

# COMMISSION

## COMMISSION DECISION

of 10 December 2008

concerning State aid C 15/06 (ex N 291/2000) which France plans to implement in favour of Pilkington/Interpane

(notified under document number C(2008) 7799)

(Only the French text is authentic)

(Text with EEA relevance)

(2009/145/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

Having regard to Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty <sup>(1)</sup> (hereinafter called 'the Procedural Regulation'), and in particular Article 9 thereof,

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:

### 1. PROCEDURE

(1) By letter dated 22 May 2000, registered as received on 25 May 2000 (A/34298), France notified, in accordance with the provisions of the Multisectoral Framework on regional aid for large investment projects <sup>(3)</sup> (hereinafter called 'the 1998 MSF'), aid to two public limited companies incorporated under French law, Pilkington France SAS and Interpane Glass Coating France SAS, jointly owned by the two international glassmaking groups Interpane and Pilkington. On 7 June 2000, the Commission requested additional information. France

submitted additional information by letters dated 13 June 2000, registered as received on 14 June 2000 (A/34798), 30 June 2000, registered as received on 3 July 2000 (A/35410), and 30 June 2000, registered as received on 3 July 2000 (A/35411).

(2) By Decision of 17 August 2000 <sup>(4)</sup>, reference SG(2000) D/106264 (hereinafter called 'the 2000 Decision'), the Commission approved the intensity of the aid for Pilkington/Interpane notified under the 1998 MSF.

(3) Annual reports were provided by France, in cooperation with the aid recipients, on 17 October 2002, 18 August 2003 and 31 August 2004 as part of the ex-post monitoring of the proper implementation of the decisions taken under the 1998 MSF (point 6.4) and in accordance with the 2000 Decision.

(4) By letter dated 13 January 2005, registered as received on the same day (A/30447), and by letter dated 13 June 2005, registered as received on 14 June 2005 (A/34734), the French authorities informed the Commission that the information furnished in the notification which had resulted in the 2000 Decision was incorrect, notably as regards the calculation of the amount of the business tax exemption, and asked the Commission to amend the 2000 Decision.

(5) By letter dated 6 March 2006 (D/57979), the Commission, in accordance with Article 9 of the Procedural Regulation, invited the French authorities to submit their comments on its intention to revoke the 2000 Decision. The French authorities submitted their comments by e-mail dated 16 March 2006, registered as received on 17 March 2006 (A/32057).

<sup>(1)</sup> OJ L 83, 27.3.1999, p. 1.

<sup>(2)</sup> OJ C 196, 19.8.2006, p. 3.

<sup>(3)</sup> OJ C 107, 7.4.1998, p. 7.

<sup>(4)</sup> OJ C 293, 14.10.2000, p. 7.

- (6) By letter dated 26 April 2006, the Commission informed France of its decision to open the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid at issue with a view to revoking its Decision of 17 August 2000 and adopting a new Decision. The Commission's Decision to open the procedure was published in the *Official Journal of the European Union* <sup>(1)</sup>. The Commission called on interested parties to submit their comments on the aid.
- (7) France submitted its comments by e-mail dated 2 June 2006.
- (8) The Commission received no comments on the matter from interested parties.
- (9) By letter dated 12 September 2007 (D/53668), the Commission requested additional information. France submitted a partial answer by letter dated 21 December 2007 (A/40607) and supplemented that answer by e-mail dated 30 May 2008 (A/10204).
- (10) By e-mails dated 16 September and 19 September 2008 (A/19328 and A/19263), France submitted new information, which was supplemented by e-mail dated 24 October 2008 (A/22746).

## 2. DESCRIPTION OF THE AID

### 2.1. The aid recipients

- (11) The following description of the recipients reflects the situation as it existed in 2000.

#### 2.1.1. The companies concerned

- (12) In its 2000 notification, France informed the Commission of its intention to grant regional investment aid to two French public limited companies (incorporated in the form of *sociétés par actions simplifiées*) jointly owned by two glassmaking groups, Interpane and Pilkington, and named Pilkington Glass France SAS and Interpane Glass Coating France SAS (PGF/IGCF).

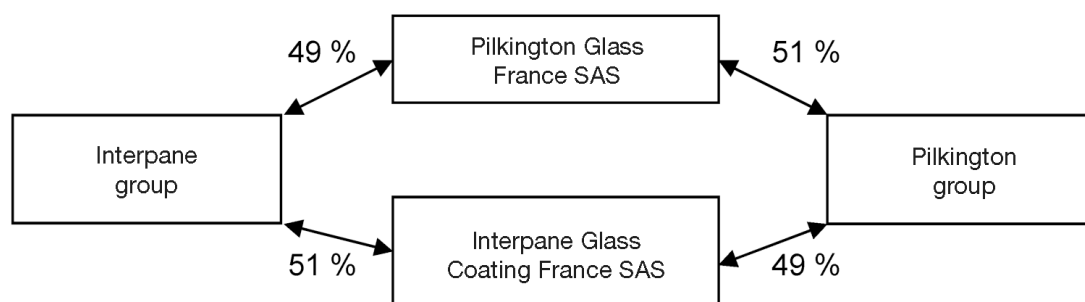
- (13) Ownership of the joint ventures is shared unequally between the parent companies as follows (see also figure 1):

— PGF is owned 51 % by Pilkington and 49 % by Interpane,

— IGCF is owned 51 % by Interpane and 49 % by Pilkington.

Figure 1

#### Legal structure of the companies



- (14) The two new State-aided companies are production joint ventures. They will not operate autonomously in the market. Their sole object will be to supply the parent companies with first-stage-processed raw flat float glass either for their own use or for on-selling.

#### 2.1.2. The formation of the joint ventures

- (15) The formation of the joint ventures was notified, by letter dated 7 April 2000, under Article 81 of the EC Treaty <sup>(2)</sup> with a view to obtaining individual exemption under Article 81(3) of the Treaty.

<sup>(1)</sup> OJ C 196, 19.8.2006, p. 3.

<sup>(2)</sup> On the basis of Article 4 of Council Regulation No 17 (OJ 13, 21.2.1962, p. 204/62).

- (16) The notifying parties agreed to the notification being dealt with by comfort letter.
- (17) On 29 June 2000, two comfort letters were sent by the Commission to each of the notifying parties, informing them that:
- the agreements contained restrictions of competition caught by the prohibition in Article 81(1) of the EC Treaty,
  - the Directorate-General for Competition considered that the notifying parties had furnished sufficient justification for its concluding that the criteria of Article 81(3) of the EC Treaty were met,
  - consequently, the Directorate-General for Competition considered that it was unnecessary to close the procedure by proposing that the Commission adopt an exemption decision under Article 81(3) of the EC Treaty in accordance with the procedure laid down by the old Regulation No 17 <sup>(1)</sup>.
- (18) The comfort letters were sent following an economic analysis of the situation, which can be summed up as follows:
- the notified operation consisted in the formation of two cooperative joint ventures,
  - the notified agreements concerned:
    - (a) the production by the joint ventures of unprocessed or intermediate products intended for further processing into finished products by the founders or for sale by their own distribution networks;
    - (b) the exclusive supplying of the founders by the joint ventures; this agreement was ancillary to the formation of the joint ventures in so far as it could not be dissociated from the joint ventures without calling their existence into question;
- there was a strong presumption that the joint ventures were caught by Article 81(1) of the EC Treaty inasmuch as:
- (a) there was a likelihood of sensitive information being exchanged between them;
  - (b) the cooperation between two major competitors could lead to coordination of the parties' conduct in the highly concentrated market for coated glass;
- the Directorate-General for Competition analysed the agreements in the light of Article 81(3) of the EC Treaty and, following confirmation by the parties that clause 2 of the exclusive supply agreement had been deleted, concluded that the criteria of Article 81(3) were satisfied. Clause 2, the ancillary nature of which was open to question, provided that Pilkington and Interpane could at any time obtain supplies according to their requirements from different plants of the two joint ventures.

### 2.1.3. *The partners*

- (19) The recipient companies are co-owned by the two international glassmaking groups Interpane and Pilkington.
- (20) Interpane was set up in 1971 by Mr Georg Hesselbach, the current majority owner and chairman of the management board of the Interpane group. The group is presently active worldwide in the sector of glass for the building industry and in related fields (manufacture of windows in Germany and the United States, manufacture of equipment for the glass industry in Germany).
- (21) In Europe, the activities of the group (15 companies in 1999) are centred on the treatment and processing of glass for the building industry. Interpane has been present in France since 1998 following its acquisition of two glass processors (at Hoerdts in Alsace and Mity-Mory in the Paris area). The European subsidiaries are headed by the holding company Interpane Glas Industrie AG, the registered office of which is in Lauenförde, Germany. This holding company is owned 88 % by the Hesselbach family and 12 % by the German publicly owned bank Nord/LB.

<sup>(1)</sup> First Regulation implementing Articles 81 and 82 (formerly Articles 85 and 86) of the Treaty.

(22) The holding company holds, in partnership with the Dutch holding company Interpane NV, via the holding company Interpane Glass Manufacturing BV, the Interpane group's shares in the joint ventures receiving the aid. Interpane NV and Interpane Glass Manufacturing BV were specially created for the purposes of this transaction. They are owned by the Hesselbach family either alone or jointly with Nord/LB.

(23) The Pilkington group is a world leader in the glass sector. Its activities cover all industrial areas of the sector: the manufacture, treatment and processing of glass for the building industry (49 % of activities) and the automotive industry (44 %), and the production of special glasses. The group's headquarters are in the United Kingdom. The group has 24 manufacturing subsidiaries worldwide (Europe, North and South America, Asia/Pacific).

(24) The group's shareholdings in the joint ventures situated in Freyming-Merlebach are held by the Dutch holding company Pilkington BV.

Table 1

**Turnover**

(EUR million)

Interpane group			
	World/Europe <sup>(1)</sup>	France <sup>(2)</sup>	
1996	107	0	
1997	114	0	
1998	118	0	
Pilkington group			
	World	Europe	France
1996/1997	4 380	2 730	69,5
1997/1998	4 830	2 500	75,0
1998/1999	5 000	2 410	73,0

NB: The figures for Interpane are based on an exchange rate of FF 3,35 to one DM (1999 rate). The figures for Pilkington are based on an exchange rate of FF 10,60 to one GBP (January 2000 rate).

<sup>(1)</sup> Holding company Interpane Glas Industrie AG.

<sup>(2)</sup> Two subsidiaries of the Interpane group have been active since 1998 in the insulating glass sector in France: Interpane Hoerd SA (67) and Interpane Ile-de-France at Mitry-Mory (77). These subsidiaries employed 97 people in 1999.

Table 2

**The groups' workforces**

(EUR million)

Interpane group			
	World	Europe <sup>(1)</sup>	France <sup>(2)</sup>
1996	na	703	0
1997	na	721	0
1998	1 748	732	65
Pilkington group			
	World	Europe	France
1996/1997	39 100	24 200	537
1997/1998	37 800	23 500	524
1998/1999	32 300	20 500	497

<sup>(1)</sup> Holding company Interpane Glas Industrie AG.

<sup>(2)</sup> Two subsidiaries of the Interpane group have been active since 1998 in the insulating glass sector in France: Interpane Hoerd SA (67) and Interpane Ile-de-France at Mitry-Mory (77). These subsidiaries employed 97 people in 1999.

**2.2. The investment project**

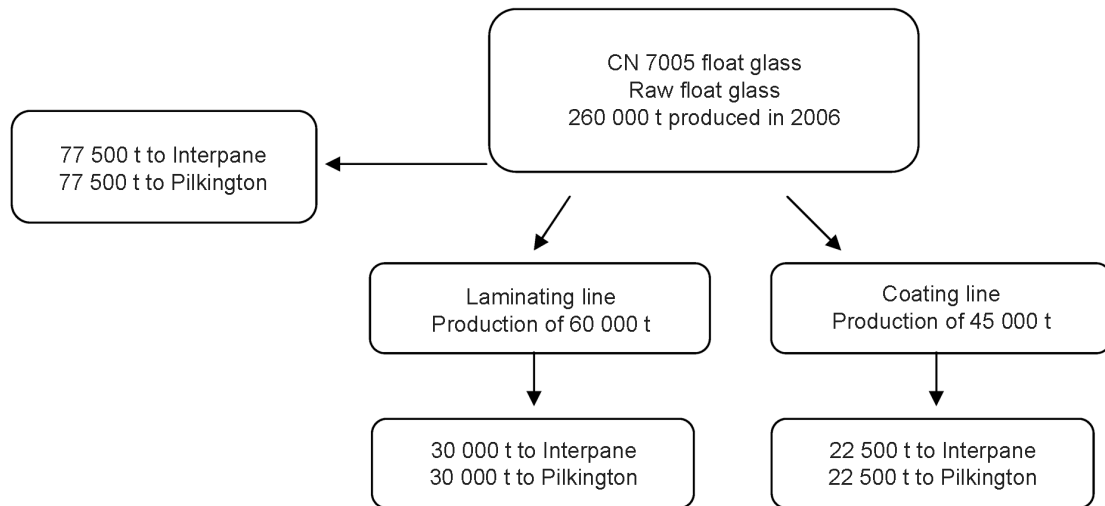
(25) The joint ventures are situated in the Freyming-Merlebach employment area, which was an assisted area within the meaning of Article 87(3)(c) of the EC Treaty for the period 2000-2006 <sup>(1)</sup> in which the intensity of public investment aid may be as high as 15 % NGE.

(26) According to the information furnished by France, the investment project is being carried out by two separate joint ventures owing to the dual ownership of the production facilities. The investment project is nevertheless fully integrated and self-contained: the float glass production unit was designed from the outset to part supply a joint glass-treatment unit, and the latter unit is present on the site only because its float glass supplier is adjacent to it. According to the same information, the integrated nature of the project is attested by the siting of the float, laminating and coating lines in the same building. France accordingly considers the joint investment project on the site in Lorraine to be an 'initial investment in fixed assets in the creation of a new establishment' within the meaning of point 7.2 of the 1998 MSF. There are two aid recipients, but a single investment project is being aided.

<sup>(1)</sup> Commission Decision of 15 March 2000 defining the regional aid map for France 2000-2006 (N 45/2000).

- (27) Production was set to start at the end of the first half of 2001 and reach its maximum after five years in 2006-07. Float glass production was to amount to 147 000 tonnes during the first full year of operation in 2001-02, increasing gradually to 260 000 tonnes of usable product per year when operating at full capacity as from 2006.
- (28) The purpose of the project is to construct an integrated float glass production unit for the building, comprising the activities of raw float glass manufacture, cutting, treatment (coating) and processing by laminating. The planned glass manufacturing cycle is as follows:

Figure 2



- (29) By letter dated 13 January 2005, the French authorities informed the Commission that the project had been amended. Eligible expenditure now came to EUR 158,5 million in nominal terms. The number of direct jobs created was 176 and the number of indirect jobs created was 150 (see also point 5.2).
- (31) The PAT scheme was approved by Commission Decision of 28 June 2000 (N 782/1999). The Sofirem loans scheme was approved by Commission Decision of 15 June 1989 (NN 2/89), as amended following the taking of appropriate measures to bring the scheme into line with the 1998 Guidelines on national regional aid <sup>(1)</sup>.

### 2.3. The aid measures

- (30) The planned State aid consists of several measures which either come under various authorised aid schemes or are individual ad hoc aid measures:
- regional planning grant (*prime à l'aménagement du territoire* — PAT) for industrial projects,
  - European Regional Development Fund (ERDF),
  - ad hoc aid for purchasing the land (discount on the selling price),
  - ad hoc aid for real estate development,
  - exemption from business tax,
  - soft loan from the Société Financière pour favoriser l'industrialisation des Régions Minières (Sofirem).
- (32) The five-year exemption from business tax is based on Articles 1464 B and 1465 of the General Tax Code (*Code Général des Impôts* — CGI), the Order of 16 December 1993, the Order of 24 November 1980 and Decrees 86/225, 80/921 and 80/922.
- (33) The current aid total is EUR 17 106 280 in nominal terms (see also point 5.2).

## 3. OPENING OF THE PROCEDURE

### 3.1. The new information communicated by the French authorities

- (34) By letter dated 13 January 2005, the French authorities informed the Commission firstly that the project had been amended and secondly that the amount of aid linked to the business tax exemption had been underestimated by France.

<sup>(1)</sup> OJ C 74, 10.3.1998, p. 9.

- (35) Total eligible expenditure now came to EUR 158,5 million in nominal terms (EUR 164,7 million in the 2000 Decision). The net present value of the eligible expenditure came to EUR 149,97 million. The project ended in March 2005 and the investment was carried out in full. In March 2005, the number of direct jobs created was 176 and the number of indirect jobs created was 150 (245 and 260 respectively in the 2000 Decision).
- (36) In their letter of 13 January 2005, the French authorities explained that the business tax exemption had originally been underestimated. It now came to EUR 6,28 million, of which EUR 2,14 million had already been paid by the French State (being part of the EUR 17,89 million in State aid already disbursed). This sum corresponded to the amount of aid before tax and was therefore expressed as gross grant equivalent (GGE).
- (37) The outstanding EUR 4,14 million business tax exemption forms part of the EUR 5,19 million still remaining to be paid to the project by the French State, this being the last instalment for which prior Commission authorisation is needed in accordance with point 6.2 of the 1998 MSF and the 2000 Decision, which provide that the final significant payment of the aid (e.g. 25 %) may be made only when the French authorities are satisfied that execution of the investment project by the companies is in compliance with the Commission Decision.
- (38) France has explained that the difference compared with the aid amount notified in 2000 is due to an upward adjustment to the original estimate of the business tax exemption.
- (39) The aid total is now said to come to EUR 23,09 million in nominal terms (EUR 14,65 million at net present value). The intensity of the aid to the Pilkington/Interpane project is therefore said to be  $14,65/149,97 = 9,77\%$  net grant equivalent (NGE). According to France, this aid intensity is lower than the maximum allowable intensity recalculated to take account of the changes in the project's parameters (9,82 % on the basis of the 1998 MSF).

### 3.2. Grounds for opening the procedure

- (40) The new information furnished by the French authorities gives rise to a new maximum allowable aid intensity<sup>(1)</sup>. The Commission is of the opinion, therefore, that it is not sufficient to amend the 2000 Decision by way of a

corrigendum as in the case of typographical errors. In reality, the 2000 Decision was based on incorrect information provided by the French authorities.

- (41) Consequently, the Commission must revoke the 2000 Decision in accordance with Article 9 of the Procedural Regulation, which states that 'the Commission may revoke a decision ..., after having given the Member State concerned the opportunity to submit its comments, where the decision was based on incorrect information provided during the procedure which was a determining factor for the decision. Before revoking a decision and taking a new decision, the Commission shall open the formal investigation procedure pursuant to Article 4(4)'.
- (42) In their e-mail of 16 March 2006, the French authorities argued that the elements to be taken into account from both an industrial and an aid standpoint did not entail any substantial overturning of the broad logic of the 2000 Decision and that a new decision on the matter would have a limited impact on how it turned out. In the same e-mail, they stated that they accepted the procedure as set out in Article 9 of the Procedural Regulation, which requires the Commission, after opening the formal investigation procedure provided for in Article 88(2) of the EC Treaty, to first revoke the 2000 Decision and then take a new decision replacing it in the light of the corrected information provided.

## 4. COMMENTS FROM INTERESTED PARTIES

- (43) The Commission did not receive any comments from interested parties.

## 5. COMMENTS FROM FRANCE

### 5.1. E-mail of 2 June 2006

- (44) France submitted comments on the decision to open the procedure by e-mail dated 2 June 2006.
- (45) It explained that the Commission had been informed of changes to the industrial project in the light of altered market conditions, and also of changes in the original aid estimate. The data relating to the industrial project itself, on the one hand, and those relating to the aid, on the other, had been set out in a letter from France dated 13 January 2005. France argued, however, that none of these changes altered the general thrust of the 2000 Decision, and the aid granted to the two companies complied with the maximum intensity authorised by the 1998 MSF.

<sup>(1)</sup> Calculated on the basis of point 3.10 of the 1998 MSF.

(46) When the 2000 Decision monitoring reports were being drawn up, the French authorities had taken the opportunity to review all the information on which the decision was based. During that review, the French authorities had discovered that two elements in relation to the aid affected the information originally transmitted to the Commission, namely:

— the estimate of the business tax exemption needed to be revised,

— the method of calculating the net grant equivalent also needed revising to take account of the actual investment allocation (land, buildings and equipment) and of the impact of taxation on all the aid — something which had not been done when the aid was notified.

(47) There was no particular connection between the two changes. Taken together, though, they altered both the nominal amount of the aid and its net grant equivalent.

(48) In 2000, when the project support file was being compiled, the business tax exemption scheme applied to a basis consisting of the rental value of any tangible fixed assets (land, buildings, fixtures and fittings, physical equipment, furniture, etc.) and a portion of the amount of any wages and fees paid. As from 2003, a reform of the business tax arrangements meant that wages were no longer included in the tax basis. Since then, the business tax has been based solely on fixed assets.

(49) France explained that the business tax exemption had originally been the subject of a clerical error following the calculation of the various hypotheses as to the timetable for implementing the industrial project. The original estimate had not been corrected until 2005 owing, firstly, to the fact that various departments were involved in compiling and administering the file and, secondly, to the time delay in the effect of the exemption. The checks carried out had induced the French authorities to inform the Commission of the re-evaluation of the original estimate in 2005.

## 5.2. Subsequent information

(50) By letter dated 12 September 2007, the Commission requested additional information in order to clarify the details of the project and of the calculation of the aid granted. After several requests for extension of the time limit for submitting the information requested, France submitted a partial reply by letter dated 21 December 2007. In this letter, France confirmed that the project completed in March 2005 was indeed the project originally planned at the time of the notification.

(51) The missing information was submitted, after further extensions of the time limit, by e-mail dated 30 May 2008. Other additional information was submitted by e-mails dated 16 and 19 September and 24 October 2008. This information was derived from calculations based on final project data on investments and jobs created. The aid linked to job creation had been recalculated from 2006 to allow for fewer jobs being created than planned.

(52) In the light of all these new elements, the level of aid granted is lower than what was planned in 2000 and in 2005. The eligible costs of the project come to EUR 158,5 million (EUR 150,165 million at net present value). The total amount of aid granted is EUR 17 106 280 (EUR 12 985 610 at net present value), corresponding to an aid intensity of 8,65 % NGE.

(53) The (nominal) amount of the final aid instalment, which ought not to be paid until after the Commission has given its authorisation<sup>(1)</sup>, comes to EUR 4 276 570. France has informed the Commission, however, that 4/5 of this amount has already been disbursed and that the balance comes to EUR 727 389 (in nominal terms). France thus acknowledges having anticipated payment of the final instalment of 25 % of the aid, but this was due to errors in calculating the business tax exemption. The French authorities assert that at no time have they sought to usurp the Commission's prerogatives.

<sup>(1)</sup> In accordance with point 6 of the 1998 MSF.

- (54) In view of the changes (fewer jobs created than planned), some of the planned aid has had to be revised downwards. Pilkington even had to repay in September 2007 an overpayment under the PAT of EUR 146 430. The revised aid granted under the three measures at issue now comes to: EUR 993 968 under the PAT (of which EUR 34 561 still has to be paid), EUR 1 532 765 under the FIL <sup>(1)</sup> (aid linked to the PAT, of which EUR 399 851 still has to be paid) and EUR 694 426 under the FIBM <sup>(2)</sup> (part of the aid for real estate development, of which EUR 64 304 still has to be paid). To the total of EUR 498 716 still to be paid, there must be added EUR 228 673 of aid from the Conseil Général, which brings to EUR 727 389 the amount to be taken into account pending the Commission's Decision authorising payment of the final instalment.
- (55) France explains that only PGF enjoyed business tax exemption in respect of its Seingbouse establishment during the period 2001-05 (IGCF did not enjoy such exemption during that period).
- (56) The aid which PGF received by way of the exemption provided for in Article 1465 of the General Tax Code is equal to the difference between the tax actually paid by the company and the tax it would have paid had there been no exemption, the amounts taken into account being the net amounts after application, where appropriate, of the value-added ceiling <sup>(3)</sup>. The amount in question comes to EUR 986 170 (business tax exemption granted to PGF's Seingbouse establishment for the years 2001 to 2005).
- (57) The French authorities state that they cannot explain the error made in 2005 in respect of the amount then over-estimated otherwise than by the existence of a misunderstanding between two government departments over the nature of the information to be produced within the framework of the annual report and, it would appear, of confusion between the relief stemming from the ceiling (general measure) and the exemption (aid measure).
- (58) France has recalculated the net grant equivalent for the aid elements taken both together and separately, using the current discount rate of 5,70 %. Each of the aid elements (apart from the aid for the land, which is not subject to tax) has been apportioned between buildings (19,24 %) and equipment (78,82 %). This apportionment is based once more on the reality of the investment on the ground, whereas at the time of the notification the calculation was made using a standard distribution of the aid basis (5 % land, 50 % buildings, 45 % equipment). Next, the annual integrated share of the aid is calculated, for each of the aid elements, on the basis of the depreciation period (20 years for the building and seven years for the equipment). The results of these calculations are set out in the table below:

Table 3

Aid measure	Aid amount (in EUR, nominal value)	Aid amount (in EUR, NGE)
PAT (and FIL)	2 526 740	1 623 160
ERDF	2 667 570	1 761 250
Aid for land purchase	2 816 000	2 816 000
Real estate development	7 974 690	6 100 300
— of which Conseil régional	2 988 100	1 983 190
— of which Conseil général	1 753 160	1 126 820
— of which District	2 539 000	2 539 000
— of which State (FIBM)	694 430	451 290
Business tax exemption	986 170	593 730
SOFIREM	135 110	91 170
Total	17 106 280	12 985 610
Aid intensity	10,79 %	8,65 %

<sup>(1)</sup> Fonds d'Industrialisation de la Lorraine.

<sup>(2)</sup> Fonds d'Industrialisation des Bassins Miniers.

<sup>(3)</sup> The General Tax Code provides for a ceiling on business tax on the basis of value added. The provision is a general one and cannot be considered State aid (Article 1 647 B *sexies* of the General Tax Code).



## 6. ASSESSMENT

### 6.1. Preliminary remarks

- (59) On 17 August 2000, the Commission approved the intensity of the aid for Pilkington/Interpane as notified by France on 22 May 2000. Subsequently, France pointed out to the Commission that incorrect information had been furnished in the original notification and, insofar as that information constituted a decisive factor for the decision, the Commission decided on 26 April 2006 to open the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid at issue with a view to revoking the 2000 Decision and adopting a new decision.
- (60) The 2000 Decision contains a full assessment of the notification. The assessment in the 2000 Decision is reproduced in the present Decision with the exception of the elements that must be corrected in the light of the information submitted by France on 13 January 2005, which formed the subject matter of the opening decision of 26 April 2006, and of the information subsequently submitted to the Commission.

#### 6.1.1. Applicable guidelines

- (61) France notified the aid for PGF/IGCF by letter dated 22 May 2000, registered as received on 25 May 2000. Footnote 58 of the Guidelines on national regional aid for 2007-2013 <sup>(1)</sup> states that 'Individually notifiable investment projects will be assessed in accordance with the rules in force at the time of notification'. Consequently, the Commission considers that the present project falls within the scope of the 1998 MSF and must be examined in the light of that framework.

#### 6.1.2. Relevant facts

- (62) The present assessment reflects the facts and situations as they existed at the time of notification, i.e. 22 May 2000.
- (63) The Commission must adopt a decision on the basis of *ex-ante* estimates of future prospects and market shares. Aid intensities are not adjusted subsequently if several years later — *ex post* — the figures show that the

market, for example, has evolved differently from what was originally expected. Although in the present case the Commission is having to take a decision eight years after the original notification, it must nevertheless base its assessment on the facts and situations as they existed at the time of notification.

- (64) In calculating the maximum aid intensity, the Commission will take account, however, of the new information submitted by France. France has reduced the aid granted to take account of the actual number of jobs created by the investment (revised downwards compared with the data contained in the notification) and to rectify an error in the calculation of the amount of the business tax exemption as notified in 2000.

### 6.2. The formation of joint ventures considered in the light of Article 81(3) of the EC Treaty

- (65) First of all it should be observed that, whilst the procedure laid down in Articles 87 and 88 leaves a wide discretion to the Commission and, in certain conditions, to the Council to come to a decision regarding the compatibility of a system of aids granted by States with the requirements of the common market, it is clear from the general plan of the Treaty that that procedure must never produce a result which is contrary to the specific provisions of the Treaty <sup>(2)</sup>.
- (66) The Court of Justice has also held that those aspects of aid which contravene specific provisions of the Treaty other than Articles 87 and 88 may be so indissolubly linked to the object of the aid that it is impossible to evaluate them separately <sup>(3)</sup>.

- (67) This obligation on the part of the Commission to ensure that Articles 87 and 88 are applied consistently with other provisions of the Treaty is all the more necessary where those other provisions also pursue, as in the present case, the objective of undistorted competition in the common market. When adopting a decision on the compatibility of aid with the common market, the Commission must be aware of the risk of individual traders undermining competition in the common market.

<sup>(1)</sup> OJ C 54, 4.3.2006, p. 13.

<sup>(2)</sup> Case 73/79 *Commission v Italy* [1980] ECR 1533, paragraph 11.

<sup>(3)</sup> Case 74/76 *Iannelli & Volpi v Meroni* [1977] ECR 557, paragraph 14.

(68) Nevertheless, the procedure under Articles 81 *et seq.* and that under Articles 87 *et seq.* of the Treaty are independent procedures governed by specific rules.

(69) Consequently, when taking a decision on the compatibility of State aid with the common market, the Commission is not obliged to await the outcome of a parallel procedure initiated under Regulation No 17, once, in the exercise of its discretion, it has reached the conclusion, based on an economic analysis of the situation, that the recipient of the aid is not in breach of Articles 81 and 82 of the Treaty.

(70) In the light of the facts described in point 3.1.2 above, and having regard to the abovementioned case law of the Court of Justice, the Commission considers that there is no obstacle to authorising the aid planned for PGF/IGCF.

### 6.3. Existence of aid within the meaning of Article 87(1) of the EC Treaty

(71) The aid at issue has been granted by a Member State through State resources within the meaning of Article 87(1) of the EC Treaty (see point 2.3 of this Decision). The aid confers an advantage on PGF/IGCF without which the companies would have had to bear all the investment costs on their own. Insofar as a substantial volume of raw glass is transported across national borders, international trade takes place in the raw glass market. Consequently, the financial advantages conferred on the companies may distort competition and affect trade between Member States. In its assessment, the Commission therefore considers that the notified measure constitutes State aid within the meaning of Article 87(1) of the EC Treaty.

### 6.4. Notification requirement

(72) Since the three cumulative conditions laid down in point 2.1(i) of the 1998 MSF are met, the aid proposal must be notified and the maximum allowable aid intensity must be determined in accordance with the 1998 MSF. Ad hoc aid must, moreover, be notified to the Commission under Article 88(3) of the EC Treaty.

### 6.5. Legal basis of certain aid measures

(73) Part of the aid is being granted on the basis of regional investment aid schemes approved by the Commission and in force at the time the aid was notified (see point 2.3 of this Decision), while another part is being granted as ad hoc aid.

(74) As regards aid granted under the ERDF, Article 25 of Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds <sup>(1)</sup> provides that those Funds may finance expenditure in respect of major economic projects the cost of which exceeds EUR 50 million. The ERDF can thus supplement national measures such as the PAT and assistance towards business premises where the single programming documents (DOCUP) of the region concerned so provide. The Freyming-Merlebach area is included in the French map for Objective 2 'Economic and social conversion of areas facing structural difficulties' approved by the Commission on 16 January 2000.

(75) The possibility of ad hoc aid for purchasing land and buildings is open by law to regional and local authorities in regionally aided areas.

(76) By letter dated 30 June 2000 (A/35411), the French authorities provided a breakdown of the calculation of the amount of business tax exemption showing that, in the present case, the cost of the investments and the cost of the permanent jobs created had been taken as a basis for calculating the exemption. However, in 2003, a reform of business tax law led to wages being removed from the tax basis. Since then, business tax has been based solely on fixed assets. Consequently, the aid can be considered investment aid within the meaning of the 1998 Guidelines on national regional aid.

(77) The award of ad hoc aid to businesses is conditional on their committing themselves to maintaining the aided jobs and investment in the area for at least five years.

(78) The Commission's examination in the present proceeding is limited to assessing the compatibility of the notified aid intensity of 8,65 % according to the criteria of the 1998 MSF.

<sup>(1)</sup> OJ L 161, 26.6.1999, p. 1.

### 6.6. Assessment under the 1998 MSF

- (79) The maximum allowable aid intensity for projects under the 1998 MSF must be determined on the basis of the maximum intensity rate applicable to regional aid in the assisted area in question at the time the aid was notified.
- (80) The Commission considers that the new elements do not call into question its overall assessment of the market and its evolution as set out in its 2000 Decision.
- (81) The Commission would recall that none of the companies taking part in the project at issue held, at the time the project was notified, a high market share within the meaning of point 3.6 of the 1998 MSF.

#### 6.6.1. The relevant product and market

- (82) Float glass can be used to make windows for buildings and for motor vehicles. The plant forming the subject-matter of the notification is configured to produce glass for the building industry. The product and market definitions contained in the 2000 Decision have been neither called into question nor modified and did not form part of the decision of 26 April 2006 to open the procedure. The assessment that follows is therefore reproduced from the 2000 Decision.

#### The product

- (83) Raw float glass is produced by floating a continuous stream of molten glass onto a bath of molten tin in an atmosphere of nitrogen (so-called float glass process developed by Pilkington in the 1960s).
- (84) Coated glass is a basic glass which has undergone a surface treatment or coating (applied under vacuum using an electromagnetic process<sup>(1)</sup>) designed to eliminate reflections or ensure thermal insulation. It is thus possible to obtain a thermo-regulating glass (low-emission, or 'low-E', glass: Iplus brand for Interpane) or a solar control glass (sunlight-reflective glass: Ipasol brand

for Interpane). It is planned to produce 90 % of low-emission glass and 10 % of sunlight-reflective glass of a thickness of either 4,6 mm or 8 mm.

- (85) Laminated glass is a type of safety glass composed of two or more panes of glass with PVB (polyvinyl butyral) or resin film in between<sup>(2)</sup>.
- (86) First-stage-processed raw float glass and coated glass are listed together in the statistical nomenclature under codes:
- CN 7005: Float glass and surface ground or polished glass, in sheets, whether or not having an absorbent, reflecting or non-reflecting layer, but not otherwise worked,
  - NACE 26.1.A: Manufacture of flat glass.
- (87) Unworked float glass is used in the building and automotive industries. According to the GEPVP, 80 % of European float glass production is intended for the building industry. The investors will manufacture only glass for buildings at the Freyming-Merlebach site. A special feature of this type of production is that the manufacturing plant works to order (for batch sizes and the thickness and other specifications of the glass) on small production runs.
- (88) The products resulting from the first-stage processing of raw float glass are intermediate goods used in the manufacture of safety glass (statistical code CN 7007 — consisting of toughened (tempered) or laminated glass) and of multiple-walled insulating units of glass for the building industry (statistical code CN 7008 — consisting of at least two panes of glass separated by one or more hermetically sealed spaces enclosing dehydrated air and/or other gases). Glass insulating units are made mostly from coated glass.

<sup>(1)</sup> The process used is the 'magnetron' process whereby the raw glass is treated on a separate production line. There exists another process, the pyrolytic treatment process (pulverisation), which makes it possible to treat the glass directly on the float line.

<sup>(2)</sup> All definitions have been taken from the work *L'industrie du verre* by the Secrétariat d'Etat à l'industrie, Service des Etudes et des Statistiques Industrielles (SESSI), 1999.

(89) The companies will also produce laminated glass for the building industry at the Lorraine plant. This product is listed for statistical purposes under CN heading 7007 29 00 — Laminated safety glass — Other. The other types of laminated glass included under this heading are used in the automotive industry, which is the leading consumer of laminated glass manufactured in Europe (windcreens).

(90) Float glass can be used to make windows for buildings and for motor vehicles. The Commission notes that, in keeping with the investors' wishes to satisfy the increasing demand for glass for building construction, the Freyming-Merlebach plant is configured to produce glass for the building industry. This speciality now represents the totality of Interpane's business. The group has no capacity for processing primary glass into car windows, nor has it any commercial relations with motor manufacturers. The coated glass produced at the new plant will have properties that are useful for buildings only<sup>(1)</sup>. The laminated glass will likewise be used to make safety glass for buildings. Consequently, the investors' decision to manufacture only glass for the building industry at Freyming-Merlebach would appear to be irreversible.

(91) In the light of the above, and with a view to comparing market trends, the Commission considers that a distinction must be drawn between the trend in raw float glass and the trend in intermediate products such as laminated glass or coated glass which undergo subsequent treatment for final use as architectural or building glass. This distinction is consistent with the Commission's analysis of the relevant market in the context of the abovementioned agreements on the formation of two joint ventures, where a distinction is made between the raw float glass market as such and the final use of the various types of glass (including laminated and coated glasses) as architectural or building glass.

#### Geographic scope

(92) The geographic market comprises in principle the EEA or, where appropriate, any substantial part of the territory of the EEA if the conditions of competition are appreciably different there from those prevailing in the rest of the EEA.

<sup>(1)</sup> Standards and requirements in terms of solar and thermal reflectivity are different in the automotive industry.

(93) In the present case, no evidence to show that the relevant geographic market is different from the EEA emerged during the investigation. The relevant geographic market must therefore be defined as the EEA.

#### Market trends

(94) The Commission is not disposed to accept the data enclosed with the notification showing a high rate of utilisation of production capacity. The data were supplied by the glass industry (GEPVP)<sup>(2)</sup> and correspond to what the industry calls 'saleable capacities'<sup>(3)</sup>. This calculation method may be useful to the industry, but it makes it hard to compare the capacity utilisation data with those available for other industrial sectors.

(95) Consequently, the Commission based its analysis in its 2000 Decision on the evolution of apparent consumption.

(96) The notification included volume data on the evolution of apparent consumption of float glass (CN 7005) during the period 1993-98.

(97) The results show a fall in price levels<sup>(4)</sup>. Such a fall, together with a volume growth rate of 4,89 %, points to average growth being below the annual average of 5,78 % for EEA manufacturing industry as a whole, which suggests that the market is in decline within the meaning of the 1998 MSF.

(98) The Commission considers however — as indicated above — that a distinction must be drawn between the trend in raw float glass and the trend in intermediate products such as laminated glass or coated glass which undergo subsequent treatment for final use as architectural or building glass.

<sup>(2)</sup> European Flat-Glass Producers Association.

<sup>(3)</sup> Saleable capacities are calculated from the nominal melt capacity corrected for losses (approximately 15 % of the float glass produced is lost during the manufacturing process) and for furnace stoppages to change the glass colour and thickness and to carry out major periodic repairs.

<sup>(4)</sup> EUR 366,9/t in 1993 and EUR 338,19/t in 1995, peaking in 1995.

(99) The Commission notes in particular that prices of sealed units (CN 7008) <sup>(1)</sup> increased substantially during the period 1993-98. The increases were due to the introduction of new European standards concerning the use of insulating materials in building and to the long-term trend in the industry towards using insulating products and materials.

(100) The Commission notes also that the average growth in consumption of insulating products (including insulating glass for building) will experience a strong upward trend owing to the stricter carbon emission controls following the adoption of the Kyoto Protocol to the 1997 United Nations Framework Convention on Climate Change. In the residential and building sector, thermal insulation is an effective technology in terms of energy saving and hence in terms of carbon emissions reduction. Implementation of the new standards for insulation types (ISO 10456) and for heat loss (ISO 832) will entail higher heat loss values which will lead to an increased need for energy savings.

(101) Consequently, in line with the analysis in the Commission Decision in the *Rockwool* case <sup>(2)</sup>, the strong upward trend shown by intermediate glass products which undergo subsequent treatment for final use as architectural or building glass points to the conclusion that the market is not in decline <sup>(3)</sup>.

(102) To conclude, a different trend is found to exist in the case of (i) raw float glass and (ii) intermediate glass products which undergo subsequent treatment for final use as architectural or building glass (such as laminated glass or coated glass): as regards (i), the Commission considers that the market is in decline within the meaning of the multisectoral framework; as regards (ii), the market is not in decline.

#### Market shares

(103) Where a project results in a capacity expansion in a sector facing structural overcapacity and/or a declining market and is likely to reinforce high market share <sup>(4)</sup>, there is a risk that the award of the maximum levels of

aid normally allowed in the region concerned will unduly distort competition. In such cases, the 1998 MSF provides for the application of an adjustment factor of 0,50.

(104) In the present case, the Commission has identified the raw float glass market as being a market in decline. None of the founders of the two joint ventures has a share of 40 % or more of this market.

#### 6.6.2. Determination of the maximum allowable aid intensity

(105) In accordance with the provisions of the 1998 MSF, the Commission determines the maximum allowable intensity for a notified aid measure according to a formula which takes into account various factors. The calculation begins by identifying the maximum aid intensity (regional ceiling) which a large company may obtain in the assisted area concerned within the context of the authorised regional aid system valid at the moment of notification. In order to calculate the maximum allowable aid intensity for the project in question, a range of adjustment factors are then applied to the percentage obtained in accordance with three specific assessment criteria, namely: competition, the capital-labour ratio and regional impact.

#### Maximum aid intensity in the assisted area concerned (R)

(106) According to the applicable French regional aid map for the period 2000-06, the Freyming-Merlebach employment area is an assisted area within the meaning of Article 87(3)(c) of the EC Treaty in which the intensity of public investment aid can be as high as 15 % NGE.

#### The competition factor (T)

(107) The competition factor (points 3.2 to 3.6 of the 1998 MSF), as determined in the 2000 Decision, has been neither challenged nor amended and did not form part of the decision of 26 April 2006 to open the procedure. The assessment that follows is therefore reproduced from the 2000 Decision.

(108) The competition factor involves an analysis of whether the notified project will be implemented in a sector or subsector suffering from structural overcapacity.

<sup>(1)</sup> Multiple-walled insulating units of glass, consisting of one or more hermetically sealed spaces enclosing dehydrated air and/or other gases.

<sup>(2)</sup> Commission Decision of 21 April 1999 in Case N 94/99 *Rockwool Peninsular SA*.

<sup>(3)</sup> See point 7.8 of the 1998 MSF.

<sup>(4)</sup> Put, for the purposes of the 1998 MSF, at least 40 %.

(109) In accordance with the provisions of the 1998 MSF (point 3.3), the potential existence of structural overcapacity is evaluated by considering the difference between the average capacity utilisation rate for manufacturing industry as a whole and the capacity utilisation rate of the relevant sector or subsector. In the absence of sufficient data on capacity utilisation, the Commission considers whether the investment is taking place in a declining market. For this purpose, it compares the evolution of apparent consumption of the product(s) in question with the growth rate of EEA manufacturing industry as a whole.

(110) As indicated above, the Commission is faced with an absence of reliable data on the sector concerned. It is therefore impossible to calculate capacity utilisation, or even apparent consumption, for this sector.

(111) On the basis of the market trend analysis, a factor of 0,75 must be applied to the part of the investment that is devoted to the production of raw float glass (CN 7005). For the part of the investment that relates to laminated or coated building glass falling under CN headings 7007 and 7008, a competition factor of 1 should be applied.

(112) The 1998 MSF does not envisage a situation in which two or more competition factors might be applied to a single investment for which a different market trend has been assessed for each relevant product. Insofar as, in the present case, the application of only one of the two factors to the whole investment would be not only disproportionate but also inaccurate, the Commission considers that the competition factor should be weighted so as to reflect the market trend for each relevant product.

(113) Inasmuch as the project consists in a fully integrated plant, it would be artificial to establish an adjustment factor calculated on the basis of the relative value of the investment in relation to each of the relevant products. The Commission has therefore used an adjustment factor (40/60) which is based on the respective capacities placed on the market by the aid recipient.

(114) This results in a factor T of 0,85<sup>(1)</sup>, which represents the competition factor (1 and 0,75) in the two markets.

#### The capital-labour factor (I)

(115) The new information furnished by the French authorities gives rise to a new capital-labour coefficient. The amount of eligible investment is EUR 158,5 million. France has indicated that the number of direct jobs created will ultimately be 176. The capital-labour ratio is therefore 900. As this ratio is between 701 and 1 000, a factor I of 0,7 should be applied instead of 0,8 as originally provided (point 3.10(2) of the 1998 MSF).

#### The regional impact factor (M)

(116) The new information furnished by the French authorities gives rise to a new indirect jobs-direct jobs coefficient. France has indicated that the number of indirect jobs created is 150, equivalent to 85 % of the number of direct jobs. As this percentage is between 50 % and 100 %, a factor M of 1,1 should be applied instead of 1,2 as originally provided (point 3.10(3) of the 1998 MSF).

#### Calculation of the maximum allowable aid intensity

(117) In the light of the above, the revised maximum allowable intensity of the aid in the present case is therefore:  $R \times T \times I \times M = 15 \% \times 0,85 \times 0,7 \times 1,1 = 9,82 \%$  (whereas it was 12,24 % in the 2000 Decision).

#### 6.7. Conclusion on the compatibility of the aid granted

(118) In the light of all these new elements, the level of aid granted is lower than what was planned in 2000. The eligible costs of the project come to EUR 158,5 million (EUR 150,165 million at net present value).

(119) Basing themselves on the method described in Annex I to the 1998 Guidelines on national regional aid, the French authorities state that the result is an NGE of EUR 12 985 610 for a nominal aid amount of EUR 17 106 280.

<sup>(1)</sup>  $(0,4 \times 1) + (0,6 \times 0,75)$ .

(120) According to the French authorities, the intensity of the aid to the PGF/IGCF project therefore comes to 8,65 % NGE (12 985 610/150 165 000), which is lower than the maximum allowable intensity recalculated to take account of the changes in the project's parameters (9,82 % NGE).

(121) The notified aid intensity of 8,65 % NGE which France proposes to grant to PGF/IGCF fulfils the conditions for its being considered compatible with the 1998 MSF.

(122) Given that the investment project has been completed, there can be no application of the *ex-post* monitoring conditions provided for in point 6 of the 1998 MSF. France can therefore be authorised to pay the balance of the final aid instalment, namely EUR 727 389 (in nominal terms), to PGF/IGCF,

HAS ADOPTED THIS DECISION:

*Article 1*

The Decision adopted on 17 August 2000 in Case N 291/2000 is hereby revoked.

*Article 2*

The State aid which France plans to implement in favour of PGF/IGCF of an intensity of 8,65 % NGE is compatible with the common market within the meaning of Article 87(3)(c) of the EC Treaty.

Implementation of the aid is accordingly authorised.

France is authorised to pay the balance of the aid, namely EUR 727 389 (in nominal terms), to PGF/IGCF.

*Article 3*

This Decision is addressed to the French Republic.

Done at Brussels, 10 December 2008.

*For the Commission*

Neelie KROES  
*Member of the Commission*