million) and any new commercial liabilities with interest arising after June 2002 (estimated at PLN [...] million)<sup>(21)</sup>. Therefore of the PLN [...] million which RFG will receive from the sale of the subsidiaries, PLN [...] million will be used to pay all outstanding debts, while PLN [...] million will be used to cover restructuring costs and about PLN [...] million will remain in RFG.
- (4) *The sale of the Huta Częstochowa companies to a strategic investor*
- (59) Together with HCz's creditors and under the supervision of the Treasury, HCz and TFS intend to sell shares in MH, MH Plus, the coking plant, Rurexpol and some other subsidiaries along with shares in HSCz to a strategic investor. The process is to be supervised by a Negotiating Committee which will include representatives of HCz, TFS and nine of HCz's creditors (BPH, Citibank Bank Handlowy, Bank Millennium, Kredyt Bank, ING BSK, PSE, PKP, PGNiG and the ARP).
- (60) After an initial tendering process, LNM holdings N.V (now merged into Mittal Steel but referred to hereinafter as 'LNM') and the Industrial Union of Donbass (hereinafter 'Donbass') have been selected by TFS and HCz as preferred bidders to enter into exclusive negotiations. A preliminary agreement was initialled on 31 March 2004 but was subsequently cancelled. In autumn 2004 the tender with the preferential bidders was relaunched.
- (61) In February 2005 LNM was awarded exclusivity on the basis of the bid price. The price had risen significantly in the light of the upturn in the coke and steel market. An agreement with LNM was initialled on 15 April 2005. However, on 16 May 2005, after LNM's talks with the trade unions broke down, negotiations were started with Donbass. According to the Polish authorities, Donbass is now also ready to pay the price offered by LNM, and

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so an agreement was initialled on 16 June 2005, which forms the basis of a final agreement to sell the companies to Donbass.

- (62) A price of around PLN [...] [...] (between 600 and 650)] million will be paid as a package for MH, MH Plus (about PLN [...] million), Koksownia (about [...] PLN million), Rurexpol and 8 other HCz subsidiaries (about PLN [...] million altogether) and HSCz (about PLN [...] million). The sellers set minimal prices, but in view of the price bid for all the components of the transaction, they were increased proportionally (because otherwise there would have been a risk of various bidders being able to submit better bids for various parts).
- (63) In October 2004 TFS presented an updated Individual Business Plan (hereinafter referred to as 'the IBP') for HSCz for 2004-2006 on the assumption that HSCz's operations and assets would be reunited in one company (comprising MH, MH Plus and HSCz). This IBP includes investments of PLN 252,6 million in the existing plant. Several other restructuring measures, such as cost reduction and an environmental programme, are also planned. On the basis of these measures the IBP anticipates a return on investments of more than 10 % for 2004 to 2006 and a return on capital of more than 5 %.
- (64) The tender required the Investor to complete the Investment Programme within 24 months of gaining control over HSCz, MH and MH Plus. In addition, the sales agreement will oblige the investor not to increase production capacity of finished products until 31 December 2006, in particular not to make investments in new production lines of hot-rolled sheets.
- f) Overview of claims and transfers
- (65) In order to evaluate the effects of the restructuring, a detailed economic analysis was conducted by PriceWaterhouseCoopers on behalf of Poland (hereinafter referred to as 'the PWC analysis'), which compares the extent of debt settlement in two respective scenarios, namely restructuring proceedings and bankruptcy. The restructuring arrangements were taken from the Creditor Agreement of October 2003 and from the restructuring decision of August/December 2003. Arrangements in the bankruptcy scenario are based on the hypothetical application of bankruptcy law<sup>(22)</sup> and on the best outcome for public institutional creditors.
- (66) The analysis assumes that bankruptcy and restructuring would take place in the first case on 31 December 2003 (see table 2) and in the second case on 31 March 2005 (see table 3). The amount of receivables and the value of the assets are calculated on the basis of the present value at the time (e.g. for 2003 the MH value will be PLN [...] (between 325 and 375)] million while for 2005 it will be PLN [...] (between 600 and 650)] million). The reason why the analysis was carried out over two different time periods is that the commercial creditors had already agreed to restructuring on the basis of Table 2, while the public institutional creditors did not give their final approval in 2003 but did

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so only later with a view to the March 2005 scenario. However, at that time the figures changed significantly as, on the one hand, creditors' receivables increased as a result of additional accrued interest and, on the other, proceeds under both the bankruptcy and restructuring scenarios improved as the value of the assets in question rose.

TABLE 2

## Comparison of proceeds in December 2003

in million zloty

2003 Analysis— Adjusted	Receivables — 31.12.2003	Proceeds under bankruptcy PWC Analysis)	Proceeds under Restructuring Programme				Difference (Restructuring Bankruptcy)	Restructuring Recovery of Bankruptcy	Restructuring Recovery %	
			Total	from Majatek Hutniczy	from RFG	from Operator ARP				
<b>All public creditors</b>	<b>875,7</b>	<b>405,1</b>	<b>531,0</b>	[...]	[...]	[...]	<b>125,9</b>	<b>131</b>	<b>46</b>	<b>61</b>
<b>Public institutional creditors, including:</b>	<b>470,1</b>	<b>234,9</b>	<b>315,4</b>	[...]	[...]	[...]	<b>80,5</b>	<b>134</b>	<b>50</b>	<b>67</b>
Social Security (ZUS)	[...]	[...]	[...]	—	[...]	[...]	[...]	136	53	72
Gmina Częstochowa	[...]	[...]	[...]	[...]	[...]	[...]	[...]	148	39	58
Tax Office (Urząd Skarbowy)	[...]	[...]	[...]	—	[...]	[...]	[...]	67	100	67
Guaranteed Employee Benefits Fund (FGŚP)	[...]	[...]	[...]	—	[...]	[...]	[...]	53	100	53
State Fund for Rehabilitation of	[...]	[...]	[...]	—	[...]	[...]	[...]	178	30	53

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Handicapped Persons (PFRON)										
Śląsk voivodship	[...]	[...]	[...]	—	[...]	[...]	[...]	210	25	53
Gmina Poraj and other gminas	[...]	[...]	[...]	—	[...]	[...]	[...]	165	42	69
<b>Public Corporate Creditors, including:</b>	<b>405,6</b>	<b>170,2</b>	<b>215,6</b>	[...]	[...]	—	<b>45,4</b>	<b>127</b>	<b>42</b>	<b>53</b>
PSE S.A. (Power Grid)	[...]	[...]	[...]	[...]	[...]	—	[...]	139	38	54
Zakład Energetyczny (Energy Distribution Company)	[...]	[...]	[...]	[...]	[...]	—	[...]	97	69	67
Agencja Rozwoju Przemysłu S.A. (Industrial Development Agency)	[...]	[...]	[...]	[...]	[...]	—	[...]	116	42	49
PKP S.A. (Polish Railway)	[...]	[...]	[...]	[...]	[...]	—	[...]	174	26	46
PGNiG S.A. (Polish Gas Company)	[...]	[...]	[...]	[...]	[...]	—	[...]	104	51	53

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Kompania Węglowa S.A.	[...]	[...]	[...]	[...]	[...]	—	[...]	198	23	45
CZW Węglowozbyt S.A.	[...]	[...]	[...]	[...]	[...]	—	[...]	169	28	47
<b>Key Private Corporate Creditors, including:</b>	<b>520,5</b>	<b>312,3</b>	<b>265,91</b>	[...]	[...]	—	<b>46,4</b>	<b>85</b>	<b>60</b>	<b>51</b>
Kredyt Bank	[...]	[...]	[...]	[...]	[...]	—	[...]	80	70	56
ING Bank Śląski S.A	[...]	[...]	[...]	[...]	[...]	—	[...]	91	63	57
Bank BPH S.A.	[...]	[...]	[...]	[...]	[...]	—	[...]	62	81	50
Citibank Handlowy	[...]	[...]	[...]	[...]	[...]	—	[...]	99	46	46
Millennium Big Bank Gdański S.A.	[...]	[...]	[...]	[...]	[...]	—	[...]	65	78	50
Others	[...]	[...]	[...]	[...]	[...]	—	[...]	111	41	45
<b>TOTAL</b>		<b>717,41</b>	<b>796,91</b>	[...]	[...]					

TABLE 3

Comparison of proceeds in March 2005

*in million PLN*

2005 analysis of 31.3.2005	Proceeds under PWC Analysis)	Proceeds under Restructuring Programme			Difference (Restructuring Bankruptcy)	Restructuring Recovery of Bankruptcy	% Recovery Restructuring
		Total	from Majatek Hutniczy	from RFG			
				from Operator ARP			



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<b>All public creditors</b>	950,6	659,7	664,4	[...]	[...]	[...]				
<b>Public institutional creditors, including:</b>	<b>504,72</b>	<b>342,4</b>	<b>365,6</b>	[...]	[...]	[...]	<b>23,2</b>	<b>107</b>	<b>68</b>	<b>72</b>
Social Security (ZUS)	[...]	[...]	[...]	—	[...]	[...]	[...]	110	<b>68</b>	74
Gmina Częstochowa	[...]	[...]	[...]	[...]	[...]	[...]	[...]	110	69	75
Tax Office (Urząd Skarbowy)	[...]	[...]	[...]	—	[...]	[...]	[...]	62	100	62
Guaranteed Employee Benefits Fund (FGSP)	[...]	[...]	[...]	—	[...]	[...]	[...]	49	100	49
State Fund for Rehabilitation of Handicapped Persons (PFRON)	[...]	[...]	[...]	—	[...]	[...]	[...]	105	55	58
Slask voivodship	[...]	[...]	[...]	—	[...]	[...]	[...]	122	47	57
Gmina Poraj and other gminas	[...]	[...]	[...]	—	[...]	[...]	[...]	53	73	39
<b>Public Corporate Creditors, including:</b>	<b>445,9</b>	<b>317,3</b>	<b>306,3</b>	[...]	[...]	—	<b>11,0</b>	<b>97</b>	<b>71</b>	<b>69</b>

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PSE S.A. (Power Grid)	[...]	[...]	[...]	[...]	[...]	—	[...]	96	69	66
Zakład Energetyczny (Energy Distribution Company)	[...]	[...]	[...]	[...]	[...]	—	[...]	90	85	76
Agencja Rozwoju Przemysłu S.A. (Industrial Development Agency)	[...]	[...]	[...]	[...]	[...]	—	[...]	74	100	74
PKP S.A. (Polish Railway)	[...]	[...]	[...]	[...]	[...]	—	[...]	142	47	67
PGNiG S.A. (Polish Gas Company)	[...]	[...]	[...]	[...]	[...]	—	[...]	92	72	66
Kompania Węglowa S.A.	[...]	[...]	[...]	[...]	[...]	—	[...]	146	43	63
CZW Węglózbyt S.A.								122	51	62
<b>Key Private Corporate Creditors, including:</b>										
<b>Banks:</b>	<b>411,4</b>	<b>346,2</b>	<b>295,9</b>	[...]	[...]	—	<b>50,3</b>	<b>85</b>	<b>84</b>	<b>72</b>
Kredyt Bank	[...]	[...]	[...]	[...]	[...]	—	[...]	82	89	73

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ING BSK	[...]	[...]	[...]	[...]	[...]	—	[...]	92	77	71
Bank BPH	[...]	[...]	[...]	[...]	[...]	—	[...]	84	82	69
Citibank Handlowy	[...]	[...]	[...]	[...]	[...]	—	[...]	84	83	70
Bank Millenium	[...]	[...]	[...]	[...]	[...]	—	[...]	90	90	81
Other Corporate Creditors	[...]	[...]	[...]	[...]	[...]	—	[...]	63	88	55
Small Creditors			[...]	[...]	[...]					
<b>TOTAL</b>		<b>1 529,0</b>	<b>1 152,5</b>	<b>1 070,4</b>	[...]	[...]				

### 3. Subsidies and other measures

#### a) Subsidies in favour of Huta Częstochowa

(67) Between 1997 and May 2002 HCz received financial support from the state amounting to PLN 25 161 072,08 (EUR 5,3 million).

(68) PLN 19 699 452 (EUR 4,15 million) was granted for operating support and employment restructuring:

— On 10 June 1997 a preferential loan of PLN 900,0 was granted by Wojewódzki Fundusz Ochrony Środowiska i Gospodarki Wodnej (Fund for the Protection of the Environment, hereinafter referred to as ‘the Environmental Fund’). The difference between the preferential rate and market rates amounted to PLN 354 175,28<sup>(23)</sup>.

— On 24 October 1997 the Head of Popów municipality waived claims of PLN 1 019 436 and PLN 2 695 558<sup>(24)</sup>.

— On 25 October 1998 the Environmental Fund waived claims of PLN 50 000<sup>(25)</sup>.

— On 21 December 1998 Częstochowa Province waived claims of PLN 2 116 260<sup>(26)</sup>.

— On 22 April 1999 the FGŚP waived interest on a loan granted to HCz of PLN 13 726 271,88. The amount of interest waived is PLN 3 369 111<sup>(27)</sup>.

— On 22 April 1999 the tax office in Częstochowa waived claims of PLN 186 809.

— On 5 May 1999 the tax office in Częstochowa waived claims of PLN 151 187<sup>(28)</sup>.

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- On 14 September 1999 the Minister for the Economy granted aid of PLN 3 556 808 for employment restructuring.
  - On 15 November 1999 Częstochowa City Council waived outstanding claims of PLN 394 427 and PLN 305 904<sup>(29)</sup>.
  - On 2 February 2000 the Minister for the Economy granted aid of PLN 24 400,55 for employment restructuring<sup>(30)</sup>.
  - On 22 February 2000 the Head of Popów municipality waived claims of PLN 13 494,4 and of PLN 1 339,6<sup>(31)</sup>.
  - On 10 May 2000 the Minister for the Economy granted aid of PLN 4 217 240,57 for employment restructuring<sup>(32)</sup>.
  - On 1 February 2001 the Minister for the Economy granted aid of PLN 117 849,19 for employment restructuring<sup>(33)</sup>.
  - On 2 May 2001 the Head of Poraj municipality waived PLN 77 986,7<sup>(34)</sup>.
  - On 2 July 2001 the Minister for the Economy granted aid of PLN 795 685,06 for employment restructuring<sup>(35)</sup>.
  - On 10 May 2002 the Minister for the Economy granted aid of PLN 251 780,73 for employment restructuring<sup>(36)</sup>.
- (69) In addition, PLN 5 461 620 (EUR 1,15 million) was granted to HCz by Komitet Badań Naukowych (Committee for Scientific Research, hereinafter 'KBN'). These subsidies were based on agreements between HCz and KBN and the Institute of Metallurgy in Gliwice designed to further research and development (hereinafter 'R&D projects'). The following grants were awarded:
- A grant dated 20 June 1997 of PLN 394 420 against total costs of PLN 2 391 420 (16,5 %) for industrial research and pre-competitive development activity concerning the review, from the engineering perspective, of the development of an ISO 14001 compliant system in accordance with Polish environmental legislation<sup>(37)</sup>. The whole project was carried out by the Institute of the Polish Academy of Science<sup>(38)</sup>. The Polish authorities have indicated that the purpose of the aid was to promote R&D, as HCz does not carry out this type of research and would not itself have commissioned work to develop ISO document templates that can be used by a wide range of industrial companies.
  - A grant dated 6 October 1997 of PLN 2 450 000 against total costs of PLN 7 920 000 (31,9 %) for industrial research and pre-competitive development activity as part of a project for the development of modern alloyed steel production processes on a full process line for manufacturing of plates and tubes<sup>(39)</sup>. The research was conducted by the Institute of Metallurgy. The Polish authorities have indicated that the aid had an incentive effect as it provided information on technical procedures for processing alloyed steel to a wide range of companies (in the drilling, shipbuilding, energy and construction industries amongst others) which HCz would have not commissioned on its own.

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- A grant dated 26 November 1998 of PLN 104 000 against total costs of PLN 290 000 (i.e. 35,8 %) for industrial research as part of a project for developing the process of improving water quality in industrial cooling systems with cooling towers<sup>(40)</sup>. This project was carried out by the Polish Academy of Science. The Polish authorities indicate that the aid had an incentive effect, as otherwise the project would not have been supported by HCz as it was made available to other companies using similar cooling systems and would not have been undertaken by HCz alone.
  - A grant dated 30 November 1999 of PLN 2 290 000 against total costs of PLN 5 626 000. PLN 2.000.000 was designated for industrial research of a total value of PLN 3 526 000 (56.7 %) and PLN 290 000 for pre-competitive development activity of a total value of PLN 2 100 000 (13.8 %). The research was carried out by the Institute of Metallurgy and concerned the manufacturing of plates with homogeneous internal structure<sup>(41)</sup>. The Polish authorities have indicated that the aid had an incentive effect in view of the fact that the information was later made available to other companies involved in metal processing, as the research would not otherwise been commissioned.
  - A grant dated 15 November 2000 of PLN 223 200 against total costs of PLN 496 400 (45 %) for industrial research as part of a project involving plastometric tests and parameter identification for metalworking processes. This project was carried out as part of the Fifth European Union Framework Programme, Theme Programme III GROWTH, with the acronym TESTIFY and the Polish authorities have given assurances that the company would not have participated in the project without state support.
- b) Measures in favour of Huta Stali Częstochowa
- (70) HSCz benefited from a variety of financial measures between November 2002 and January 2004.
  - (71) HCz deferred its debts to ZUS and FGSP which have, however, since been repaid. Late payments (made later than two weeks after the due date) amount to PLN 18 155 302 in total. For these late payments, which were generally not more than six months overdue, HCSz was charged statutory interest, i.e. PLN 560 383.
  - (72) The tax office in Częstochowa accepted deferral of tax payments for an amount of around PLN 7 million in exchange for payment of statutory interest, which was duly paid. However, the Office waived part of the statutory interest owed by virtue of the late payments. The difference between the interest paid and the full statutory interest is PLN 31 145.
  - (73) The Chairman of PFRON waived interest claims against HSCz of PLN 22 821 and accepted payment of these claims in instalments of around PLN 350 000, i.e. an aid value equivalent to PLN 8 150. When fiscal benefits of PLN 31 145 are factored in, HSCz was released from claims totalling PLN 62 116 (about EUR 13 077).

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- (74) Finally, on 27 November 2002 and 20 November 2003 the KBN awarded grants of PLN 1 100 000 and PLN 280 000 (PLN 1 380 000) in total against total costs of PLN 4 370 000 (30.4 %) for industrial research and pre-competitive activity for a project designed to help analyse ways of modernising the technological process in foundries by amending the breakdown of components used to make steel with a view to increasing quality and efficiency<sup>(42)</sup>.

### III. GROUNDS FOR INITIATING THE PROCEDURE

- (75) In its decision to initiate proceedings, the Commission expressed doubts that the measures implemented by Poland involved aid, essentially for three reasons:
- The Commission had reasons to believe that the restructuring of HCz did not pass the private creditor test. It appeared that some public creditors were writing off more debts in the course of restructuring than they would have if they had faced bankruptcy, given the possession of first-class sureties, at least in the case of public institutional creditors. In these circumstances the Commission was reluctant to accept the Polish argument that overall the restructuring plan would produce a better return for the state than liquidation. Moreover, the Commission was not sure whether the public institutional creditors' consent was obtained purely on the basis of the Act of 30 October 2002 and whether the Operator really would receive valuable assets.
  - In addition, the Commission was not sure how HSCz had continued production without working capital and whether it had received other financial aid.
  - Finally, the Commission had information in its file that HCz had received various financial aid measures between 1997 and 2002.
- (76) The Commission also expressed concern as to whether, in the light of point 4a of Protocol No 8, LNM would be entitled to acquire shares in HCz, as LNM already owned MSP, a state aid recipient under that Protocol.

### IV. COMMENTS FROM INTERESTED PARTIES

- (77) By letter dated 9 September 2004, UK Steel, acting on behalf of HCz's UK competitors, argues that debt write-offs and deferrals constitute state aid until such time as they are repaid in full. It endorses the Commission's concerns that under normal market conditions HCz's steel assets would be liquidated and not leased to HSCz. UK Steel also urges the Commission to apply point 4b of Protocol No 8 which, in its view, would completely bar LNM from acquiring HCz's assets.
- (78) By letter dated 10 September 2004, the Czech Republic, as the owner of another plate producing steel plant, Vítkovice Steel, declared its interest in the Commission proceedings.

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- (79) By letter of 10 September 2004, LNM intervenes in the Commission proceedings as one of the potential bidders. LNM states that its aim is to help demonstrate that the privatisation of the HCz steel companies and the relationship between other LNM group companies are fully compatible with the Accession Treaty and the state aid rules. In particular, it confirms that its subsidiary MSP is not acquiring the HCz companies. It reiterates its unequivocal assurance that, should it be successful in acquiring the HCz companies, it would operate them as an independent entity, entirely separate from MSP, and that it would ensure that no state aid or capacity were transferred between them and MSP. The only relationship the companies would have would be a commercial one whereby MSP would supply slabs to HCz; this relationship would be organised in a transparent fashion and at market prices which did not differ from the prices charged by the company's competitors.
- (80) Donbass intervened in the Commission proceedings as one of the potential bidders by letter dated 13 September 2004. In Donbass' view the restructuring is taking place under market conditions. Given the cumbersome nature and length of bankruptcy proceedings, it doubts that it would be interested in purchasing HCz's assets if such proceedings were launched.

## V. COMMENTS FROM POLAND

- (81) The Polish authorities provided additional information. They attempt to explain that neither the restructuring of HCz nor the operation of HSCz involved restructuring aid. They only admit that some aid was awarded to HCz prior to end-2002. Finally, Poland explains why the Commission should agree to a change of the NRP.
1. The restructuring of Huta Częstochowa
- (82) The Polish authorities first provide new arguments as to why the restructuring of HCz did not involve state aid. In that connection, they present the above-mentioned analysis of the bankruptcy scenario carried out by PWC. They wish to demonstrate that all public creditors' claims will be met to a greater extent in the event of restructuring than they would in the event of bankruptcy.
- (83) The analysis is based on a proper analysis of the value of the sureties, which had not been conducted before. In fact, the PWC analysis emphasises that public creditors' claims are predominantly secured on non-productive assets, with only a small part of the security on productive assets, while civil creditors' claims are primarily secured on (the most valuable) productive assets. Moreover, even in cases where public creditors' claims are secured on HCz's productive assets, they were registered with later dates than the claims of private creditors. Under the Polish Bankruptcy Act, such claims cannot be satisfied until claims registered previously have been settled (i.e. the private creditors' claims).

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- (84) On the basis of this analysis, Poland claims that restructuring would meet the private creditor test. Only a few public creditors receive less in restructuring than in bankruptcy (those which have a minus in the last column of tables 2 and 3) but, in any event, this would still be more than in a realistic bankruptcy scenario.
- (85) Poland argues that the PWC analysis for 2003 is a very optimistic scenario for public institutional creditors. In reality, a further reduction in proceeds from bankruptcy proceedings is primarily the result of the peculiar nature of court-supervised bankruptcy proceedings in Poland, which comprise the receiver's costs, usually amounting to 5 % of receipts from sales and, in HCz's case, probably as much as 10 %. In addition, bankruptcy proceedings take a long period of time, which can further diminish the value.
- (86) The Polish authorities also argue that bankruptcy might have the effect that assets are not sold in a uniform process, as some creditors have ownership rights transferred onto individual assets and can thus sell them separately. As such, investors cannot be sure that they will obtain the full production line, which may result in the price being reduced. Poland has provided several examples of sales under bankruptcy procedure, including the case of Huta Andrzej in which the breakdown of ownership of production assets made the sale very difficult and caused the price to be reduced. Therefore a sale under bankruptcy procedure may result in a much lower price than a sale organised under the restructuring process.
- (87) The Polish authorities also argue that 'loss-making' public creditors still get a better deal than private creditors who, in any event, opted for restructuring (for details see tables 2 and 3)<sup>(43)</sup>.
- (88) The Polish authorities explain that the main reason why creditors were reluctant to sign the Creditor Agreement was a lack of trust that the restructuring programme would produce positive results. The Polish authorities also suggest that private creditors are generally reticent about new proposals, in particular because banks are unwilling to swap sureties and mortgages on assets for shares, as this results in their receivables being downgraded by the auditors or Banking Inspectorate and their being obliged to indicate a loss in their books. Keeping the status quo, on the other hand, allows them to keep a higher value in their books, even if this is not realistic.
- (89) However, when restructuring seems to be a realistic scenario, the time needed to achieve results is not very long and there is a good chance of cashing in receivables, there is a tendency to agree to such deals. In fact, Poland has provided letters from Kredyt Bank and ING BSK which show that even those banks which lose the most from restructuring now view restructuring programmes as a better solution than bankruptcy. In the meantime, the private commercial creditors have indicated that they are prepared for a further



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reduction in interest recovery in order to ensure that HCz retains sufficient funds to repay all its non-restructurable liabilities and associated costs.

(90) Poland also argues that the public commercial creditors who, on the basis of the PWC analysis, would get less from a restructuring scenario than from bankruptcy would not, in any event, have enough power to prevent a conciliatory agreement being concluded under Polish law. Therefore in practice a minority of unsatisfied creditors would not have the power to force liquidation.

(91) As regards public institutional creditors, the Polish authorities have indicated that the release of collateral held by public creditors and the transfer of claims to a new entity, the Operator, does not take place automatically. Instead such action shall require the sole, individual consent of each of the public institutional creditors which — according to the Polish authorities — is discretionary. This is best exemplified by three public institutional creditors (Częstochowa Tax office, the FGSP and Poraj municipal authorities), which rejected the special restructuring scheme on the grounds that bankruptcy would bring them a better result.

## 2. The operation of Huta Stali Częstochowa

(92) Poland has also provided additional information on the operation of HSCz. It argues that the lease of steel production assets by HCz to HSCz is an act any private creditor would normally agree to. While the standard practice of the court receivers would have caused cessation of production activities, the solution consisting in leasing such assets prior to bankruptcy to an independent company beyond the receivers' control is a way of preserving the value of the assets as a going concern. To that end a private creditor would also have accepted a deferral of payments under the lease agreement.

(93) In addition, the Polish authorities do not accept that their activities constitute state aid as financing was provided from loans granted on a commercial basis by suppliers and prepayments from the steelwork's customers, who did not want to lose HCz/HSCz as a customer.

(94) As regards payment of energy bills to PSE, Poland argues that the guarantees did not constitute state aid as HSCz paid TFS the market rate for the sureties, amounting to 2 % of their real value. This value is calculated on the basis that the guaranteed sum was never to exceed PLN 6 million and thus the premium of PLN 120 000 should actually be equivalent to 2 %. By way of comparison, the Polish authorities quote the National Fund for Credit Guarantees, which offers 'loan guarantees' to the clients of more than 25 commercial banks at rates that currently amount to 1 % for 1 year, 1,2 % for 2 years and 1,4 % for 3 years. Therefore, in the Polish authorities' view, the cost of the guarantees and the amounts thereof reflect the market terms prevailing at the time.

## 3. Grants and other measures

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- (95) First, Poland accepts that the aid to HCz of PLN 19 699 452 (EUR 4 147 332) granted between 1997 and May 2002 constituted restructuring aid.
- (96) Second, however, as regards the aid to KBN, the Polish authorities take the view that the grants in question meet the criteria set out in the Community framework for state aid for research and development (hereinafter ‘R&D framework’)<sup>(44)</sup> and should be treated as aid of that type.
- (97) The Polish authorities indicate that this aid is partly covered by the Programme of 30 November 2001 issued by the Chairman of KBN on the criteria for and method of granting state financial support for science, which was included on the list of existing aid in the Accession Treaty. This is the case at least for the aid of PLN 1 380 000 to HSCz, which was granted after the Programme was adopted.
- (98) Poland also takes the view that KBN's grants of PLN 5 461 620 to HCz, although not awarded under the Programme, should be regarded as compatible as they meet the similar conditions set out in the R&D aid framework. Although they were awarded before the programme came into effect, the aid was nevertheless assessed under the same criteria of the programme and is thus in line with the R&D aid framework. Poland indicates that more detailed information on this aid, which was described in part II above, is not available as the KBN has in the meantime been dissolved.
- (99) Third, Poland argues that various financial measures in favour of HSCz have been repaid in the meantime. The deferred lease payments to HCz as well as the interest owed to ZUS and FGSP were paid at the statutory rate of 16 % between July 2002 and 21 January 2003, 13 % until 24 September 2003 and 12,25 % until 25 November 2004.
- (100) Finally, the aid in the form of fiscal benefits from PFRON and the Tax Office of PLN 62 116 (about EUR 13 077) has not been repaid because the tax authorities did not accept repayment without a recovery decision. However, Poland claims that this is de minimis aid.
4. Approval of changes in the NRP
- (101) Poland asks for the Commission's agreement under point 10 of Protocol No 8 to changes in the NRP. The Polish authorities have provided assurances that HCz will continue to operate without aid and not be liquidated. In exchange, Poland undertakes that HCz will not receive any additional state aid between 1997 and 2006 and not increase the capacity described above before end-2006, the end of the restructuring period laid down in Protocol No 8.
- (102) The Polish authorities have explained that restructuring HCz without state aid was not considered possible when the NRP was drafted in autumn 2002. As long as there seemed to be a possibility of full repayment of debts with the help of state aid, no creditor was willing to forego its part of the debt. Only when

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the NRP refused to provide aid to HCz did the company's creditors agree to reduce their receivables. Furthermore, only the entry-into-force of the Act of 30 October 2002 provided an effective instrument under Polish law enabling public claims to be written off and creditors to be paid in proceedings under their control.

5. Assurance concerning separation of the respective operations of LNM, MSP and HCz

(103) Poland has assured the Commission that the contract for the sale of MH, HSCz and other companies to a strategic investor will exclude the possibility of state aid being passed on from any of the recipients under Protocol No 8 to HCz. With that aim, specific provision will be made in the sales contract with the investor for all necessary monitoring arrangements.

## VI. AID ASSESSMENT

1. Applicable law

(104) Point 1 of Protocol No 8 provides that ‘notwithstanding Articles 87 and 88 of the EC Treaty, state aid granted by Poland for restructuring purposes to specified parts of the Polish steel industry shall be deemed to be compatible with the common market’ if, inter alia, the conditions set out in the Protocol are met.

(105) According to point 3 of Protocol No 8, restructuring aid may be granted only to the companies listed in Annex 1. Poland has selected 8 companies to be included on that list. Neither HCz, HSCz nor any subsidiaries of HCz are listed.

(106) Point 6, third subparagraph of Protocol No 8 prohibits granting any additional aid for the purpose of restructuring the Polish steel industry. To that end, point 18 of Protocol No 8 gives the Commission the power to take ‘appropriate steps requiring any company concerned to reimburse any aid granted’ if monitoring of the restructuring shows non-compliance as a result of the award of ‘additional incompatible state aid to the steel industry.’

(107) The grace period for granting restructuring aid to the Polish steel industry under the Europe Agreement was extended by the Council until 31 December 2006. This arrangement was recognised in Protocol No 8 as part of Poland's accession to the European Union. In order to achieve this objective, it covers a time-frame extending before and after accession. More precisely, it authorises a limited amount of restructuring aid for the years from 1997 to 2003 and forbids any further state aid for restructuring purposes to the Polish steel industry between 1997 and 2006. In that respect, it clearly differs from other provisions of the Accession Treaty such as the interim mechanism set out in Annex IV (the ‘existing aid procedure’), which only concerns state aid granted before accession in so far as it is ‘still applicable after’ the date of accession.

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Protocol No 8 can therefore be regarded as *lex specialis* which, for the matters that it covers, supersedes any other provision of the Act of Accession<sup>(45)</sup>.

- (108) Consequently, while Articles 87 and 88 EC would normally not apply to aid granted before accession and which is not applicable after accession, the provisions of Protocol No 8 extend state aid monitoring under the EC Treaty to any aid granted for the restructuring of the Polish steel industry between 1997 and 2006.
- (109) The decision may be taken after Poland's accession under Article 88(2) EC because, in the absence of specific provisions in Protocol No 8, the normal rules and principles should apply. Consequently Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93<sup>(46)</sup> (hereinafter 'the Procedural Regulation') will also apply.

## 2. Existence of aid

- (110) According to Article 87(1) EC, state aid is 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, in so far as it affects trade between Member States, and is thereby incompatible with the common market. Article 86(1) EC specifies that Article 87 EC also applies to public undertakings, i.e. to companies controlled by the state.
- a) Aid for the restructuring of Huta Częstochowa and application of the private creditor test
- (111) The writing-off of debts by the authorities confers an economic advantage as it constitutes an agreement to forgo revenue and is therefore aid from state resources. However, in case-law, a state measure constitutes aid for the purposes of Article 87 EC only if the recipient acquires a competitive edge which it would not have acquired under normal market conditions. In fact, it has been established that a market economy investor may pursue a structural policy whereby he is guided by the longer-term prospect of the capital invested yielding a profit. However, according to case-law, a market economy creditor would tend to seek to obtain payment of sums owed to him by a debtor in financial difficulties within a reasonable period of time<sup>(47)</sup>.
- (112) Therefore, the Court of First Instance takes the view that, where a debtor in financial difficulties proposes rescheduling debt in order to avoid liquidation, each creditor must, as a minimum, carefully balance the advantage inherent in obtaining the offered sum under the restructuring plan and the sum they would be able to recover via the firm's liquidation (this evaluation is hereinafter referred to as 'the private creditor test')<sup>(48)</sup>. The Court of First Instance has established that the private creditor test is influenced by a number of factors, including the creditor's status as the holder of a secured, preferential or ordinary claim, the nature and extent of any security it may hold, its

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assessment of the chances of the firm being restored to viability, as well as the amount it would receive in the event of liquidation.

Existence of aid as regards debt write-offs in favour of Huta Częstochowa

- (113) As regards the restructuring of HCz, the Commission has assessed the documentation and information provided by Poland and concluded that the doubts it expressed when proceedings were opened have subsequently been allayed. The Commission considers that the restructuring meets the private creditor test.
- (114) On the basis of the PWC analysis, the Commission no longer takes the view that, in view of the guarantees held by public institutional creditors, liquidation would yield better proceeds than restructuring. It understands from the explanations provided in the PWC analysis that public creditors had similar guarantees to private creditors on the same production assets; however, their guarantees were registered later than those of private creditors. Therefore priority will be given to satisfying private creditors, thus reducing the extent to which public institutional creditors are satisfied.
- (115) In addition, the Commission can now conclude that the present restructuring proposal will allow each public creditor to benefit from the restructuring of HCz. To this end, the Commission notes that the assessment concerning commercial creditors should be made with reference to the situation prevailing in December 2003. Although the Creditor Agreement has subsequently been amended, the basic elements of the agreement have remained valid and binding since that time. However, the relevant date for institutional public creditors is June 2005 because these creditors still have to agree unconditionally to the terms of the restructuring decision.
- (116) The analysis that restructuring will be more profitable for creditors than bankruptcy applies even in the best-case scenario of bankruptcy for public creditors. In the best-case bankruptcy scenario for public creditors, only three public institutional creditors in 2005 and one public commercial creditor in 2003<sup>(49)</sup> could have received a smaller return in the event of restructuring than in the event of bankruptcy. However, all three public institutional creditors have voted against the restructuring and the Polish authorities have guaranteed that their claims will be repaid in full from RFG's assets. Therefore these public creditors have not provided any advantage to the debtor nor have they committed public resources, i.e. their conduct cannot entail any state aid<sup>(50)</sup>.
- (117) As to the public commercial creditor, Zakład Energetyczny, which is the energy provider in the Częstochowa region, it should first be noted that the difference in the level of satisfaction of its claims between the restructuring scenario and the bankruptcy scenario is minimal. Second, the Commission understands that a private creditor providing services to HCz would, in most cases, be against its bankruptcy because it would lose an important customer if HCz's production were interrupted for a long time or simply abandoned. This

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is particularly true of Zakład Energetyczny, which would have lost its main client. Therefore this creditor acted in accordance with its business interests and did not provide HCz with an undue advantage.

- (118) In addition, the Commission understands that the private creditor test requires a realistic assessment of bankruptcy vis-à-vis restructuring, when considering the above-mentioned case-law<sup>(51)</sup> according to which ‘the amount it would receive in the event of liquidation’ must be compared with ‘the assessment of the chances of the firm being restored to viability.’
- (119) In the present case there is clearly a good likelihood of the firm being restored to viability. The commercial liabilities will be sold to a strategic investor, and there was evidence (in 2003) and still is today (in 2005) that serious offers have been made. In addition, the transfer of claims to the Operator also appears to have a sound economic basis. The value of the assets has been confirmed by a credible evaluation company.
- (120) The Commission also understands that the amount receivable in the event of bankruptcy as suggested by way of an example in the PWC analysis is by no means guaranteed. Rather, the analysis was made on the basis of a best-case scenario for public creditors, and is based on similar expectations of the sale of assets as those indicated for restructuring. However, it is by no means guaranteed that assets would be sold together by the receiver in a uniform process. Instead, some creditors may take away assets on which they have pledges, and as such the sale will probably yield a lower price than the restructuring process. Poland has provided empirical evidence to confirm this hypothesis.
- (121) The behaviour of the private creditors clearly suggests that they would adopt a market-based approach. In fact, the private creditors also voted for restructuring despite the fact that, according to tables 2 and 3, bankruptcy was in their favour. For example, in 2003 the private bank BPH faced losses of its receivables of PLN 75 million equivalent to 19 % (PLN 14 million) in the event of bankruptcy while, in the event of restructuring, it was expected to lose about 49 % (PLN 37 million). As such, compared at the time with the best-case bankruptcy scenario, restructuring offered a return of only 62 %. Nevertheless, BPH voted in favour of the Creditor Agreement.
- (122) If the same yardstick were to be applied to the public creditors, almost everyone should have favoured restructuring. i.e. all public commercial creditors and most public institutional creditors.

Existence of aid as regards Huta Stali Częstochowa's activities

- (123) The Commission has also overcome its doubts that the outsourcing of HCz's production to HSCz involved aid. The Commission notes that the rationale of leasing the steel assets prior to bankruptcy to a separate company beyond the receivers' control was a way of preserving the value of assets as a going concern.

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- (124) Moreover, the Commission concludes that HSCz obtained its working capital and the guarantee from TFS on a commercial basis that meets the private creditor test. It understands that HSCz was financed by loans granted by suppliers on a commercial basis and prepayments from steelwork customers, who had a vested interest in the continuation of steel production at Huta Częstochowa.
- (125) As for the guarantee granted by TFS, the Commission finds that, on the basis of the Commission's practice for assessing individual guarantees, it does not constitute state aid<sup>(52)</sup>.
- (126) First, HSCz was not in financial difficulty in the sense of the Community Guidelines on state aid for rescuing and restructuring firms in difficulty<sup>(53)</sup>. Instead it is a new company without debt which already has a significant number of orders on its books. Second, it was able to obtain loans from the financial markets without state intervention. Third, the guarantee is linked to a fixed maximum amount and is not open-ended.
- (127) As for the price of the guarantee, the Commission has no evidence that the premium paid does not correspond to the market price. That is obvious if the Polish authorities' argument is accepted that, because of the contractual arrangements, the guaranteed sum did not exceed PLN 6 million and the premium was therefore 2 %. However, even in the case of a premium of 0,8 %, examples of similar guarantees with premiums of 1 % indicate that the premium was a market rate, in particular if one bears in mind that TFS had comprehensive information about HSCz and had thus been able to set up a monitoring system which allowed the guaranteed sum to be limited. In addition, the Commission recalls that in other steel cases it took the view that the correct premium was even lower than in the present case<sup>(54)</sup>.

b) Grants and other measures

Existence of aid as regards the grants to Huta Częstochowa

- (128) The financial measures received by HCz between June 1997 and May 2002 amounting to PLN 25 161 072,08 (about EUR 5,3 million) were granted to the company from state resources. Because steel plate is a product which is widely traded throughout Europe, such aid granted by Poland could possibly distort competition by favouring HCz and affect trade between Member States. The measures thus constitute state aid pursuant to Article 87(1) EC.

Existence of aid to Huta Stali Częstochowa in other forms

- (129) KBN's grants of PLN 1 328 000 also conferred an economic advantage on HSCz and thus constitute state aid because, like the grants to HCz, they affect trade and threaten to distort competition.
- (130) However, the Commission sees no advantage as regards the late payment by HCz of public dues. As HSCz was not in difficulty, the Commission has no

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reason to believe that a private creditor in the place of the public institutions would have opted for short-term enforcement of its debts<sup>(55)</sup>.

- (131) In addition, HSCz paid the statutory interest on late payments in accordance with Polish law; this interest is above the Commission's reference rate. The Commission recalls that according to Article 14 of the Procedural Regulation, the object of a procedure regarding unlawful aid is to identify the amount to be recovered in order to re-establish the situation as if no aid had been granted. However, if the recipient has repaid the aid in an amount equal to, or in excess of, compound interest calculated from the day on which the aid was granted until its repayment, in line with Commission practice the measure no longer constitutes state aid within the meaning of Article 87(1) EC.
- (132) Indeed, the statutory interest rate, which ranged, between 2002 and 2004, from 16 % to 12,25 % (see point 98) is higher than the reference rate which the Commission applies for repayment of aid. Pursuant to Article 9 of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty) hereinafter 'the Implementing Regulation') this is the five-year inter-bank swap rate for the last three months of the previous year, plus 75 basis points. This reference rate was as of 1 May 2004 7,62 % for Poland<sup>(56)</sup>. Before 2004 no five-year inter-bank swap rate existed in Poland. In any event, other indicators too, such as the average yield on one-year treasury bonds, were clearly lower (8,24 % in 2002, 5,34 % in 2003 and 6,63 % in 2004).
- (133) Only the deferrals of payments to Częstochowa tax office and PFRON, PLN 62 116,09 in total, which have not been repaid, could constitute state aid.

### 3. Compatibility of aid with the common market

#### Compatibility of the aid to Huta Częstochowa

- (134) The aid of PLN 25 161 072,08 received by HCz between June 1997 and May 2002 was awarded in view of the fact that it would subsequently be approved as state aid under the NRP and Protocol No 8, but it was later disregarded in view of HCz's bankruptcy. However, as this aid was not authorised under Protocol No 8, it constitutes prohibited restructuring aid unless it is compatible under other state aid rules.
- (135) The Commission notes that until 23 July 2002 the state aid rules for the steel sector were contained in Commission Decision No 2496/96/ECSC of 18 December 1996 establishing Community rules for state aid to the steel industry<sup>(57)</sup> (hereinafter 'the Steel Aid Code').
- (136) Article 2 of the Steel Aid Code authorises aid which is compatible with the R&D framework. The Commission takes the view that the five measures granted by KBN to an amount of PLN 5 461 620 do not give rise to serious



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doubts as to their compatibility with the R&D framework pursuant to Annex IV(3)(2) of the Accession Treaty<sup>(58)</sup>.

- (137) First, although the subsidies granted by KBN to HCz are not directly covered by the Programme of the Chairman of KBN on the Criteria of Granting Financial Support for Science dated 30 November 2001 (which has been accepted by the Commission as existing aid under Measure PL 6 of Annex IV to the Accession Treaty), it seems that Poland did not assess its aid differently before the programme was approved. In fact, in the NRP the Polish authorities had already identified the 'KBN's resources' as 'authorised state aid instruments in the form of subsidies for R&D.'<sup>(59)</sup> This NRP as such has been assessed by the Commission and was approved by a Council decision in July 2003 (see point 25).
- (138) Second, the aid measures are compatible with the R&D framework. Clearly, the aid was awarded for the purposes of R&D. In addition, the aid remains below the ceiling for compatible aid as indicated in the R&D framework assuming an additional bonus of 10 % as the recipient was situated in an Article 87(3) (a) region<sup>(60)</sup>. It is either aid for industrial research and remains below the ceiling of 60 % (point 0 of subparagraph 1, 2 and 4) or aid which is used for either industrial research or pre-competitive development and which remains below the ceiling for pre-competitive development of 35 % (point 0 of subparagraph 3, 4 and 5). The aid also had an incentive effect as the Polish authorities have convincingly demonstrated that HCz would not have commissioned the R&D without it.
- (139) The Commission therefore takes the view that it would not have raised objections to KBN's aid measure between 1997 and 2001 under Annex IV of the Accession Treaty and thus considers this aid as compatible R&D aid and not as restructuring aid within the meaning of Protocol No 8.
- (140) However, in the case of the remaining operating and employment restructuring aid of PLN 19 699 452, the Commission does not see under which provisions of the Steel Aid Code this aid could be compatible. It is obviously not aid for R&D or aid for closures (Article 4). Moreover, the aid is not permissible operating aid within the meaning of the Community guidelines on state aid for environmental protection<sup>(61)</sup>. In any event, the Polish authorities did not invoke any derogation under either the Steel Aid Code or the EC rules.
- (141) In view of the fact that these measures are not covered by any other exception under the ECSC Steel Aid Code, the Commission takes the view that they constitute restructuring aid pursuant to Article 1 of the Steel Aid Code which, under Protocol No 8, is deemed incompatible with the common market.

Compatibility of the aid to Huta Stali Częstochowa

- (142) KBN granted PLN 1 380 000 to HSCz in 2002 and 2003. This aid can be considered as existing aid under Measure PL 6 of Annex IV to the Accession

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Treaty. Poland confirmed that the aid was granted under the scheme approved under Measure PL 6. Accordingly, these measures do not give rise to serious doubts as to their compatibility with the R&D framework pursuant to Annex IV(3)(2) of the Accession Treaty.

- (143) In view of the compatibility of the aid granted to HCz by KBN, the amount of potential incompatible aid which HSCz received amounts to PLN 62 116,09 (about EUR 13 077). However, this amount fulfils the conditions of Commission Regulation 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to de minimis aid<sup>(62)</sup> and thus allows the Commission to conclude that the measure does not constitute state aid within the meaning of Article 87(1) EC.

#### 4. Conclusions

- (144) For all these reasons, the Commission concludes that the measures which Poland has implemented for the restructuring of HCz as part of the restructuring plan of 7 August 2003, as amended on 1 December 2003 and 30 April 2004, do not constitute aid within the meaning of Article 87(1) EC. The measures which Poland has implemented for the operation of HSCz do not constitute aid within the meaning of Article 87(1) EC either. Furthermore, the subsidies granted to HCz and HCSz by KBN for R&D are compatible with the common market.
- (145) However, the restructuring aid received by HCz between 1997 and 2002 of PLN 19 699 452 (EUR 4,1 million) is not compatible with the common market and must be repaid pursuant to point 18 of Protocol No 8.
- (146) The company which actually benefited from the aid will be asked to repay it. At the time when the aid was awarded, the economic entity that received it formed part of the legal entity HCz. Since the assets and liabilities of the original HCz will be distributed to three successor companies, RFG, MH and Operator, the economic entity which received the aid is not longer limited to the legal entity — HCz — but should also extend to the entities which received HCz's assets and liabilities. Consequently, repayment of the aid will be requested from HCz, RFG, MH and Operator, which are jointly and severally liable.
- (147) The sums to be recovered shall bear interest calculated in accordance with the provisions of the Implementing Regulation. In particular, under Article 9(4) of the Implementing Regulation, when five-year inter-bank swap rates are not available, the Commission may, in close cooperation with the Member State concerned, fix a state aid recovery interest rate using a different method and on the basis of the information available to it. As five-year inter-bank swap rates were not available for Poland for the period when the incompatible aid was granted, the recovery interest rate to be applied should be based on an available interest rate deemed appropriate for that period.

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## VII. APPROVAL OF CHANGES IN THE NRP UNDER POINT 10 OF PROTOCOL NO 8

- (148) Poland has announced a change in the NRP with a view to stating that HCz will not be liquidated but may be restructured without state aid. Pursuant to Point 10 of Protocol No 8, the Commission has no objections to this change.
- (149) Pursuant to Point 10 of Protocol No 8 ‘any subsequent changes in the overall restructuring plan and the individual plans must be agreed by the Commission and, where appropriate, by the Council.’ As the Commission decision concerns state aid it is appropriate to refer to the procedural provisions of Article 88 EC and to Regulation No 659/99. In this context, decisions are taken by the Commission, except when a decision to consider the aid compatible is justified by exceptional circumstances within the meaning of Article 88(2) third subparagraph.
- (150) Therefore the Commission is entitled to approve the proposed change, since the main figures indicated in the Protocol concerning state aid, capacity, timing and proportionality of state aid remain unchanged<sup>(63)</sup>. The change in the NRP will not have any effect on Protocol No 8 itself. HCz will not become a recipient under Protocol No 8 and nor will the overall capacity reduction laid down for the Polish steel industry in point 7 be altered.
- (151) In addition, Poland has provided sufficient justification for the change. Indeed, restructuring of HCz seems to be a market-based option and the above evaluation has shown that HCz can, contrary to the situation in 2003, be restructured without state aid.
- (152) However, the Commission concludes that it cannot accept the aid granted to HCz between 1997 and 2002. Acceptance of this aid would entail including HCz in the list of recipients, and would increase the amount of state aid which could be granted to the Polish steel industry, which would disturb the balance between state aid commitments and distortion of competition. The Commission could not approve such a change without the consent of the Council.

## VIII. COMPLIANCE WITH POINT 4 OF PROTOCOL NO 8

- (153) The Commission does not consider the sale of the subsidiaries of HCz and HCSz to be in breach of Point 4 of Protocol No 8.
- (154) Point 4 of Protocol No 8 states that: ‘A benefiting company may not:
- (a) in the case of a merger with a company not included in Annex 1, pass on the benefit of the aid granted to the benefiting company,
  - (b) take over the assets of any company not included in Annex 1 which is declared bankrupt in the period up to 31 December 2006.’

The NRP (cf. point 25) reiterated that this provision was intended to prevent a recipient under Protocol No 8 acquiring HCz assets or shares.

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- (155) The Commission takes the view that point 4(a) and not point 4(b) of Protocol No 8 should be considered in the present case, as it does not involve a sale of assets but a sale of shares which is considered a merger<sup>(64)</sup>. In practice, the strategic investor will acquire only shares in companies and not individual assets. Moreover, application of point 4(b) suffices for bankruptcy of HCz, which has not been declared.
- (156) The Commission does not see any infringement of point 4(a) of Protocol No 8, as the provision is clearly addressed to recipients under Protocol No 8 and neither Donbass nor LNM are recipients under that Protocol.
- (157) It is true that LNM has acquired a recipient, namely MSP. However, the Commission has no evidence that LNM is acting in behalf of or as an agent of MSP. Instead, LNM and MSP are run as separate companies on a stand-alone basis. Even if the Commission were to understand the rationale of the above provision as prohibiting any cross-subsidisation between recipients (possibly MSP) and non-recipients (here HCz), the Commission has been provided with sufficient assurances that any buyer will abstain from cross-subsidising HCz from the aid received under the NRP. Indeed, not just Poland but also LNM have given undertakings (see points 78 and point 105) to underline these assurances,

HAS ADOPTED THIS DECISION:

*Article 1*

1 The measures which Poland has implemented for the restructuring of Huta Częstochowa S.A. on the basis of the restructuring decision of 7 August 2003 as amended on 1 December 2003 and 30 April 2004 do not constitute aid within the meaning of Article 87(1) of the Treaty.

2 The measures which Poland has implemented for the operation of Huta Stali Częstochowa Sp z o.o. do not constitute aid within the meaning of Article 87(1) of the Treaty.

*Article 2*

The state aid which Poland awarded for R&D amounting to PLN 5 461 620 for Huta Częstochowa S.A. and PLN 1 328 000 for Huta Stali Częstochowa Sp z o.o. is compatible with the common market.

*Article 3*

1 The state aid which Poland awarded to Huta Częstochowa S.A. between 1997 and May 2002 as operating aid and aid for employment restructuring amounting to PLN 19 699 452 is incompatible with the common market.

2 Poland shall take all necessary measures to recover from Huta Częstochowa S.A., Regionalny Fundusz Gospodarczy, Majątek Hutniczy Sp. z o.o. and Operator Sp. z o.o. the aid referred to in paragraph 1 and unlawfully made available to Huta Częstochowa S.A. All these companies shall be jointly and severally liable.

Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective enforcement of the

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decision. The sums to be recovered shall bear interest from the date on which they were made available to Huta Częstochowa S.A. until their actual recovery. The interest shall be calculated in conformity with the provisions laid down in Chapter V of Commission Regulation (EC) No 794/2004.

3 Within two months of receiving notification of this Decision, Poland shall inform the Commission of the measures already taken and planned to comply with it. It shall provide this information using the questionnaire attached to Annex 1 of this Decision. In particular, Poland shall provide the Commission, within that deadline, with any documents which can prove that the recovery process has been initiated vis-à-vis the entities responsible for reimbursing the unlawful aid.

#### *Article 4*

The Commission approves the proposed change in the Polish National Restructuring Plan under point 10 of Protocol No 8 to the Accession Treaty in so far as it will permit the restructuring of Huta Częstochowa S.A. without state aid and without increasing capacity.

#### *Article 5*

This Decision is addressed to the Republic of Poland.

Done at Brussels, 5 July 2005.

*For the Commission*

Neelie KROES

*Member of the Commission*

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## ANNEX

## Information regarding enforcement of Commission Decision 2006/937/EC

1. Calculation of the amount to be recovered
  - 1.1. Please provide the following details on the amount of unlawful state aid made available to the recipient:

Date(s) of payment <sup>a</sup>	Amount of aid <sup>b</sup>	Currency	Identity of recipient

**a** (°) Date(s) on which (individual instalments of) the aid (were)/was made available to the recipient (if a measure comprises several instalments and reimbursements, use separate rows)

**b** Amount of aid made available to the recipient (gross grant equivalent)

*Comments:*

- 1.2. Please explain in detail which is the interest rate your authorities intend to apply for the purposes of recovering the unlawful aid which is deemed to be an appropriate interest rate in Poland for the period from 1997 till May 2004.
- 1.3. Please explain in detail how the interest to be paid on the amount of aid to be recovered will be calculated.
2. Measures planned and already taken to recover the aid
  - 2.1. Please describe in detail what measures have already been taken and what measures are planned to effect an immediate and effective recovery of the aid. Please also explain what alternative measures are available under national law to effect recovery. Please also indicate, where relevant, the legal basis for the measures taken/planned.
  - 2.2. By what date will recovery of the aid be completed?
3. Recovery already effected
  - 3.1. Please provide the following details on the amounts of aid recovered from the recipient:

Date(s) <sup>a</sup>	Amount of aid repaid	Currency	Identity of recipient

**a** (°) Date(s) on which the aid was repaid

- 3.2. Please attach information documenting the repayment of the aid amounts specified in the table under point 3.1 above.

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- (1) [OJ L 236, 23.9.2003, p. 948.](#)
- (2) [OJ C 204, 12.8.2004, p. 6.](#)
- (3) For details see: COMP/ECSC 1351 Usinor/Arbed/Aceralia, Commission decision of 21 November 2001, para. 88.
- (4) Rurexpol is specialised in the production of seamless tubes, products used for drilling applications and boilers. It has a capacity of 60,0 tonnes. Its sales in 2003 and 2004 exceeded PLN 200 million annually.
- (5) On the assumption that EUR 1 is about PLN 4,75. This was the average exchange rate in May 2004 when Poland joined the EU and the opening decision was taken.
- (6) Parts of the text have been deleted in order to protect confidential information. These parts are indicated by square brackets: [...]
- (7) Legal Gazette No 111, item 1196.
- (8) For more information on LNM holdings see Commission Decision PHS/LNM of 5 February 2004 in case COMP/M 3326, which clarified the acquisition of a Polish steel company under the Merger Regulation.
- (9) The other recipients are the following seven steel-producing companies: Huta Bankowa, Huta Buczek, Huta Lucchini-Warszawa, Huta Labędy, Huta Pokój, Huta Andrzej and Huta Batory. The last two have since been declared bankrupt.
- (10) In fact the Council took two decisions, one in July 2002 prolonging the grace period under the conditions of a credible restructuring programme and individual business plans pursuant to Article 8(4) of Protocol 2 of the Europe Agreement and one in June 2003 endorsing the plans submitted in April 2003, with the result that the grace period to grant state aid was prolonged until the end of 2003.
- (11) Normally state aid to the steel sector is not allowed in the EU; see Communication from the Commission on Rescue and Restructuring aid and closure for the steel sector ([OJ C 70 of 19.3.2002, p. 21](#)). Regional investment aid is also prohibited; see point 27 of the Multisectoral framework on regional aid for large investment projects ([OJ C 70 of 19.3.2002, p. 8](#)).
- (12) Law of 30 October 2002, Legal Gazette No 213 item 1800, amended by the Act of 14 November 2003, Legal Gazette No 229, item 2271.
- (13) This Act is the basis for several restructuring cases in Poland. A detailed description of the Act is provided inter alia in the Commission decision of 1 June 2005, cases C(2005) 17 and 18, opening a formal investigation procedure under Article 88(2) EC on restructuring aid for Polish shipyards Gdynia and Gdansk, [OJ C 220 of 8.9.2005, p. 7](#). If application of the law varies slightly from one case to another, this is due to the description of the Polish authorities, as it concerns a matter of national law.
- (14) The following are non-restructurable: pension insurance contributions and those parts of social security contributions which are employee contributions and are connected to salary payments (contributions have two main components which normally make up 50 % each). This is because part of the contribution which should be paid by the employee is a liability of the employee (and not the employer), even if the employer has to pay it to ZUS. Hence the company remains fully liable for employees' contributions. In addition, if the amounts are overdue they result in statutory interest being charged. However, this interest, together with the above-mentioned social security contributions paid by the insured party or pension insurance contributions may be deferred for 24 months (Article 32b of the Act of 30.10.2002).
- (15) On 31 March 2004 the OCCP submitted a paper to the Commission indicating why, in its opinion, the restructuring would pass the private creditor test.
- (16) However, the decision still did not comply with all the conditions introduced by the amendments to the Act of 30.10.2002, as it neither contained a detailed description of the public liabilities subject to the special restructuring scheme nor explained why assets would be transferred to the Operator (although that information is contained in the restructuring plan). The Polish authorities have stated that this information will be provided in a new version which is scheduled for end-June 2005 and will reflect decisions taken by public institutional creditors.
- (17) The company ATEST 'Zakład Usług Doradczych i Technicznych' has been active on the Polish market since 1992 and specialises in valuations of companies, commercial real estate and

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- production assets. It has carried out valuations of a number of companies for the purposes of obtaining debt bank financing, privatisation and mergers between companies.
- (18) The restructuring plan initially stated that the assets received by Operator had a book value of about PLN 203,3 million. In fact, the exact breakdown of the assets to be transferred to Operator had been renegotiated as representatives of Operator were focusing on assets which would be easy to sell.
  - (19) BRE Corporate Finance S.A. is a 100 % subsidiary of BRE Bank S.A., one of the largest banks in Poland, which is quoted on the Warsaw Stock Exchange. Management control over BRE Bank is held by Commerzbank AG of Germany, which has over 72 % of the shares. BRE Corporate Finance is involved in investment banking, M&A, restructuring and corporate finance activities. Poland confirms that the company has been involved in many large privatisation and M&A deals in Poland on behalf of private clients as well as the Treasury. These projects have usually involved valuations of these companies using various methods.
  - (20) This is an estimate taking into account proceeds as at March 2005 of PLN [...] million (see table 3 below), plus about PLN [...] million of monthly interest until October 2005, plus payment of about PLN [...] million for the receivables of those public creditors that have rejected restructuring.
  - (21) Figures are estimates for end-June 2005.
  - (22) PWC's analysis is based on a simulation under the Bankruptcy and Restructuring Act of 28 February 2003.
  - (23) On the basis of the Environmental Protection Act of 31 January 1980, Legal Gazette 1994/49, item 196.
  - (24) By Decision No FEO/72752/E/97/TT under Articles 8(1) and 4(1) of the Employment and Rehabilitation (Disabled) Act of 9 May 1991 (Legal Gazette No 46, item 201 with amendments).
  - (25) Within the meaning of the Environmental Protection Act of 31 January 1980 (Legal Gazette 1994/49, item 196).
  - (26) By Decision of the Province No GKN.IV.7224/653/98 under Article 219(1) of the Real Estate Management Act of 21 August 1997 (Legal Gazette No 115, item 741).
  - (27) By Decision of the Board of FGSP No 205/99 under Article 4(1) of the Protection of Employees' Claims (Bankrupt Companies) Act of 29 December 1993 (Legal Gazette 1994/1, item 1).
  - (28) By Decision of the Head of the Tax Office (No DUS-PP-733/12/99) under Article 67 of the Tax Ordinance of 29 August 1997 (Legal Gazette No 137, item 926 with amendments).
  - (29) On the basis of an agreement concerning the restructuring of HCz's debt resulting from non-payment of real estate tax.
  - (30) Under Article 36(1) of the 1999 Budget Act of 17 February 1999 (Legal Gazette 1999/17, item 154).
  - (31) By Decision No 2/2000 under Article 67 of the Tax Ordinance of 29 August 1997 (Legal Gazette No 137, item 929 with amendments).
  - (32) Under Article 36(1) of the 2000 Budget Act of 21.01.2000 (Legal Gazette No 7, item 85).
  - (33) Under Article 36(1) of the 2000 Budget Act of 21.01.2000 (Legal Gazette No 7, item 85).
  - (34) By Decision No II — 3130/4/01 under Article 67 of the Tax Ordinance of 29 August 1997 (Legal Gazette No 137, item 929 with amendments).
  - (35) Under Article 36(1) of the 2001 Budget Act of 1.3.2001 (Legal Gazette No 21, item 246).
  - (36) Under Article 36(1) of the 2000 Budget Act of 14 March 2002 (Legal Gazette No 30, item 275) and the Restructuring (Iron and Steel Industry) Act of 24 August 2001 (Legal Gazette No 111, item 1196).
  - (37) Of these costs, PLN 606,8 was allotted to industrial research; the rest went into pre-competitive development activity. The Academy of Sciences now has commercial rights to the R&D programmes.
  - (38) A State scientific institution which is the main scientific advisory body and is purely state funded.
  - (39) Of these costs, PLN 3 870 000 was allotted to industrial research and PLN 4 050 000 went into pre-competitive development activity. All payments from KBN were made to the Institute of Metallurgy.



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- (40) The results of the research were passed on by the Polish Academy of Science to a number of other industrial plants which face the problem of having to use cooling water from sources containing large amounts of organic substances which damage the heat exchangers.
- (41) The purpose of the project was to develop technology for casting and rolling thick plate steel with a homogenous alloy structure across the whole depth of the plate. These types of steel were required by the shipbuilding industry and had not previously been made in Poland. The results of the research were also made available to other companies and a number of clients.
- (42) The aid was mainly paid to the Institute of Metallurgy.
- (43) The Polish authorities have also indicated that in 2003 the percentage of public creditors' claims recovered as a result of restructuring was between 46 % and 72 % (on average 61 %) whereas the reduction in the case of private creditors was between 46 % and 58 % (on average 54 %).
- (44) Community framework for state aid for research and development, [OJ C 45 of 17 February 1996, p. 5](#).
- (45) See Decision of 14 December 2004, Restructuring aid to the Czech steel producer Třinecké Železárny a.s, [OJ C 22 of 27 January 2005, p. 2](#), which is based on Protocol 2 to the Accession Treaty concerning the restructuring of the Czech steel industry.
- (46) [OJ L 83, 27.3.1999, p. 1](#).
- (47) Case C-342/96 Spain v Commission, paragraph 46; Case C-256/97 DMT, paragraph 24, Opinion of the Advocate General in Case C-256/97 DMT, paragraph 38; Case T-152/99 Hamsa, paragraph 167.
- (48) Case T-152/99 Hamsa, paragraph 168: 'When a firm faced with a substantial deterioration of its financial situation proposes an agreement or series of agreements for debt arrangement to its creditors with a view to remedying the situation and avoiding liquidation, each creditor must make a decision having regard to the amount offered to it under the proposed agreement, on the one hand, and the amount it expects to be able to recover following possible liquidation of the firm, on the other. Its choice is influenced by number of factors, including the creditor's status as the holder of a secured, preferential or ordinary claim, the nature and extent of any security it may hold, its assessment of the chances of the firm being restored to viability, as well as the amount it would receive in the event of liquidation. If it turned out, for example, that in the event the firm was liquidated, the realisation value of its assets was only sufficient to cover mortgage and preferential claims, ordinary claims would have no value. In such a scenario, acceptance by an ordinary creditor of the cancellation of a major part of its claim would not really be a sacrifice'.
- (49) In fact there are four in 2005, but this is not of relevance in this case as they had already agreed to restructuring in 2003.
- (50) The Commission is also not concerned by the fact that also other creditors could have rejected the restructuring, as these other creditors had clearly benefited from restructuring and did not want to jeopardise this process.
- (51) Case T-152/99 Hamsa, paragraph 168 (author's emphasis).
- (52) Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees ([OJ C 71, 11.3.2000, p. 14](#)).
- (53) [OJ C 244, 1.10.2004, p. 2](#).
- (54) See Commission Decision Anon of 26 July 2004, C(2004)1813 fin, point 47, not yet published, in which the Commission accepts a premium of 0,6 %.
- (55) Advocate General Opinion in Case C-276/02 Spain v Commission, paragraph 40.
- (56) Reference and recovery rates in the field of state aid, [OJ C 48, 24.2.2005, p. 2](#).
- (57) [OJ L 338, 28.12.1996, p. 42](#).
- (58) Protocol No 8 applies only to restructuring aid in the steel sector, which is any aid that is not compatible under the other EC state aid rules.
- (59) Page 38.
- (60) See Commission letter to Poland dated 13.08.2004, which did not raise any objections to the notified measures, including the Polish regional aid map (C(2004)3230/5).

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- (61) [OJ C 72, 10.3.1994, p. 3](#), applied in accordance with Article 3 of the Steel Aid Code (since replaced by [OJ C 37 of 3.2.2001, p. 3](#)). In particular it is not aid for waste management or energy savings.
- (62) [OJ L 10, 13.1.2001, p. 30](#).
- (63) Decision of 3 March 2005, C(2005) 424 — Postponement of capacity reduction of VPFM.
- (64) See Article 3(1)(b) of Council Regulation 139/2004, [OJ L 24, 29.1.2004, p. 1](#).

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