

Commission Decision (EU) 2015/1072 of 1 October 2014 on the measures implemented by Germany in favour of Propapier PM2 GmbH — State aid SA.23827 (2013/C) (ex NN 46/12, ex N 582/07) (notified under document C(2014) 6837) (Only the German text is authentic) (Text with EEA relevance)

COMMISSION DECISION (EU) 2015/1072

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on the measures implemented by Germany in favour of Propapier PM2 GmbH — State aid SA.23827 (2013/C) (ex NN 46/12, ex N 582/07)

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THE EUROPEAN COMMISSION,

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

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

Having called on interested parties to submit their comments pursuant to the provision cited above and having regard to their comments,

Whereas:

1. **PROCEDURE**

- (1) By letter dated 8 October 2007, registered at the Commission on the same day, the German authorities, pursuant to Article 108(3) of the TFEU, notified under the Guidelines on national regional aid for 2007-2013<sup>(1)</sup> (hereinafter: RAG) their intention to grant aid in favour of Propapier PM2 GmbH (see below point 2.2, The beneficiary) for a large investment project in Eisenhüttenstadt, Brandenburg-Nordost, Germany. The proposed aid was registered with the reference N 582/07.
- (2) After the submission of additional information, the receipt of several complaints<sup>(2)</sup>, and a meeting with the German authorities and representatives of the beneficiary, the Commission adopted, on 2 April 2008, a decision<sup>(3)</sup> not to raise objections to the notified aid measure.
- (3) After the adoption of the Commission decision on 2 April 2008, the Commission received further submissions from complainants contesting the assessment of the Commission and the adoption of a decision not to raise objections to the aid measure. Smurfit Kappa Group plc (hereinafter: ‘Smurfit

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Kappa') also submitted information on 24 June 2008, alleging that additional aid had been granted to Propapier PM2 GmbH & Co. KG in the form of infrastructure aid, and asked the Commission to revoke its decision. The Commission opened a separate investigation registered as State aid case SA.36147 (C 30/10)<sup>(4)</sup>, in order to assess the latter allegations.

- (4) On 5 August 2008, Smurfit Kappa brought an action for annulment of the Commission decision of 2 April 2008 before the General Court.
- (5) By letter dated 7 November 2008, Germany informed the Commission of the implementation of the aided investment. By letters dated 22 December 2008 and 13 January 2010, it informed the Commission of certain changes to the notified project.
- (6) By its judgment of 10 July 2012, T-304/08, *Smurfit Kappa Group plc v Commission*, the General Court annulled the abovementioned Commission decision of 2 April 2008 (hereinafter: 'the annulled decision'). Therefore, the Commission was required to re-assess the aid measure and take a new decision placing itself in the situation which existed on 2 April 2008<sup>(5)</sup>.
- (7) On 14 August 2012, a meeting took place between the Commission services, the German authorities and representatives of the beneficiary company. By letters of 24 August 2012 and 5 February 2013, the German authorities submitted comments.
- (8) It has to be noted that the granting of the aid by Germany was subject to the approval of the Commission. Germany started to pay out the aid only after the adoption by the Commission, on 2 April 2008, of the annulled decision. Following the annulment by the Court, however, it must be considered that the annulled Commission decision has never existed and that Germany has not been duly authorised to grant the proposed aid. The Commission has accordingly transferred the case to the register of non-notified aid under the reference SA.23827 (2012/NN-46).
- (9) By letter dated 15 May 2013, the Commission informed Germany of its decision to initiate the procedure laid down in Article 108(2) of the TFEU (hereinafter 'the opening decision') in respect of the regional aid granted to Propapier PM2 GmbH. The Commission decision to initiate the procedure was published in the *Official Journal of the European Union*<sup>(6)</sup> on 8 August 2013. Third parties were invited to submit their comments.
- (10) Germany submitted comments by letter dated 15 July 2013 (2013/073407).
- (11) By email dated 20 September 2013 (2013/092832) and letter dated 20 November 2013 (2013/113552), the Commission requested further information, which was provided by Germany by letters dated 16 October 2013 (2013/102801), 9 December 2013 (2013/123872), and 21 January 2014 (2014/007118).

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- (12) Smurfit Kappa submitted, as interested third party, comments by letter dated 6 September 2013 (2013/090228) (these comments were forwarded to Germany by letter dated 13 September 2013 (2013/091012)), announcing potential further comments. By letter dated 30 September 2013 (2013/095929) the Commission invited Smurfit Kappa to submit its further comments by 30 October 2013. By email dated 30 October 2013 (2013/107610) Smurfit Kappa declared not to have additional comments, but asked for information about the procedure. The Commission reacted to this by letter dated 29 November 2013 (2013/119741). Germany reacted on the comments of Smurfit Kappa by letter dated 14 October 2013 (2013/101451).
- (13) By letters dated 30 September 2013 (2013/095932, 2013/095939, 2013/095941, 2013/095942), the Commission informed the former complainants the Swedish and Finnish Forest Industry Federations, the Koninklijke Vereniging van Nederlandse Papier- en Kartonfabrieken and Procelpac — Groupement français des fabricants de papiers et cartons d'emballage à base de cellulose, which had intervened in the preliminary examination before the adoption of the annulled decision (see recital 2), about the opening of the formal investigation and invited them to submit their comments. None of these complainants submitted comments.

## 2. DETAILED DESCRIPTION

### 2.1. OBJECTIVE

- (14) Germany intended to promote regional development by providing regional investment aid to Propapier PM2 GmbH & Co. KG for the setting up of a paper production plant in Eisenhüttenstadt, Brandenburg-Nordost, an assisted area pursuant to Article 107(3)(a) TFEU with a regional aid ceiling of 30 % gross grant equivalent (GGE) under the regional aid map of Germany for the applicable period 1 January 2007—31 December 2013<sup>(7)</sup>.

### 2.2. THE BENEFICIARY

- (15) The beneficiary of the aid identified in the annulled decision was Propapier PM2 GmbH & Co. KG, a large enterprise belonging to the group headed by Progroup AG (hereinafter: Progroup).
- (16) The corporate relationship between the aid recipient and the group was described as follows: [...] <sup>(8)</sup> % of the capital of Propapier PM2 GmbH & Co. KG is held by Propapier PM2 Beteiligungs GmbH in its capacity as a member of the commercial partnership with unlimited liability. Propapier PM2 Beteiligungs GmbH is owned [...] % by Propapier Papiererzeugung GmbH and [...] % by Mr Jürgen Heindl. The sole owner of Propapier Papiererzeugung GmbH was Progroup, in which Mr Jürgen Heindl held [...] % of the shares through JH-Holding GmbH. The remaining [...] % of the shares in Progroup AG were distributed as follows: two shareholders each had

a holding of [...] % and a further shareholder had a share of [...] %. None of these shareholders had any special voting rights.

- (17) Progroup produces and sells corrugated case material and corrugated board through its subsidiaries. In 2007, at the time of the notification, corrugated board was produced in plants in Europe by Prowell GmbH & Co. KG and its subsidiaries, i.e. Prowell SA in France, Prowell s.r.o. in the Czech Republic; at the end of 2008, Prowell Sp. z.o.o. started production in Poland. Corrugated case material was being produced by Propapier Papiererzeugung GmbH. The other companies belonging to Progroup offer services in connection with the sale of corrugated board.
- (18) As originally notified in 2007, the investment project included the setting up of a power plant supplying the new paper mill. The core part of the investment project, i.e. the setting up of the paper mill, was to be carried out and operated by Propapier PM2 GmbH & Co. KG. The power plant providing steam and energy for the production process of the paper mill, on the other hand, was to be set up and financed by Propower GmbH (hereinafter: Propower), a company belonging to the same group and holding the remaining [...] % stake in Propapier PM2 GmbH & Co. KG. A leasing agreement between the parties was to convey the right to use the power plant to Propapier PM2 GmbH & Co. KG.
- (19) Germany explained that, under German tax law, business assets ('Wirtschaftsgüter') forming part of the special business assets (the so-called 'Sonderbetriebsvermögen') of a partner (in this case, Propower) of a commercial partnership (in this case, Propapier PM2 GmbH & Co. KG) are allocated for tax purposes to the assets of the commercial partnership and not to those of the member, even if that member is the civil law owner of the asset. This is a consequence of the tax transparency of commercial partnerships. Consequently, Propapier PM2 GmbH & Co. KG would be able to claim the aid for the whole investment project, including for the construction of the power plant to be operated by Propower.
- (20) After the adoption of the annulled decision, Germany informed the Commission that the power plant was excluded from the scope of the aided investment project, and that no aid was requested or would be granted for the realisation of the power plant. Propower was to be sold to EnBW Energy Solutions GmbH (ESG), a daughter company of EnBW Energie Baden-Württemberg AG.
- (21) Because under German corporate law a commercial partnership ('Kommanditgesellschaft') must consist of at least two members, one of which with limited liability, Propapier PM2 GmbH & Co. KG was dissolved following the stepping out of Propower. Its other member, Propapier PM2 Beteiligungs GmbH, was transformed from an investment company into an

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operational company and renamed as Propapier PM2 GmbH (hereinafter: Propapier), and became the beneficiary of the aid measure.

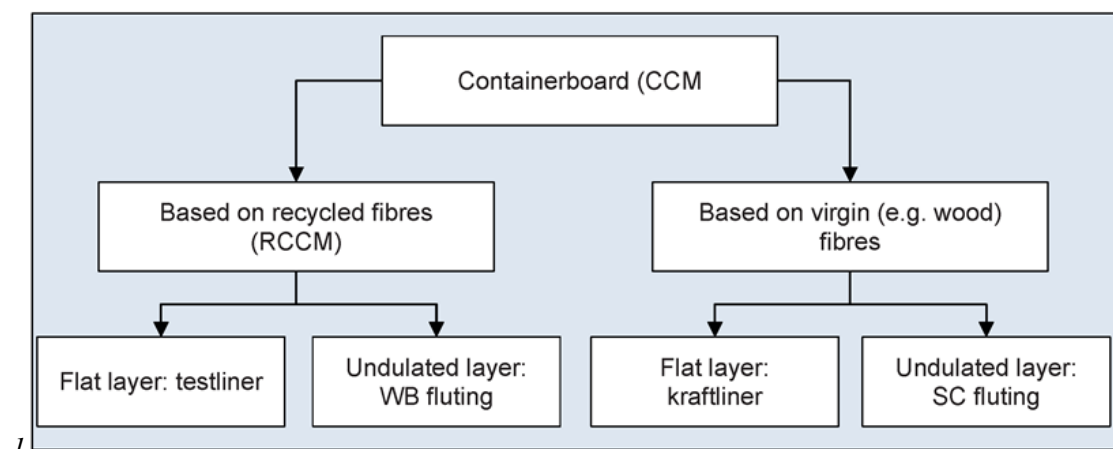
- (22) Germany informed that Propapier Papiererzeugung GmbH now operates under the name Propapier PM1 GmbH and holds all the shares of Propapier PM2 GmbH.

### 2.3. THE INVESTMENT PROJECT

#### 2.3.1. PRODUCTS AND TECHNOLOGY

- (23) Corrugated case material (hereinafter: CCM), also called containerboard, is paper manufactured for the production of corrugated board. The term encompasses both linerboard and fluting. The liner constitutes a flat inner or outer layer whereas the fluting is the undulated layer. CCM is made out of natural wood or recycled fibres. Liners made out of wood (also called virgin) fibres are called kraftliners, whereas liners made out of recycled fibres are called testliners. Flutings made out of virgin fibres are called SC flutings and those made out of recycled fibres are called WB flutings. Recycled CCM (RCCM) encompasses all CCM made of recycled fibres, i.e. testliners and WB flutings. Figure 1 below schematically represents the different types of CCM.

Figure



- (24) CCM is the base paper to manufacture corrugated board, which is made by combining layers of liner board with layers of fluting. Corrugated board is then further processed into corrugated boxes used for packaging.
- (25) The paper mill was intended to produce two types of CCM, namely testliner up to 150 g/m<sup>2</sup> and fluting made from recycled fibres (WB fluting).
- (26) According to the business planning at the time of the notification, a large part (approx. 75 %) of the CCM produced in the aided plant was to be used within Progroup for the production of the downstream product, i.e. corrugated board. Progroup sells corrugated board as a final product on the market. The part of CCM not used internally was to be sold to third parties. Progroup was not involved in the production of corrugated boxes for final customers.

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(27) The paper plant was to include waste paper recycling equipment, a paper machine for producing CCM, an operational building, a spare parts store, workshop buildings and a paper roll warehouse.

(28) The power plant was to generate the steam needed for the production process. In order to make efficient use of heat energy, the power plant was expected to also generate electricity covering [ $< 60$ ] % of Propapier's electricity needs.

#### 2.3.2. PROJECT IMPLEMENTATION

(29) The investment project started in December 2007 and was expected to be implemented by mid-2010. Full capacity of 615 000 t/a of CCM was scheduled to be reached gradually by 2015.

#### 2.4. ELIGIBLE EXPENDITURE

(30) The eligible investment costs are calculated on the basis of the costs relating to initial investment. In the initial notification, the eligible expenditure calculated in accordance with the RAG amounted to EUR 643 862 500 in nominal value (EUR 586 722 900 in discounted value<sup>(9)</sup>), distributed over buildings, installations and equipment, and other costs.

(31) The category "other costs" included, among others, interior design, informatics costs, and software licences. Germany confirmed that software licences worth EUR [...] would only be used in the establishment receiving the aid; they constitute amortisable assets, would be purchased from third parties, and would remain in the establishment receiving the aid for five years.

(32) After the adoption of the annulled decision, Germany informed the Commission that, since the power plant was excluded from the subsidised project, the eligible costs were reduced accordingly. The total incurred eligible costs of the modified project amount to EUR 385 944 683 in nominal value, corresponding to EUR 352 974 825 in discounted value.

#### 2.5. FINANCING OF THE INVESTMENT

(33) In the initial notification, Germany informed that some 73 % of the total project costs would be financed through bank loans free of any aid (in particular, the loans would not be covered by a public guarantee). Another 14 % was to be funded from own resources, while the balance was to be financed through the aid.

(34) Germany confirmed that even after the exclusion of the power plant investment, the condition that the beneficiary makes an own contribution of more than 25 % of the total eligible expenditure, free of any public support, was respected.

#### 2.6. LEGAL BASIS

- (35) In the initial notification, the indicated legal basis for the aid was the following:
- (a) Investitionszulagengesetz 2007 vom 15. Juli 2006 in der Fassung der Bekanntmachung vom 23. Februar 2007 (BGBl. 2007 I S. 282) (block-exempted scheme XR 6/2007<sup>(10)</sup>);
  - (b) Gesetz über die Gemeinschaftsaufgabe “Verbesserung der regionalen Wirtschaftsstruktur” vom 6. Oktober 1969 (BGBl. I S. 1861), zuletzt geändert durch Article 102 der Verordnung vom 25. November 2003 (BGBl. I S. 2304), in Verbindung mit dem 36. Rahmenplan der Gemeinschaftsaufgabe “Verbesserung der regionalen Wirtschaftsstruktur” (GA) für den Zeitraum 2007 bis 2010 (BT-Drs. 16/5215 vom 27. April 2007) (block-exempted scheme XR 31/2007<sup>(11)</sup>);
  - (c) Richtlinie des Ministeriums für Wirtschaft zur Förderung der gewerblichen Wirtschaft im Rahmen der Gemeinschaftsaufgabe “Verbesserung der regionalen Wirtschaftsstruktur” — GA — (GA-G) vom 7. Dezember 2006 (ABl. für Brandenburg Nr. 51 vom 27. Dezember 2006, S. 798);
  - (d) Landeshaushaltsordnung (LHO) vom 21. April 1999 (GVBl. I/99, S. 106) mit den dazugehörigen Verwaltungsvorschriften (VV-LHO).
- (36) Germany informed, after the adoption of the annulled decision, that the aid was granted exclusively under the “Investitionszulagengesetz 2007”, i.e. the block-exempted scheme XR 6/2007.

#### 2.7. *THE AID MEASURE*

- (37) Before works on the project started in December 2007, the beneficiary had applied for the aid on 15 May 2007 and Germany had confirmed by letter of the Investitionsbank des Landes Brandenburg of 24 May 2007 that, subject to the final outcome of a detailed verification, the project meets the conditions of eligibility.
- (38) Germany notified a total aid amount of EUR 82 509 500 in nominal value, corresponding to EUR 72 145 700 in discounted value. Germany confirmed that this aid would not be cumulated with other aid for the same eligible costs.
- (39) Germany later informed that aid amounting to EUR 50 559 153 in nominal value, corresponding to EUR 44 172 973 in discounted value, had been paid out to Propapier for the reduced investment project. Germany further specified that the aid paid out exceeded the aid intensity of 12,3 % GGE approved in the annulled decision, corresponding to EUR 43 415 903 in discounted value calculated on the basis of the reduced eligible costs.
- (40) In the context of the initial notification, Germany had undertaken to respect the maximum aid intensity of 12,3 % GGE. Accordingly, Germany confirmed by letter dated 21 January 2014 that it obtained from Propapier

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the reimbursement of a total amount of EUR 1 099 539, corresponding to the excessive amount of aid granted, including interest.

- (41) The responsible granting authority is the Finanzamt Frankfurt (Oder).

## 2.8. CONTRIBUTION TO REGIONAL DEVELOPMENT

- (42) Brandenburg-Nordost was a region with significant socioeconomic handicaps where in 2004 GDP per capita was 76,3 % of EU-27 average<sup>(12)</sup> and the unemployment rate stood in 2005 at 19,8 %, equivalent to 220 % of the EU-27 average and 178 % of the German average.

- (43) To further the regional development of the region, Germany considered it necessary to support and develop the paper production and processing sector, which had emerged as a potential new economic activity for the Brandenburg-Nordost region. It was expected that the paper production plant, which brought a key technology to the region, would lead to the settlement of a new primary industry and to the extension of the value-added chain (corrugating machines, packaging, etc.). The investment into an advanced paper mill also reflected the intention of Eisenhüttenstadt to diversify its economic profile beyond that of a mono-structure focused on the metal industry. The production of CCM from recycled fibre is consistent with Eisenhüttenstadt's plan to establish a recycling industry in the city.

- (44) The investment project as initially notified was expected to create 150 direct jobs (including 36 in the power plant) and some 450 indirect jobs<sup>(13)</sup>.

## 3. DOUBTS AND GROUNDS FOR OPENING

- (45) In the annulled decision, the Commission concluded that the thresholds laid down in § 68(a) and (b) of the RAG were not exceeded. The Commission also stated that, according to § 68 of the RAG, the Commission had limited its discretionary power to undertake a detailed verification that the benefits of the aid outweigh the distortions of competition only to those situations where one of the thresholds in § 68(a) or (b) of the RAG is exceeded. Moreover, the Commission expressed the view that if the thresholds for market share and capacity increase are not exceeded and the scaling down mechanism of § 67 of the RAG is applied to adjust the maximum aid intensity, this ensures that the potential distortion of competition through the aid remains proportionate to the objective of regional development. It also argued that the requirements of the RAG secure the contribution of the aid to regional development. On this basis, the Commission declared the measure compatible with Article 87(3)(a) of the EC Treaty.

- (46) In its judgment in Case T-304/08, the General Court held that the fact that a measure complies with all standard compatibility criteria of the RAG is not sufficient to demonstrate that it will have a positive effect on regional development and that it is not apparent from § 68 of the RAG that the initiation of the formal investigation procedure is precluded where the market share



and capacity thresholds have not been exceeded<sup>(14)</sup>. The General Court further stated that the assessments made in the annulled decision could not alone enable the Commission to eliminate all doubts as to the compatibility of the aid measure with the common market in the light of the derogation provided for in Article 107(3)(a) TFEU, since the application of that derogation presupposes that the benefits of the measure outweigh its disadvantages, however limited these may be. The General Court thus underlined that it is the Commission's duty to open the formal investigation in accordance with Article 108(2) TFEU — even if the thresholds laid down in § 68 of the RAG are not exceeded — in cases where it has doubts on the positive balance of the aid.

- (47) In recitals 118 and 127 of its opening decision, the Commission referred to the claims from complainants that the capacity created by the Propapier project would exceed 5 % on the relevant market defined for the assessment of § 68 of the RAG, and that the aid to Propapier would seriously distort competition in a sector that suffers from structural overcapacity. According to the complainants, the industry reacted by capacity reductions, but the capacity to be created by Propapier would exacerbate the existing sectorial problems by creating new capacity that would replace the capacity of the production mills that were decommissioned to restore a competitive balance on the CCM market.
- (48) In its opening decision, the Commission expressed doubts on the question whether indeed a situation of overcapacity existed in the sector, and whether the aid to Propapier would have maintained or reinforced this situation. The Commission also left open for comments by third parties the issue of whether the capacity increase effect to be taken into account exceeds 5 % of the apparent consumption on the relevant market or not. The Commission stated that, on the basis of the information available to it before the adoption of the annulled decision, it could not affirm without doubt that the positive effects of the aid outweigh its negative effects (the resulting distortion of competition and effect on trade between Member States), or that the capacity creation threshold laid down in § 68 of the RAG is not exceeded.
- (49) The Commission therefore invited the Member State and third parties to submit comments on the correct application of the test laid down in § 68(b) of the RAG. In particular, the Commission invited interested parties to submit information allowing it to conclude whether or not the relevant market was in structural overcapacity over the relevant period 2001-2006, whether the notified aid would have maintained or reinforced such a situation, and whether the positive effects of the aid to Propapier could have outweighed its negative effects in terms of distortion of competition or effect on trade between Member States.

#### 4. COMMENTS FROM THE COMPLAINANT SMURFIT KAPPA

##### 4.1. PRELIMINARY REMARKS

(50) Smurfit Kappa stresses that it is the primary responsibility of Germany, rather than Smurfit Kappa, to show that the Propapier project does not lead to unacceptable distortions of competition.

(51) Smurfit Kappa insists that the General Court's judgment in Case T-304/08 requires the Commission to assess whether the expected benefits of the aid outweigh the distortions of competition and the impact on trade between Member States, and remarks that since the formal investigation was opened, the thresholds of § 68 of the RAG are no longer relevant.

#### 4.2. *MARKET DEFINITION*

(52) Smurfit Kappa comments on the provisional definitions of the relevant product market as set out by the Commission in the opening decision — which are the same as in the annulled decision — and refers to Smurfit Kappa's application to the Court of 5 August 2008 for the annulment of the initial State aid decision N 582/07 (hereinafter: the Application), where it argued that these definitions are not correct.

(53) Smurfit Kappa claims that a market for testliner of up to 150 g/m<sup>2</sup> and fluting made from recycled paper does not exist, and that in any case, with its new PM2 paper machine, Propapier never intended to produce testliner up to 150 g/m<sup>2</sup> but “corrugating medium and testliner III of 70/110 g/m<sup>2</sup> as well as fluting of 70/130 g/m<sup>2</sup>” (information from press releases), suggesting implicitly that an even narrower market should be considered. Therefore Smurfit Kappa asks the Commission to delineate the relevant product markets more accurately.

#### 4.3. *CAPACITY INCREASE CALCULATION*

(54) Smurfit Kappa points to information mentioned in interviews and press releases, stating that the new paper mill will be able to produce 650 000 t per annum, and even up to 750 000 t per year, which is much more than the capacity notified by Germany. Smurfit Kappa concludes that the Commission should not rely on figures provided by Germany but should conduct its own investigation.

(55) Smurfit Kappa bases most of its argumentation on the 2007 London Economics study (Economic analysis of State aid given to Progroup AG<sup>(15)</sup>), commissioned by itself, which states that Progroup's production expansion will turn it from a net CCM buyer to a net seller, to the tune of 250 000 t/a. Based on the 650 000 t/a total capacity of the new PM2 mill (figure advanced by Smurfit Kappa), this would reduce the company's need for third party delivered CCM by 400 000 t/a. Smurfit Kappa concludes that thus the full 650 000 t/a would have to be allocated to the open market (i.e. the market for sales to third parties only, excluding in-house deliveries) data.

(56) Smurfit Kappa argues that the so-called “displacement effect” (concept as explained in the London Economics study) should be taken into account:

according to Smurfit Kappa, the CCM production to be used intra-group will ultimately displace sales from other producers in the open market, i.e. Progroup will no longer buy that CCM production on the open market. Therefore, the real capacity increase amounts to the new sales by Propapier on the open market plus the “freed” sales by other producers on the open market. This constitutes in fact the total new production capacity according to Smurfit Kappa.

- (57) Smurfit Kappa provides an xls sheet dated 30 June 2008 which constitutes Annex A.10 of the Application and uses a few figures issuing from a 2007 report by Henry Poole Consulting<sup>(16)</sup>. This table indicates a Progroup demand of 240 000 t/a on the recycled CCM market in 2008, and a post-investment forecast for 2010 of 285 000 t/a recycled CCM production to be sold on the market by Propapier. Smurfit Kappa argues that the sum of these two (525 000 t/a), i.e. 285 000 t/a that will not be used intra-group plus 240 000 t/a that Progroup will no longer buy on the open market) is the total impact of the subsidised investment on the open market for CCM and should be used for the calculation of the capacity increase in accordance with § 68(b) of the RAG.
- (58) Smurfit Kappa also rejects the Propapier figure of 150 000 t/a for CCM capacity increase on the open market. Smurfit Kappa alleges that the new corrugated board plant to be built by Progroup in Stryków (Poland) would only use approximately 100 000 t/a of recycled paper. Even deducting this additional demand (from 650 000 t/a) would still leave a total capacity of 550 000 t/a.
- (59) On this basis, Smurfit Kappa concludes that the capacity increase created by the subsidised Propapier investment would exceed the 5 % threshold of § 68(b) of the RAG (measured on the basis of 2006 figures for the CCM open market).

#### 4.4. *OVERCAPACITY*

- (60) Smurfit Kappa argues that the CCM market was in structural overcapacity over the relevant period 2001-2006. According to Smurfit Kappa, the market was characterised by an absence of adequate demand growth, while new capacity was largely driven by State aid, which even further exacerbated the overcapacity. As a result, other paper producers were forced to close down production facilities (Smurfit Kappa closed 14 paper machines in the period 2001-2008) to remain competitive. Smurfit Kappa refers to the London Economics study, which states that new capacity, especially if supported by State aid, will have serious detrimental consequences for competition. The study denotes serious difficulties on the European CCM market for the period 2002-2006 and points to serious overcapacity problems in the sector. The figures are based on data provided by Groupement Ondulé and Smurfit Kappa, and show capacity utilisation rates below 90 % for the years 2003-2005. The rates for 2006 and 2007 are above 90 %, but the study also mentions for these

years alternative rates below 90 % which “would have prevailed in the absence of capacity reduction”.

4.5. *CONTRIBUTION TO REGIONAL DEVELOPMENT AND BALANCING EXERCISE*

- (61) As to the balancing of the positive effects of the aid against the distortion in a market characterised by structural overcapacity, Smurfit Kappa observes that the installation of the paper machine built elsewhere and transported to the region concerned does not, in itself, contribute to the technological development of the region. Smurfit Kappa adds that, apart from the power plant and the waste water treatment plant which are both part of the Propapier project, the project does not attract additional investment to the region, and that no increased efficiencies from clustering of paper mills were to be expected. No extension of the value-added chain was to be expected, e.g. there was no reason to add a corrugator plant since there were no customers for corrugated board in the region.
- (62) Smurfit Kappa adds that it could be foreseen in 2007 that whatever the number and quality of jobs created by the Propapier investment, the number of jobs lost elsewhere would be higher.
- (63) Based on the figures given in the opening decision, Smurfit Kappa calculates that the aid amounts to approximately EUR 350 000 per direct job created. Smurfit Kappa questions whether these jobs are created in the region on a permanent basis and whether they can be characterised as high quality jobs. Smurfit Kappa also questions whether the region really benefits from these jobs, since part of the Propapier staff commute from and to other regions. Smurfit Kappa wonders whether the fact that part of the key production team came from the Propapier mill in Burg (Sachsen-Anhalt) is the kind of benefit that justifies subsidies.
- (64) As for the 529 indirect jobs, Smurfit Kappa quotes a 2010 Propapier board member, mentioning only 329 indirect jobs and that (only) over 60 % of the workers are from the region. Smurfit Kappa is of the opinion that more detailed information (e.g. whether maintenance jobs or jobs in infrastructural projects are included, whether the indirect jobs are permanent positions) is needed to properly assess the regional effect, and it urges the Commission to carefully look into this.

4.6. *INFRASTRUCTURE AID TO PROPAPIER*

- (65) Last but not least, Smurfit Kappa refers to the separate Commission decision to open the formal investigation on infrastructure aid to Propapier (State aid case SA.36147). Smurfit Kappa takes the view that the funding of the waste water treatment plant constitutes investment aid that cannot be seen separate from the aid covered by the SA.23827 opening decision and that the Commission should assess both measures under the same procedure or

otherwise should explain why they cannot be considered to be part of the same project.

## 5. COMMENTS FROM GERMANY

### 5.1. PRELIMINARY REMARKS

- (66) Germany is of the opinion that after the annulment of its decision N 582/07, the Commission should not have initiated the formal investigation procedure in accordance with Article 108(2) of the TFEU, but should have adopted a decision within the preliminary investigation in accordance with Article 4(3) of Council Regulation No (EC) 659/1999<sup>(17)</sup>. Germany stresses that the General Court judgment in case T-304/08 did not require the Commission to initiate the formal investigation procedure. Germany finds it incomprehensible that, without new facts, the Commission now expresses doubts on the question whether a situation of overcapacity existed in the market for CCM before 2008, while it has clearly concluded in the annulled decision that the market was not in overcapacity and that the 5 % threshold of § 68(b) of the RAG was not exceeded, and has defended this position before the General Court.
- (67) Germany observes that the mere fact that an applicant has come forward does not substantiate “serious difficulties” for the Commission to determine if the aid is compatible with the internal market, and that the choice of procedure should not be dictated by a third party. Germany argues that the fact that after the investment the beneficiary has no more influence on competition (since it does not have a higher market share) than before the investment supports this conclusion. Germany adds that, in fact, the paper factory was intended primarily to satisfy Progroup’s additional internal demand for CCM.
- (68) Germany adds that should the Commission decide to make an in-depth assessment, it should consider the fact that the thresholds of § 68 of the RAG are not exceeded as an important indicator that the aid has limited impact on competition.
- (69) Germany submitted different studies:
- (a) a 2013 economic analysis of investment aid to Progroup<sup>(18)</sup> (hereinafter: ECA report), commissioned by Progroup for use in the State aid case SA.23827. The report is based on information provided by Pöyry Management Consulting Oy (Pöyry);
  - (b) a 2013 report established by Roland Berger Strategy Consultants<sup>(19)</sup> (hereinafter: Roland Berger report) at the request of Progroup. The report compiles an *ex post* comparison between the decided investment site Eisenhüttenstadt and an alternative location, namely [...].
  - (c) a 2007 analytical report from Deutsche Bank Research on Smurfit Kappa<sup>(20)</sup> (hereinafter: Deutsche Bank study).

(70) Germany also submitted copies of the pleadings and annexes in case T-304/08.

5.2. *MARKET DEFINITION*

5.2.1. RELEVANT MARKET FOR CCM — OPEN MARKET V OVERALL MARKET

(71) Germany contests Smurfit Kappa's comments that the PM2 machine is indeed optimised for producing gram weights between 70 g/m<sup>2</sup> and 130 g/m<sup>2</sup> but can easily be adjusted to heavier or lighter weights. The PM2 machine can technically produce grammages until 150 g/m<sup>2</sup>. Propapier also has a commercial interest in producing higher grammages when their market price increases. Germany adds that the argumentation of Smurfit Kappa is in contradiction with constant Commission decision practice (the Smurfit Kappa specifications go below the smallest market segmentation that the Commission has used for market definition purposes in similar cases).

(72) In its comments, Germany also argues that it is not relevant to distinguish between the open and the overall market. The open market is not the relevant product market, but part of a total market for CCM. Germany claims that there are no independent statistical data for the open market, and that the impact of the subsidised investment on competition and trade can only be assessed on the basis of the overall market.

(73) Germany further claims that the distinction between CCM used in vertically integrated groups and CCM supplied to the open market is artificial and arbitrary. Paper produced in vertically integrated groups and paper supplied on the open market is highly interchangeable (same base material and same product characteristics). Vertically integrated producers trade on both sides of the market (which causes market effects in price and demand/supply on the overall market and in the value-added chain), thus there is no independent open market. CCM used in-house and CCM supplied on the open market depend on each other: vertically integrated producers also supply competitor's corrugated board producers and buy CCM from other competitors, among others to optimise their own production and logistics. According to Germany, quantities involved in such optimisation transactions would have to be allocated to the CCM open market, if at all a distinction is made.

(74) Germany also claims that there is a single market for CCM which includes recycled fibre and virgin fibre based CCM, regardless of its weight. Recycled paper based testliners and flutings, on the one hand, and kraftliners and virgin fibre based CCM are interchangeable on both supply and demand sides. Most paper factories are technically able to produce CCM from both recycled and virgin fibre with the same machines. To enable the Eisenhüttenstadt plant to use virgin fibre, a one-off investment of EUR [...] million, which is less than [...] % of the overall investment, would be sufficient.

- (75) Manufacturers also shift production to lower or heavier grammages when prices drop for certain gram weights; chains of substitution then result in price and quantity adjustments. On the demand side, in case of significant price differences between heavier and lighter weight CCM, customers (packaging manufacturers) can substitute heavier weight paper by more layers of cheaper lighter weight paper.
- (76) In addition, liners and flutings are perfectly substitutable from the supply side: machines can produce both and readily switch.
- (77) As for the geographic market, Germany claims that numerous characteristics suggest that it extends beyond the EEA. Large quantities of CCM are imported into the EEA, e.g. from China, and exported from the EEA, e.g. 585 000 t/a to Africa, Middle East, Asia and Turkey in 2005. In 2007, approximately [...] % of CCM bought by Progroup was imported from outside the EEA ([...] t/a from [...]).
- (78) Germany concludes that there is only one relevant market for CCM, which is at least EEA-wide, includes intragroup sales, liners and flutings, all grammages, and CCM based on recycled and virgin fibre. According to Germany, this conclusion is corroborated by the high correlation between the prices of testliners of all grammages and the prices of testliner and kraftliner, even after controlling for raw material input cost<sup>(21)</sup>.

#### 5.2.2. RELEVANT MARKET FOR CORRUGATED BOARD

- (79) Germany agrees with the Commission's view expressed in its opening decision that corrugated board constitutes a separate relevant product market (both from the supply and the demand side).
- (80) In its comments, Germany claims that the relevant geographic market for corrugated board is EEA-wide (as set by default in § 70 of the RAG): there are no trade barriers, no technical differences, no national preferences, it is produced according to uniform standards, and average prices in the EEA vary little. Germany claims that the largest Progroup factory (Burg) ships over [...] % of its corrugated board output in volume terms beyond 400 km and over [...] % beyond 500 km and some [...] % even between 700 km and 1 100 km. Considering all Progroup factories, in 2007, Progroup supplied [...] % of its output to buyers located over 400 km of its factories, as a rule crossing at least one national border. Most areas supplied by Progroup overlap and cover a large part of the EEA. Between [...] % and [...] % of corrugated board shipments from the Progroup plants cross at least one country border, so even if markets were defined by plant, geographic markets would be supra-national.
- (81) The average prices of corrugated board in the supplied EEA countries vary by less than 10 %. This should be considered as small, given that within Germany price fluctuations for given types of corrugated board of up to 20 % around the average can be observed.

- (82) For Progroup as a whole, the percentage of transport costs of corrugated board remains on average below [...] % of overall turnover up to a shipping distance of 600 km. This percentage however heavily depends on the quality type of corrugated board.
- (83) Germany argues that given that local markets overlap, there exists a chain of substitution effect which affects prices and competitive conditions throughout an area much larger than the selling radius of a given site: a decrease in price of one factory results in an expansion of its shipment area into one of its neighbouring competitors, which in turn reacts to decreasing demand for its product and the decline in capacity utilisation by a more aggressive price policy which will affect areas not reached by the initial expansion. The price effects are stronger the more pronounced the overlap between shipment areas is. In the corrugated board market the overlaps are substantial.
- (84) Therefore Germany argues that it is not relevant to also consider a narrower market (as considered by the Commission in its opening decision) which covers only the Propapier PM2 core delivery countries.

#### 5.2.3. MARKET SHARE

- (85) On the basis of the market definitions proposed by Germany, the market shares of Progroup on the relevant markets are well below 25 %, before and after the investment. Germany presents the same market share figures as in the Commission opening decision (for CCM and corrugated board), and adds additional figures for CCM assuming that the relevant geographic market covers the EEA and neighbouring countries. These additional figures show market shares for 2011 which are slightly below those in the Commission opening decision.

#### 5.3. CAPACITY INCREASE CALCULATION

- (86) Germany contests the capacity figures advanced by Smurfit Kappa, which alleges a capacity created of 650 000 t/a or even up to 750 000 t/a. Germany explains that Smurfit Kappa's figure on Propapier's capacity of 650 000 t/a corresponds to the technically possible maximum capacity and does not reflect the actual production capacity of Propapier PM2, which is lower because the Propapier PM2 machine is expected to produce mainly CCM of lighter grammage ranges (causing lower output due to higher production complexity). Germany informs that in 2012 the Propapier PM2 production amounted to [ $< 615\,000$ ] t.
- (87) Germany adds that even if 650 000 t/a was taken into account, this would not lead to a capacity increase of more than 5 % on the CCM market. Germany further informs that the capacity of 750 000 t/a referred to by Smurfit Kappa is the theoretical capacity established in the framework of environmental protection licences (the "Immissionsschutzrichtlinien" authorisation).



- (88) Germany is of the view that the overall capacity of 615 000 t/a must not be taken into account for the calculation of the capacity increase on the open market, because [ $> 365\,000$ ] t/a of this total capacity will be used internally, and only [ $< 250\,000$ ] t/a will be sold on the open market. Germany states that in its opening decision the Commission rightly calculated the capacity increase as a proportion of the overall market<sup>(22)</sup>, and that measuring the capacity increase in terms of the size of open market is not appropriate.
- (89) Germany rejects the correctness of the capacity figures advanced by Smurfit Kappa, in particular the 285 000 t/a mentioned by Smurfit Kappa as being excess recycled CCM production, to be sold on the open market by Propapier in 2010. Germany states that this figure is based on an unknown source.
- (90) Germany rejects the method to calculate the capacity increase on the open market suggested by the complainant, which takes account of a so-called “displacement effect”. Germany argues that it would result in the same capacity increase on the open and on the overall market, independently of what proportion Propapier actually sells on the open market, and the capacity increase thus calculated for the open market would not change even if Propapier would not offer any CCM on the open market, i.e. use all its new production in-house. Germany clarifies that the Propapier PM2 capacity which will be used internally does not increase the supply that is available on the open market, but has the only effect of reducing the demand that has to be satisfied. Germany therefore maintains that only the [ $< 250\,000$ ] t/a to be sold on the open market must be taken into account in the numerator when calculating the capacity increase in the open market, whilst the displaced demand of 240 000 t/a needs to be taken into account in the denominator, to reduce the overall size of the open market.
- (91) Germany argues that the figure of [ $< 250\,000$ ] t/a to be sold externally is realistic and was accepted by the Commission at the time of the approval of the initial decision and in the opening decision. The new Progroup corrugator plant in Stryków was expected to use about [100 000-200 000] t/a of CCM. In addition, Progroup planned the construction of other facilities in eastern Europe, which would have tied an additional part of the capacity of Propapier PM2 to internal use.

#### 5.4. *MARKET GROWTH AND OVERCAPACITY*

- (92) For the purpose of the § 68(b) RAG test, the average annual growth rate of the apparent consumption of the product concerned over the last five years has to be compared with the average annual growth rate of the EEA’s GDP.
- (93) Germany rejects the Commission conclusion in the opening decision that based on volume figures and growth of real EEA GDP, the CCM market was growing in the relevant period 2001-2006 (CCM 2,15 % compared to GDP growth of 1,97 %) while it was decreasing in value terms (nominal growth

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rate of CCM market of 0,02 % compared to nominal EEA GDP growth rate of 3,98 %).

- (94) Germany argues that only the growth in volume terms of the market reflects actual growth in demand on that market. Germany assumes that, on a market in which demand increases faster than GDP, additional capacity can be quickly absorbed and thus only has a negligible impact on competition.
- (95) Germany claims that the Commission statement in recital 106 and sequitur of its opening decision that GDP grew faster than the overall CCM market gives a distorting picture, because it compares market growth in value terms with GDP growth at current prices, i.e. figures which have not been corrected for inflation. Germany considers that value figures reflect factors which play a part in pricing, but have nothing to do with real demand (e.g. an increase in input costs would result in growth even though actual demand remains unchanged). Footnote 62 of the RAG, which states that apparent consumption must be calculated on the basis of “production”, suggests that calculations for the test of § 68 (b) of the RAG should be in terms of output as a result of the investment project in volume terms.
- (96) Germany quotes the 2007 Deutsche Bank study, which — taking the capacity of the planned Propapier PM2 into account — states that “New capacity is not a threat, but a need to satisfy demand”<sup>(23)</sup>. Germany claims that such an explicit statement by industry experts in 2007 is sufficient evidence against concerns of structural overcapacity.
- (97) Germany argues that the capacity shut-downs in the CCM industry referred to by Smurfit Kappa were not driven by the will to restore the supply-demand balance on the market but were mostly due to old and inefficient machines. This results among others: (1) from an increasing trend towards lighter CCM by customers, which older machines are unable to produce; (2) from low economies of scale of older machines due to lower production capacities; and (3) the increased standardisation of trim width to 2,5/2,8 m of corrugated board machines, which leads for non-standardised machines to significant waste of paper if CCM of different width is supplied<sup>(24)</sup>. Furthermore, whilst Smurfit Kappa closed down own plants, it also invested in new capacity in the EEA. In this context, Germany quotes the Deutsche Bank study which qualifies the consolidation of Smurfit Kappa (after the 2005 merger with Jefferson Smurfit Group) as an attempt to improve the quality of its assets<sup>(25)</sup>. Germany adds that in 8 of the 10 years before 2007, as well as over the whole period, Smurfit Kappa actually exhibited a net increase in its CCM capacity in the EEA rather than a decrease<sup>(26)</sup>.
- (98) The Deutsche Bank study also states that the three planned capacity expansions in Europe (Progroup, Mondi, and SAICA) known in 2007 are needed in order to cater for the expected demand in 2009-2012, and that operating rates will remain high despite this capacity increase. Germany

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observes that the Deutsche Bank study, as well as Pöyry data, refer to operating rates above 90 % in the sector for the period 2006-2008. The study further identifies GDP growth as key demand driver for the corrugated and CCM industry, and notes that the estimated GDP growth rate of 2,2 % and 2 % respectively for 2007-2008 supports their estimated demand CAGR<sup>(27)</sup> of 2,9 % for 2006-2009. Pöyry volume data as estimated in 2007 refer to CCM annual growth of 1,5 % in western Europe for the period 2005-2015, and 6,2 % in eastern Europe for the period 2005-2010, dropping to 3,8 % for the period 2010-2015. In Germany's view, periods of declining prices, long capacity building times, and volatile demand are typical for this cyclical industry, and must not be taken for indicators of structural overcapacity.

- (99) Germany concludes that all evidence available at the time of the annulled decision depicts a positive development for the CCM market at the time of the investment decision and after 2007, and that there was no indication for imbalances in the CCM market.

#### 5.5. *INCENTIVE EFFECT*

- (100) Germany is of the opinion that, since based on its figures the market share and capacity thresholds of § 68 of the RAG are not exceeded, there is no need for a detailed verification of whether the aid has an incentive effect. Germany observes that at the time of the initial approval decision this incentive effect was only assessed based on formal criteria, and that these formal criteria were all fulfilled. At that time, it was not necessary to submit a full business plan to prove that the aid was indeed critical for the decision to locate the investment in an assisted area and no such detailed plan was established by Progroup at the time. Germany however points out that the CEO and owner of Progroup confirmed that the aid was instrumental for Progroup in the choice of the Eisenhüttenstadt site for the location of its Propapier PM2 investment project, and that he would have otherwise invested in [...]. Progroup therefore asked Roland Berger Strategy Consultants to compare the economics of choosing a location in [...] with the location in Eisenhüttenstadt.
- (101) The 2013 Roland Berger report states that the objective of the investment was to enhance [...] of Progroup. [...] is considered a better location since [...]. Other advantages of the [...] location are: cheaper [...], cheaper [...], lower [...] and [...]<sup>(28)</sup>. According to the report, the choice of Eisenhüttenstadt resulted in additional annual costs of EUR [...] million to [...] million compared with [...]. Total discounted cost advantages amount to between EUR [...] million and EUR [...] million. Part of these additional costs was offset by the grant and by expected [...]. Eisenhüttenstadt also offered an opportunity to expand in the future, the cost of land was lower, fresh water supply was guaranteed and the planned power plant would supply steam.
- (102) Germany claims that the investment aid was just high enough to cover the cost disadvantages — of a location in the disadvantaged region of North-East

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Brandenburg — in case of a successful overall strategy of [...]. Germany claims that on this basis Progroup took the entrepreneurial decision to invest in Eisenhüttenstadt and therefore the investment aid provided the necessary incentive for Progroup to choose Eisenhüttenstadt as location for Propapier PM2, rather than a location in [...].

#### 5.6. CONTRIBUTION TO REGIONAL DEVELOPMENT

- (103) Germany explains that the Propapier PM2 investment project fits into the strategy to support the development of an expert paper industry sector in the Land Brandenburg. The paper industry is one of the expertise fields identified in the coalition agreement for the fourth election period 2004-2009 for the Land Brandenburg<sup>(29)</sup>.
- (104) A 2007 document established by Pöyry at the request of the Ministry of Economy of the Land Brandenburg<sup>(30)</sup> states that overall the expected development of the paper industry expertise was positive at the time of adoption of the annulled decision. While no specific new paper industry investment plans (other than the Propapier PM2) were identified, there was a clear possibility of capacity expansions or diversification or enlargement of the product portfolio of established companies.
- (105) Germany emphasises that the investment took place in a heavily disadvantaged region: in 2004 GDP per capita in Brandenburg-Nordost was 76,3 % of the EU-27 average and the unemployment rate in 2005 stood at 19,8 %, equivalent to 220 % of the EU-27 average and 178 % of the German average. Eisenhüttenstadt is part of the regional growth area (regionale Wachstumskern — RWK) Frankfurt Oder/Eisenhüttenstadt, which showed for 2006, compared with 1998, a fall of 15 % of employees paying social security contributions or, in absolute terms, a reduction of 7 573 employees.
- (106) Germany argues that the Propapier investment was expected to form an important contribution to the diversification of the region's mono-structure economy highly dependent on the steel industry (Arcelor) threatened by rationalisation initiatives. Germany refers to the loss of hundreds of jobs in the steel industry since 2003 in Eisenhüttenstadt.
- (107) Germany also points to the potential benefits of the Propapier PM2 investment in terms of extension of the value-added chain (e.g. investments in corrugator plants, packaging industry etc.).
- (108) Germany is of the view that the creation of 150 high-quality direct jobs (of which, in 2012, 82 % were from the region) and of some 450 indirect jobs highly contributes to the development of the heavily disadvantaged Brandenburg region. Germany also points to substantial training activities<sup>(31)</sup> for local workers as well as cooperation with the Technical University in Cottbus. The training activities contribute to the overall qualification level of workers in a region characterised by a lack of technically qualified staff,

and thus potentially attract other investors. Germany adds that the demand for trained staff also leads to the creation of specific training programmes by regional education institutions.

- (109) Germany stresses the highly innovative character of the Propapier PM2 machine, which is the first in the world to produce CCM of very light weight, allowing it to put Eisenhüttenstadt on the map as a know-how centre for the sector.
- (110) Contesting Smurfit Kappa's allegations, Germany claims that Progroup did not reduce its personnel when the Propapier PM2 paper mill was set up. It also asserts that the paper machine was assembled in Eisenhüttenstadt and only a few components were produced outside Germany.
- (111) Germany also stresses the importance of the long duration of the investment for a sustainable development of the region. According to Germany, the commitment of Progroup was conceived as a long-term project since the initial planning, in the framework of its vertical integration and its eastern Europe strategy, and therefore the Propapier PM2 investment will also ensure positive effects in the longer term.
- (112) Germany adds that the Propapier PM2 investment also contributes to a higher standard of living in the region: wages paid by Propapier in Brandenburg were regularly higher than the average gross wages and salaries in Brandenburg, which amounted in 2008 to EUR 22 932. This contributes to an increase of the GDP per capita and thus to a positive development of the region. Germany also adds that the expected turnover of the Propapier investment and the job creation lead to higher tax income for the region, allowing further public investments which also contribute to the socioeconomic development of the region.

#### 5.7. *NEGATIVE EFFECTS*

- (113) Germany emphasises that the aid did not lead to overcapacity in the sector. After the adoption of the annulled decision, the Commission approved a series of other State aid measures in the paper sector<sup>(32)</sup>, for which it had to take account of the capacity created by the Propapier investment when calculating the capacity increase on the relevant market. Germany claims that the Commission would not have approved these measures if the sector had been characterised by significant overcapacity.
- (114) Germany states that, without State aid, the new plant would have been built anyway, but elsewhere. Given that in the relevant market (EEA), with or without aid, the installed CCM capacity would not differ, Germany concludes that there cannot be any negative effects of the aid on competition. Therefore, the aid cannot be seen as a cause for jobs losses at the site of competitors, as is alleged by Smurfit Kappa, but rather as the cause for the creation of employment in Brandenburg.

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- (115) Germany adds that the European market for CCM is characterised by a dominant competitor, Smurfit Kappa, which a large number of smaller vendors, including Progroup, have to face. Smurfit Kappa is by far the largest market participant expressing an aggressive strategy through the acquisition of a large number of competitors. In contrast, Progroup is a small market player and is focused on organic growth and not on acquisitions of competitors. Germany therefore claims that as the products of the Propapier PM2 plant are in direct competition with the offers of Smurfit Kappa, the Propapier PM2 investment will help to reducing the outstanding position of this dominant market participant and to increase competition in the market for CCM as a whole.

## 6. ASSESSMENT OF THE MEASURE

### 6.1. *EXISTENCE OF STATE AID IN THE MEANING OF ARTICLE 107(1) TFEU*

- (116) The financial support under the measure was given by Germany in the form of an investment premium and was financed from public resources. The support can thus be considered as given by the Member State and through State resources within the meaning of Article 107(1) TFEU.
- (117) As the aid was granted to a single company, Propapier, the measure is selective.
- (118) The financial support given to Propapier relieved the company from costs which it normally would have had to bear itself and therefore the company benefited from an economic advantage over its competitors.
- (119) The financial support from the German authorities was given for an investment resulting in the production of different types of CCM. Since these products are subject to trade between Member States, the support given is liable to affect trade between Member States and to distort competition.
- (120) Consequently, within this preliminary assessment, the Commission considers that **the measure constitutes State aid** to Propapier within the meaning of Article 107(1) TFEU.

### 6.2. *LEGALITY OF THE AID MEASURE*

- (121) According to article 108(3) TFEU, Member States have to notify all aid measures before putting them into effect, unless they are covered by a block exemption. Although the aid was granted in the context of the regional block-exempted aid scheme XR 6/07 (see recitals 35 and 36 above), it is excluded from the scope of the relevant block exemption regulation, i.e. Regulation (EC) No 1628/2006<sup>(33)</sup>, as it exceeded the applicable individual notification threshold (in this case EUR 22,5 million).
- (122) By notifying the aid measure in 2007, Germany complied with the applicable individual notification requirement expressed in Article 7(e) of Regulation

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(EC) No 1628/2006. However, following the annulment of the initial Commission decision, and since the aid was paid out before the General Court reached its decision on the annulment action brought by Smurfit Kappa, the aid must be regarded as illegally granted.

- (123) Since the proposed aid exceeds the individual notification threshold of Article 7(e) of Regulation (EC) No 1628/2006, the Commission will assess the measure on the basis of the RAG.

6.3. *RELEVANT PERIOD FOR PURPOSES OF THE ASSESSMENT AND APPLICABLE PROCEDURE*

- (124) As the Commission explained in recitals 47 to 50 of its opening decision, in order to give effect to the General Court's judgment in Case T-304/08, the Commission's preliminary re-assessment of the aid measure must in principle be based on the situation that existed at the time of the adoption of the annulled decision. As its task is to readopt a decision that is not vitiated by the error identified by the General Court in its above mentioned judgment, the Commission may only take into account facts, reports and other data that could have been available to it before adopting its initial decision on the compatibility of the measure<sup>(34)</sup>.

- (125) In the present case, the scope of the investment project was reduced after the adoption on 2 April 2008 of the annulled decision, leading to lower eligible costs, and the aid amount eventually granted was reduced accordingly. Even though the Commission will adopt a decision on the aid measure as implemented, taking account of the fact that the value of the eligible costs as well as of the aid granted by Germany to Propapier were reduced, the Commission will base its assessment on the information that could have been available at the time of the adoption of the annulled decision, applying the legal State aid framework applicable at that time. In general, in cases of regional aid to large investment projects, the Commission has to take a decision before the investment is actually completed, on the basis of estimates of market figures and future perspectives. The authorised aid intensities are not adapted afterwards if, some years later, the market has developed differently than anticipated at the time of adoption of the Commission decision.

- (126) The procedure for adopting a new decision may be resumed at the very point at which the illegality occurred<sup>(35)</sup>. In the context of the State aid discipline, the Court of Justice has held that, if the analysis carried out by the Commission in a previous decision has been defective, thus entailing the illegality of that decision, the procedure for replacing that decision can be resumed at that point by means of a fresh analysis of the examination already undertaken<sup>(36)</sup>.

6.4. *COMPATIBILITY WITH THE GENERAL PROVISIONS OF THE RAG*

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- (127) At the time of the adoption of the annulled decision in 2008, the Brandenburg-Nordost region was eligible for regional aid under Article 107(3)(a) TFEU.
- (128) The notified aid was to be granted for initial investment, as defined in point 4.1 of the RAG, and the eligible costs involve the costs of buildings and plant/machinery, in line with point 4.2 of the RAG (see recital 30 above). Germany confirmed that the intangible assets will fulfil the conditions of § 56 of the RAG (see recital 31 above).
- (129) The beneficiary's own contribution, free of any aid, to the eligible costs is above the 25 % threshold required in accordance with point 4.1 of the RAG (see recital 34 above).
- (130) The formal incentive effect rules of § 38 of the RAG were respected: as regards the direct grant initially envisaged, the beneficiary applied for the aid on 15 May 2007 and the German authorities confirmed in writing on 24 May 2007, before the start of work on the project in December 2007 that, subject to the final outcome of a detailed verification, the project met the conditions of eligibility laid down by the relevant scheme.
- (131) In fact, the total aid was finally granted in the form of an investment premium which is paid automatically if the objective criteria established by the relevant legal basis are fulfilled (block-exempted aid scheme XR 6/2007). For this investment premium, no previous aid application and written confirmation that the project in principle meets the conditions of eligibility is required, as set out in footnote 41 of the RAG: in the case of aid granted in accordance with approved tax aid schemes, where a tax exemption or reduction is granted automatically to qualifying expenditure without any discretion on the part of the authorities, Member States do not have to confirm in writing that, subject to detailed verification, the project in principle meets the conditions of eligibility laid down by the scheme before start of work on the project.
- (132) Germany confirmed that the investment was to be maintained in the assisted region for at least 5 years after its completion (point 4.1 of the RAG).
- (133) Germany also confirmed that the rules on cumulation of aid were to be respected (point 4.4 of the RAG).
- (134) The Commission therefore considers that, on the basis of the information that was available to it before the adoption of the annulled decision, **the aid measure complies with the standard compatibility criteria laid down in the RAG.**

6.5. *COMPATIBILITY WITH THE RAG PROVISIONS FOR AID TO LARGE INVESTMENT PROJECTS*



(135) Since the regional aid was granted for a large investment project, the Commission also has to assess its compliance with the specific requirements for regional aid to large investment projects set out in point 4.3 of the RAG.

#### 6.5.1. AID INTENSITY (§ 67 OF THE RAG)

(136) With a notified eligible expenditure of EUR 586 722 900 in discounted value and a standard regional aid ceiling of 30 % GGE applicable in the Brandenburg-Nordost region, the adjusted maximum aid intensity permitted in accordance with § 67 of the RAG is 12,3 % GGE.

(137) After the adoption of the annulled decision, Germany informed the Commission that the eligible costs have been reduced, because the power plant investment had been excluded from the subsidised project. If the scaling down mechanism foreseen in § 67 of the RAG had been applied to the reduced eligible costs, this would have resulted in a higher maximum aid intensity. However, the beneficiary started works on the project in a scenario where an aid intensity of 12,3 % GGE was notified to and later approved by the Commission. Therefore, it can be concluded that the initially approved aid intensity was sufficient to trigger the investment decision, and that an increase in the aid intensity would have no further incentive effect<sup>(37)</sup>.

(138) Aid in the amount of EUR 50 559 153 in nominal value, corresponding to EUR 44 172 973 in present value, was paid out to Propapier for the reduced investment project. This corresponds to an aid intensity of 12,51 % GGE, and thus exceeds the maximum allowable of 12,3 %. Germany however confirmed that the excessive aid, including interest, in a total amount of EUR 1 099 539, has been reimbursed by Propapier. Hence the aid remaining with the beneficiary does not exceed EUR 43 415 903, i.e. 12,3 % GGE of the reduced eligible costs of the investment project. On this basis, it can be concluded that the amount of aid granted is in line with § 67 of the RAG.

(139) In its opening decision on State aid case SA.36147 (C 30/10)<sup>(38)</sup>, the Commission expressed doubts on the potential existence of a single investment project, within the meaning of § 60 of the RAG, between the Propapier paper plant investment and several infrastructure measures undertaken by the public authorities in the industrial area hosting the Propapier investment. The Commission therefore stated in its opening decision on the regional investment aid case SA.23827 (2013/C) — Germany — LIP — Propapier PM 2 GmbH that, if after its formal investigation on State aid case SA.36147 (C 30/10) — Germany — Alleged infrastructure aid for Propapier PM2 the Commission would conclude that other aided investments constitute a single investment project with the Propapier paper plant investment, or that additional aid was granted to Propapier in the form of infrastructure measures, the compliance of the regional investment aid to Propapier with § 67 of the RAG would have to be assessed taking account of the combined aid package.

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(140) The Commission will take account of the regional aid granted to Propapier in its compatibility assessment of the infrastructure aid measures when adopting its final decision on State aid case SA.36147 (C 30/10)<sup>(39)</sup>.

#### 6.5.2. APPLICATION OF THE TESTS PROVIDED IN § 68(A) AND (B) OF THE RAG

(141) Since the total amount of aid from all sources exceeds the applicable individual notification threshold, the Commission has to carry out the tests laid down in § 68(a) and (b) of the RAG.

(142) Aid to large investment projects falling under § 68 of the RAG and where:

- the beneficiary accounts for more than 25 % of the sales of the product concerned before or on completion of the investment, or
- the capacity created by the project is more than 5 % of the size of the market using apparent consumption data of the product concerned, unless the average annual growth rate of its apparent consumption over the past five years is above the annual growth rate of the EEA's GDP,

can be approved only after a detailed verification, following the opening of the formal investigation provided for in Article 108(2) TFEU, that the aid is necessary to provide an incentive effect for the investment and that the benefits of the aid measure outweigh the resulting distortion of competition.

(143) To carry out the relevant tests provided in § 68(a) and (b) of the RAG, the Commission has first to establish the relevant product and geographic markets.

##### 6.5.2.1. Products concerned

(144) The Commission considers that, even though the Propapier PM2 machine may have been intended by Progroup to mainly produce testliner of 70/110 g/m<sup>2</sup> and fluting of 70/130 g/m<sup>2</sup> (as claimed by Smurfit Kappa), the market delineation should be based on the actual potential output of the machine. Therefore, the Commission confirms that, as submitted by Germany and described in recital 25 above, the investment project directly concerns two types of CCM, namely **testliner up to 150 g/m<sup>2</sup> and fluting made from recycled fibre**.

(145) Since an estimated 75 % of the CCM produced in the aided facility was to be used internally within Progroup for the production of the downstream product, the Commission considers, in line with § 69 of the RAG, that the downstream product, i.e. **corrugated board**, is also a product concerned by the investment project.

##### 6.5.2.2. Relevant product market

(146) According to § 69 of the RAG, the relevant product market includes the product concerned and its substitutes considered to be such either by the

consumer (by reason of the product's characteristics, prices and intended use) or by the producer (through flexibility of the production installations).

**Relevant product market for CCM**

- (147) Germany submitted that the two types of CCM to be produced in the aided facility, i.e. testliner up to 150 g/m<sup>2</sup> and fluting made from recycled fibre, belong to one and the same overall CCM market, which includes also kraftliner and fluting made from virgin fibre, independently of their weight. Germany substantiated this by referring to the relations of substitutability between the different products.
- (148) The Commission indeed considers that flutings made from recycled fibre and from virgin fibre are substitutes from the supply side point of view. Fluting made from virgin fibre can be produced on the same production line as fluting made from recycled fibre, only an adjustment concerning the preparation of the raw material is necessary (one-off investment of EUR [...] million, which is less than [...] % of the overall investment costs). Moreover, fluting based on virgin fibre is in practice made from a mixture containing up to 40-50 % of recycled fibre.
- (149) Fluting based on virgin fibre is approximately 15 % more expensive than fluting made from recycled fibre only. However, for the consumer, both products have the same basic characteristics and the same use. Consumers can substitute a heavier (e.g. 140 g/m<sup>2</sup>) recycled fibre based fluting with a lighter (e.g. 127 g/m<sup>2</sup>) fluting made from virgin fibre. The possibility to use lighter fluting based on virgin fibres compared to recycled fibres outweighs the price difference. Therefore the Commission considers that both products are also substitutes from a demand side point of view.
- (150) As regards demand side substitutability between recycled fibre based testliner and virgin fibre based kraftliner the same applies: they have the same use, and the higher price for kraftliner is offset by the possibility to substitute a heavier testliner with a lighter kraftliner.
- (151) Fluting (both from virgin and recycled fibre), testliner and kraftliner are full substitutes from the supply side viewpoint, since every modern paper machine, including the beneficiary's, can produce both.
- (152) Finally, CCM of different weights (e.g. below 150 g/m<sup>2</sup> and above) belong to the same relevant market, since they are substitutable for the consumer: the consumer can replace a single layer of heavier CCM by more layers of cheaper and lighter CCM.
- (153) Based on the above, it could be concluded that the relevant product market for CCM is the overall CCM market. In earlier merger decisions<sup>(40)</sup> however, the Commission left the question of the relevant market open, especially as regards the subdivision into virgin fibre based products and recycled fibre based products. The Commission notes that Germany provided market data

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also for the narrowest possible relevant market of testliner up to 150 g/m<sup>2</sup> and fluting made from recycled paper.

- (154) Progroup is a vertically integrated paper producer, competing on the overall market for CCM, where any integrated producer may decide, due to better conditions, to buy a certain product from Progroup rather than producing it in-house. Detailed analysis provided by Germany showed that even those vertically integrated manufacturers, which produce in-house as much CCM (measured in tons) as they need for their production of corrugated board, are buying and selling CCM from competitors depending on concrete needs of subtypes of CCM and logistic requirements. Because of the dominant presence of vertically integrated manufacturers, high market shares in the open market (i.e. for third party deliveries only) do not necessarily mean market power. On this basis, Germany concluded that the relevant product market is the overall CCM market covering both in-house deliveries of CCM and sales to third parties (= total market). Nevertheless, Germany also provided data for the open market only.
- (155) The Commission sees no reason to deviate from its practice in previous State aid<sup>(41)</sup> and merger decisions<sup>(42)</sup> in the paper sector (where the Commission either distinguished between the markets for all CCM and for recycled CCM only, or left the definition open, and either distinguished between overall/open market, or left the definition open, or defined the market to be the overall CCM market but calculated both scenarios). Therefore, on the basis of the information available to it before the adoption of the annulled decision, as well as of comments received after the opening decision that relate to the factual situation before the adoption of the annulled decision, the Commission decided to carry out the tests provided in § 68 of the RAG at the level of the market for all CCM and the market for testliner up to 150 g/m<sup>2</sup> and fluting made from recycled paper, both on the overall and on the open market.

***Relevant product market for corrugated board***

- (156) Corrugated board will not be produced in the aided facility, but it is a downstream product concerned by the investment project.
- (157) Germany submitted that corrugated board forms a standalone market from the supply side point of view, since machinery for the production of corrugated board cannot be converted, even with substantial additional costs, to manufacture other products.
- (158) On the demand side, corrugated board packaging is closest to cardboard boxes, however, corrugated board packaging is lighter, more stable and cheaper. Therefore, consumers of corrugated board, i.e. the producers of corrugated boxes, cannot substitute it either with other products for the majority of packaging needs.
- (159) Since no comments were received on this point, the Commission does not deviate from its previous practice in the merger decisions referred to above

and confirms its view, also taken in the annulled and in the opening decision, that **corrugated board** constitutes a separate relevant product market.

#### 6.5.2.3. **Relevant geographic market**

- (160) § 70 of the RAG establishes that for the purpose of applying the tests provided in § 68(a) and (b) of the RAG, “sales and apparent consumption will be defined at the appropriate level of the Prodcom classification, normally in the EEA or, if such information is not available or relevant, on the basis of any other generally accepted market segmentation for which statistical data are readily available”.

##### ***Relevant geographic market for CCM***

- (161) Germany claims that the relevant geographic market for CCM is at least EEA-wide and that it even extends beyond the EEA (i.e. including EEA neighbouring areas). The Commission sees however no reason to deviate from its practice in earlier State aid and merger decisions to consider the EEA as the relevant geographic market for CCM, and will therefore apply the market test provided in § 68 of the RAG at the generally accepted geographic market segmentation for CCM and recycled CCM for which data is readily available, which is EEA-wide.

##### ***Relevant geographic market for corrugated board***

- (162) Corrugated board will be manufactured by Progroup in other locations by using the CCM produced at the Eisenhüttenstadt facility. At the time of the notification, it was planned that Propapier would deliver CCM to Progroup plants located in Germany, as well as in France, the Czech Republic and in the future also to the plant in Stryków (Poland) after its set up in 2008. These plants would then in turn produce the downstream product, i.e. corrugated board.
- (163) Germany claims that the relevant geographic market for corrugated board is not narrower than the EEA, but nonetheless also provided data for the area covering the core delivery countries of Progroup (i.e. Czech Republic, France, Germany, the United Kingdom, the Netherlands and Poland). Taking into consideration the worst case scenario, and on the basis of its findings in earlier merger decisions<sup>(43)</sup> which indicated that corrugated board sheets may economically be transported for a distance of up to 400 km around the corrugator plant, the Commission leaves open the question of defining the relevant geographic market for corrugated board and will calculate market shares both at the EEA-level and in the area covering only the core delivery countries of Progroup.

#### 6.5.2.4. **Market shares**

- (164) To examine whether the threshold laid down in § 68(a) of the RAG is not exceeded, the Commission has to analyse the market share of the aid beneficiary at group level before and after the investment. The investment

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project started in 2007 and was completed by mid-2010, while full capacity was foreseen to be reached only by 2015. Germany indicated at the time of the notification that independent data concerning apparent consumption on the relevant markets was not available for the year after full capacity is reached, i.e. 2016. Therefore, the Commission decided to examine the market shares for the year after completion of the investment, i.e. 2011 for which independent forecasts were already available. This is an acceptable approximation since 92 % of the total capacity to be created by the project was expected to be available by then.

- (165) To establish the market share of Progroup at group level the Commission compared its total deliveries (including sales to third parties as well as captive sales within the group) in volume and in value terms in the given year to apparent consumption on the relevant markets. Market shares were also calculated separately for the open market of CCM, i.e. taking into account only non-captive sales of Progroup<sup>(44)</sup> and the total size of the market of third party deliveries.
- (166) The figures on overall EEA-wide apparent consumption in volume and in value terms on the markets for CCM, for testliner up to 150 g/m<sup>2</sup> and fluting made from recycled paper as well as for corrugated board were compiled for the purpose of the notification at the request of the beneficiary by Pöyry, a global consulting and engineering firm focusing on the energy, forest industry and infrastructure & environment sectors. Pöyry established data using its own database as well as data available in the public domain, e.g. in trade journals and provided by industry associations.
- (167) Because of a lack of independent figures concerning the size of the open market, this market volume was estimated by Germany on the basis of Pöyry capacity data for 2006. The method consisted in comparing for each integrated producer its production capacity of CCM and of corrugated board. If the capacity for corrugated board production is higher, this results in theory in a corresponding demand for the raw material, i.e. CCM, on the open market. To this extra demand of CCM by integrated producers is added the demand for CCM on the open market originating from non-integrated corrugated board producers. Calculated this way, the size of the open market of CCM is approximately 37 % of the total CCM market. This ratio was also used to estimate the size of the open market in 2011<sup>(45)</sup>.
- (168) This method does not allow to estimate the size of the open market for testliner and fluting made from recycled paper since, due to the supply side flexibility, no separate data are available distinguishing between recycled paper and virgin fibres based CCM production capacities. However, since recycled paper based CCM makes up some 70-80 % of the total CCM market, this high proportion is very likely to apply also to the open market, which means that market shares of Progroup on the open market of recycled fibre

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based CCM are only slightly higher than on the open market for all types of CCM.

- (169) Data concerning the size of the corrugated board market in the geographic area covering the core delivery countries of Progroup (i.e. Czech Republic, France, Germany, the United Kingdom, the Netherlands and Poland) was established on the basis of FEFCO<sup>(46)</sup> statistics submitted before the adoption of the annulled decision which indicate that this area represents 58 % of the total EEA market.
- (170) The market shares of Progroup in the relevant markets in the year before and after the investment, calculated on the basis of the market data provided by Germany (based on Pöyry and FEFCO data), are presented in Table 1 below.

TABLE 1

**Market shares of Progroup at group level on the relevant markets**

Market shares (in %)	2006		2011	
	volume	value	volume	value
CCM (overall market — EEA)	[0-10]	[0-10]	[0-10]	[0-10]
Recycled CCM only (testliner up to 150 g/m <sup>2</sup> and fluting made from recycled paper) (overall market — EEA)	[0-10]	[0-10]	[0-10]	[0-10]
CCM (open market — EEA)	[0-10]	[0-10]	[0-10]	[0-10]
Corrugated board (EEA)	[0-10]	[0-10]	[0-10]	[0-10]
Corrugated board (core delivery countries)	[0-10]	[0-10]	[0-10]	[0-10]

- (171) For all market definitions taken into account, Progroup's market share remains significantly below the 25 % threshold laid down in § 68(a) of the RAG. A

further segmentation based on grammage up to 130 g/m<sup>2</sup> will not increase the relevant market share above the critical threshold of 25 %.

- (172) Therefore, the Commission considers that the aid measure under scrutiny does not exceed the threshold laid down in § 68(a) of the RAG.

**6.5.2.5. Capacity increase and market performance**

- (173) The Commission also has to carry out the test provided in § 68(b) of the RAG. It needs to verify whether the capacity created by the project is less than 5 % of the size of the market measured using apparent consumption data of the product concerned, unless the average annual growth rate of its apparent consumption over the last five years is above the average annual growth rate of the EEA's GDP.
- (174) The Commission should first assess if the CCM market is underperforming in the EEA based on the average annual growth rate of its apparent consumption<sup>(47)</sup>.
- (175) The latest available data at the time of the notification were those for the years 2001 to 2006. Based on these data, the compound annual growth rate (CAGR) of apparent consumption of the overall CCM market in the EEA was 2,15 % in volume terms and 0,02 % in value terms in the period 2001 to 2006. The CAGR of apparent consumption in the EEA of testliner up to 150 g/m<sup>2</sup> and fluting made from recycled paper was 3,25 % in volume terms and 1,22 % in value terms in the same period.
- (176) As the CAGR of the European Economic Area's GDP<sup>(48)</sup> in the years 2001 to 2006 was 1,97 % in constant prices (i.e. volume terms) and 3,98 % in current prices (i.e. value terms), the CAGR of the consumption of CCM as well as of testliner up to 150 g/m<sup>2</sup> and fluting made from recycled paper exceeded the benchmark when calculated in volume terms, but was below the benchmark in value terms.

***Volume and/or value***

- (177) The Commission does not follow Germany's observation that the CAGR should only be calculated in volume terms and not in value (see recitals 93 and 94 above). It is true that in the present case only the value calculation triggers the need to calculate if the 5 % threshold of § 68(b) of the RAG is exceeded, but rejecting value calculations as a general rule would be in contradiction with previous Commission practice and would weaken the ability of the test to identify situations of overcapacity, e.g. where growth of supply strongly exceeds already high demand growth, and where average variable costs are relatively low. Consequently the Commission will verify whether the capacity created by the investment project exceeds 5 % of the size of the relevant market.

***Capacity test and capacity increase calculation***



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- (178) In accordance with § 68(b) of the RAG, the capacity increase is calculated as a proportion of apparent consumption of the product concerned, which by definition includes deliveries to third parties as well as in-house deliveries of CCM.
- (179) The capacity test of § 68(b) of the RAG aims to prevent that a substantial capacity increase (i.e. above 5 %) which is not underpinned by an appropriate growth of demand (i.e. the growth of demand is below EEA's GDP growth), has damaging effects on competitors, notably through its effects on prices. What is considered a substantial capacity increase is determined in terms of its proportion to the size of the market. For CCM, the size of the market is ultimately derived from the size of the downstream product market, independently of whether or not the downstream product is manufactured in-house or by third parties. Therefore, measuring capacity created solely in terms of the size of the open CCM market is not appropriate. In addition, as shown above, due to the interdependence between the overall and the open market, a price decrease in the open market would influence the “make-or-buy” decision of integrated producers and would immediately increase demand in the open market. On this basis, the Commission normally measures the capacity increase on the overall market<sup>(49)</sup>.
- (180) Germany indicated that the total capacity to be created by the project is 615 000 t/a of CCM (testliner and fluting made from recycled paper), which corresponds to EUR [...] million in value terms. At the same time, Germany indicated that apparent consumption of CCM in the EEA amounted to 23,363 million t in 2006 (in value terms EUR 9 409.76 million). Apparent consumption in the EEA of testliner up to 150 g/m<sup>2</sup> and fluting made from recycled paper is indicated to have been 18,281 million t in 2006 (in value terms EUR 6 752.698 million).
- (181) Based on the above figures, the capacity created by the Propapier project in Eisenhüttenstadt is 2,6 % of the total CCM market ([< 3] % in value terms), whereas it amounts to 3,4 % of the combined market for testliner up to 150 g/m<sup>2</sup> and fluting made from recycled paper ([< 5] % in value terms). It follows that the capacity created by the project is below 5 % of the apparent consumption (at EEA level) concerned.
- (182) Even applying as a worst case scenario the higher capacity creation figures advanced by Smurfit Kappa (650 000 t/a and 750 000 t/a), **the 5 % threshold would not be exceeded on the overall CCM market** (see Table 2 below).

TABLE 2

**Capacity increase on the overall CCM market (EEA)**

Relevant market(EEA)	Overall market for CCM	Overall market for recycled CCM (testliner up to 150 g/m <sup>2</sup> and
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		<b>fluting made from recycled paper)</b>
Volume in 2006 (in 1000 t)	23 363	18 281
Value in 2006 (in 1000 EUR)	9 409 760	6 752 698
Capacity increase in volume (applying 615 000 t/a)	2,6 %	3,4 %
Capacity increase in value (applying 615 000 t/a)	[< 3] %	[< 5] %
Capacity increase in volume (applying 650 000 t/a)	2,8 %	3,6 %
Capacity increase in value (applying 650 000 t/a)	[< 3] %	[< 5] %
Capacity increase in volume (applying 750 000 t/a)	3,2 %	4,1 %
Capacity increase in value (applying 750 000 t/a)	[< 3] %	[< 5] %

- (183) In order to take account of a worst case approach, the Commission also calculated the capacity increase as a proportion of open market sales of CCM. In this case, only that part of total capacity created by the investment which is aimed at production for open market sales should be taken into account. According to Germany, this amounted to [< 250 000] t/a. The remaining part of capacities to be created, i.e. [> 365 000] t/a (which, without the investment, would have to be purchased by Progroup from third parties and would thus constitute effective demand on the open market), would now be used internally within the group for further processing into corrugated board and therefore would have to be deducted from the size of the open market.
- (184) Since the size of the open market for CCM in the EEA was estimated to be 8,644 million t in 2006<sup>(50)</sup>, the capacity created by the project as a proportion of the size of the open market for CCM would amount to only [< 3] % in volume terms<sup>(51)</sup> (see Table 3 below).
- (185) At the time of the initial notification, Germany could not provide an estimation of the open market for recycled CCM (i.e. testliner and fluting made from recycled paper) only. In its comments to the opening decision, Germany informed that on the basis of further analysis of the historic data of Pöyry, this market could be estimated to be 6,5 million t in 2006. On this basis, capacity

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increase on the open market for recycled based CCM would be [ $< 3$ ] % in volume terms (see Table 3 below).

- (186) The Commission also carried out the calculations in value terms, notably assuming that the additional capacity created by the Propapier PM2 project on the open market would be 285 000 t/a (figure advanced by Smurfit Kappa), as a worst case scenario. In all scenarios, **the 5 % threshold would not be exceeded on the open CCM market** (see Table 3 below).

TABLE 3

**Capacity increase on the open CCM market (EEA)**

Relevant market(EEA)	Open market for CCM	Open market for recycled CCM (testliner up to 150 g/m <sup>2</sup> and fluting made from recycled paper)
Volume in 2006 (in 1000 t)	8 644	6 500
Value in 2006 (in 1000 EUR)	3 481 611	2 400 990
Capacity increase in volume (applying 150 000 t/a)	[ $< 3$ ] %	[ $< 3$ ] %
Capacity increase in value (applying 150 000 t/a)	[ $< 3$ ] %	[ $< 3$ ] %
Capacity increase in volume (applying 285 000 t/a)	[ $< 5$ ] %	[ $< 5$ ] %
Capacity increase in value (applying 285 000 t/a)	[ $< 3$ ] %	[ $< 5$ ] %

- (187) The Commission rejects the “displacement effect” theory invoked by the complainant (see recitals 56 and 57 above) which suggests that “freed capacity”, i.e. capacity not bought anymore on the open market by Progroup, should be added up to Progroup’s CCM production sold on the open market in order to calculate the capacity created by the Propapier investment on the open market. Such scenario (applying a capacity increase of 525 000 t/a) would lead to a capacity increase exceeding 5 %, but, as argued also by Germany, such approach would lead to the conclusion that the capacity increase is the same on the open or on the overall market. It would even be the same if Propapier would not offer any CCM on the open market and would use all its new production in-house. In the latter case, since no CCM production is sold on the market, but only the downstream product, i.e. corrugated board,

the CCM market would not even need to be considered for the purpose of the tests of § 68 of the RAG.

- (188) Furthermore, the xls sheet provided by Smurfit Kappa dates from June 2008, while the Commission may only take into account facts, reports and other data that could have been available to it before the approval date of the annulled decision, i.e. 2 April 2008. Even if the document uses some data resulting from a 2007 study (Henry Poole Consulting, see footnote 15), the calculations are based on assumptions and other data which do not seem to directly originate from this study.
- (189) As regards the downstream product, i.e. corrugated board, no production capacity is created by the project which aims to produce solely CCM (capacity increase for corrugated board is 0 %). This means that **the 5 % threshold of § 68(b) of the RAG is not exceeded for corrugated board.**
- (190) As a general conclusion, the Commission considers on the basis of the above that the capacity created by the Propapier PM2 project is below 5 % of the relevant markets concerned and thus **the aid measure under scrutiny does not lead to a situation where the threshold laid down in § 68(b) of the RAG is exceeded for the products concerned.**

#### ***Structural overcapacity***

- (191) As set out in recital 60 above, Smurfit Kappa argued that the CCM market was in structural overcapacity in the period 2001-2006, and that State aid for new investments in the sector exacerbated this overcapacity. The Commission will examine those arguments, even though the results of the test laid down in § 68(b) of the RAG indicate that no substantial capacity increase is brought on a market in structural overcapacity.
- (192) Smurfit Kappa based its argumentation on the 2007 London Economics study, which points to capacity utilisation rates below 90 % from 2003 to 2005 and indicates that these would also have remained below 90 % in 2006-2007 if the sector had not closed down capacity. Germany however claims that the capacity shut downs mainly concerned old and inefficient machines<sup>(52)</sup>. The ECA report states that the closures were largely driven by natural change in demand and technical standards and the pursuit of economies of scale, and that the need for machine replacement can be attributed to: (1) change in production technologies; (2) evolving standardisation process within the industry; and (3) the potential costs savings afforded by the economies of scale of larger machinery. Germany therefore rejected that the closures were a deliberate choice by the sector in view of restoring supply-demand balance on the market, as argued by Smurfit Kappa.
- (193) The Commission notes that an independent 2007 study (Deutsche Bank study) indeed presents the closures of Smurfit Kappa CCM plants as an attempt to improve the quality of its asset base. This study furthermore indicates that new capacity is needed to satisfy demand over the period 2009-2012 (hereby

referring to new investments by Mondi, Progroup and SAICA), and that operating rates would remain at healthy levels, regardless of the introduction of new capacity in 2009<sup>(53)</sup>.

- (194) The Commission is therefore of the view that there is no convincing evidence that the aid granted to Propapier would reinforce existing structural overcapacity in the CCM market. The figures presented by Smurfit Kappa about overcapacity mainly relate to the period before the investment, while the available forecasts at the time of the annulled decision, including an independent study (Deutsche Bank) point to demand growth as from 2007. In any case, the Commission has taken account of the relative decline of demand over the period 2001-2006 — in value terms — by calculating the proportion of the new capacity created on the relevant market, as required by § 68(b) of the RAG.

#### 6.5.3. CONCLUSION ON WHETHER A DETAILED VERIFICATION IN APPLICATION OF IDAC IS NECESSARY

- (195) The RAG state that in cases where the thresholds of § 68(a) and (b) of the RAG are exceeded, the Commission will approve regional investment aid only after a detailed verification, following the opening of the procedure provided for in Article 88(2) of the Treaty, that the aid is necessary to provide an incentive effect for the investment and that the benefits of the aid measure outweigh the resulting distortion of competition and effect on trade between Member States. The Commission notes that, in the present case, the thresholds of § 68 of the RAG are not exceeded, i.e. the detailed verification in application of the Communication from the Commission concerning the criteria for an in-depth assessment of regional aid to large investment project<sup>(54)</sup> (hereinafter: IDAC) is not required. Nonetheless, the Commission has to establish that the contribution of the aid to regional investment outweighs its possible negative effects on trade and competition.

#### 6.5.4. BALANCING OF THE POSITIVE AND NEGATIVE EFFECTS OF THE AID

- (196) The Commission notes that the incentive effect requirements laid down in § 38 of the RAG are met. The Commission notes also that the Court confirmed that the Commission can base its assessment of the incentive effect by reference to a circumstance of a chronological nature<sup>(55)</sup>. The Commission therefore considers that the aid has had an incentive effect on the investment and has triggered its positive contribution to the development of the assisted region concerned.
- (197) The RAG state that regional aid can only play an effective role if it is used sparingly and proportionately and is concentrated on the most disadvantaged regions of the European Union. In particular, the permissible aid ceilings should reflect the relative seriousness of the problems affecting the development of the regions concerned. Furthermore, the advantages of the

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aid in terms of the development of a less favoured region must outweigh the resulting distortions of competition.

- (198) The Treaty allows the Commission to accept distortions of competition and trade in order to favour the regional development of regions eligible for regional aid pursuant to Article 107(3)(a) of the TFEU. The weight given to the positive effects resulting from the aided investment is greater in the case of the most disadvantaged regions covered by Article 107(3)(a) of the TFEU than in those covered by Article 107(3)(c) of the TFEU.
- (199) The maximum aid intensity of 12,3 % GGE applicable to the investment project was subject to the scaling down of standard regional aid ceilings pursuant to § 67 of the RAG and does not exceed the applicable regional aid ceiling. It can therefore be considered to be proportionate to the handicaps to be addressed in the Brandenburg area, which was at the relevant time considered eligible for regional aid pursuant to Article 107(3)(a) of the TFEU.
- (200) Having established that the aid provides an incentive for carrying out the investment in the region concerned and is proportionate, it is necessary to balance the positive effects of the aid with its negative effects.
- (201) By creating 150 direct and 450 indirect jobs and widening the industrial base of the region concerned, the aided investment contributes to the regional development of a region declared eligible for regional aid pursuant to Article 107(3)(a) of the TFEU. The Commission notes that the aid per job created (amounting to ca. EUR 300 000 per direct job created, but only EUR 75 000 per direct and indirect job created), is not excessive when compared with similar cases of regional aid to capital-intensive investments in the paper sector, where the same standard regional aid ceiling of 30 % was applicable<sup>(56)</sup>.
- (202) The aid does not lead to the creation or the strengthening of a dominant market position of the aid beneficiary and the effects of the capacity created by the investment on the relevant product markets are limited. At the point in time when the investment and aid granting decisions were taken, those markets could not be considered or expected to be in structural overcapacity at the date of completion of the investment.
- (203) Since the aid respects the maximum scaled down aid intensity ceiling applicable to large investment projects, in accordance with the RAG and with the regional aid map approved for Germany for the period 2007-2013, the Commission considers that the aid has no excessive negative effect on trade which would be incompatible with the internal market. The Commission notes, in particular, that there is no indication resulting from the comments received in the context of the formal investigation procedure that the investment project would have been implemented, in the absence of the aid, in another region in the European Union where a higher or equal aid intensity ceiling would apply. There is also no indication that the aid led Propapier to relocate its activities and resulted in subsequent job losses in other regions

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with a comparable or worse socioeconomic situation than that of the assisted region where Propapier implemented its investment.

- (204) The Commission concludes that Germany demonstrated that the Propapier PM2 project contributes towards the achievement of the cohesion objective, which is an objective of common interest, and was implemented as part of a coherent regional development strategy. The aided investment contributes significantly to the improvement of the socioeconomic situation and to the development of the region concerned, in particular in view of its effect on employment, revenue generation and widening of its industrial base. Having regard to the nature and size of the project, the Commission considers that the aid does not result in unacceptable distortions of competition and effects on trade.
- (205) In light of the above, the Commission concludes that the benefits of the aid measure outweigh the resulting distortion of competition and negative effects on trade between Member States.

## 7. CONCLUSION

The Commission finds that Germany has unlawfully implemented the aid in favour of Propapier PM2 GmbH in breach of Article 108(3) of the TFEU. However, the Commission finds that the aid measure fulfils the standard criteria of the RAG, does not lead to a situation where the thresholds laid down in § 68(a) and (b) of the RAG are exceeded for the products concerned, has an incentive effect and is proportionate to the regional handicaps it seeks to alleviate. The Commission further finds that the benefits of the aid measure outweigh the resulting distortion of competition and negative effects on trade between Member States. Therefore, the Commission considers that the aid is compatible with the internal market within the meaning of Article 107(3)(a) of the TFEU,

HAS ADOPTED THIS DECISION:

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- (1) [OJ C 54, 4.3.2006, p. 13.](#)
- (2) These included formal complaints lodged by the Swedish and Finnish Forest Industry Federations, on 20 December 2007 (registered under reference CP 365/07); by the Koninklijke Vereniging van Nederlandse Papier- en Kartonfabrieken, on 3 January 2008 (registered under reference CP 3/08); and by Procelpac — Groupement français des fabricants de papiers et cartons d'emballage à base de cellulose, on 22 February 2008 (registered under reference CP 47/08).
- (3) [OJ C 131, 29.5.2008, p. 6.](#)
- (4) [OJ C 7, 12.1.2011, p. 10.](#)
- (5) Cf. Commission decision of 23 March 2011 on State aid case C 28/05 Glunz AG ([OJ L 228, 3.9.2011, p. 22](#)), and Commission decision of 11 May 2012 on State aid case SA.28855 (N 373/09) (ex C 10/09, ex N 528/08) ING restructuring aid ([OJ C 260, 29.8.2012, p. 1](#)).
- (6) [OJ C 230, 8.8.2013, p. 39.](#)
- (7) State aid N 459/06 ([OJ C 295, 5.12.2006, p. 6](#)).
- (8) Covered by the obligation of professional secrecy.
- (9) For the purpose of this decision, eligible costs and aid amounts are discounted to the year of initial notification, using the discount rate applicable at the moment of the notification, i.e. 5,42 % (cf. point 41 of the RAG).
- (10) Published in [OJ C 41, 24.2.2007, p. 9](#). Scheme implemented under Commission Regulation (EC) No 1628/2006 of 24 October 2006 on the application of Articles 87 and 88 of the Treaty to national regional investment aid (Regional block exemption regulation) ([OJ L 302, 1.11.2006, p. 29](#)).
- (11) Published in [OJ C 102, 5.5.2007, p. 11](#). Scheme implemented under the Regional block exemption regulation (see footnote 9 above).
- (12) Measured in purchasing power standards.
- (13) After the adoption of the annulled decision, Germany informed that the project had led to a total of 675 (of which 36 in the power plant) jobs created in the region. Propapier itself employs 123 workers and 23 employees. Besides, Propapier has created 11 apprenticeships.
- (14) See § 88 of the judgment in Case T-304/08.
- (15) Economic analysis of State aid given to Progroup AG, London Economics, 9 November 2007.
- (16) Henry Poole Consulting: Strategic Planning Aid for Corrugated Europe (03/07).
- (17) Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union ([OJ L 83, 27.3.1999, p. 1](#)), as amended.
- (18) Economic analysis of investment aid to Progroup, Report for Federal Republic of Germany, 11 July 2013.
- (19) Propapier PM2 Investitionszulage, Diskussionsunterlage, Roland Berger Strategy Consultants, 15 July 2013.
- (20) Deutsche Bank AG Global Markets Research Division, Smurfit Kappa analysis report, 24 April 2007.
- (21) ECA report, p. 19.
- (22) As it also did in State aid cases N 203/08 LIP — DE — Aid to Papierfabrik Hamburger Spremberg GmbH&Co, and SA.32063 (2011/NN) Poland — LIP — Mondi Świecie.
- (23) Deutsche Bank study, p. 21.
- (24) ECA report, p. 9.
- (25) Deutsche Bank study, p. 12.
- (26) ECA report, p. 10.
- (27) Compound Annual Growth Rate.



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- (28) Wage differential due to training costs and additional fees, e.g. for rental charges and commuting expenses, based on a comparison between Prowell existing sites in [...].
- (29) SPD Landesverband Brandenburg und CDU Landesverband Brandenburg, Vereinbarung zur Zusammenarbeit in einer Regierungskoalition für die 4. Wahlperiode des Brandenburger Landtages 2004 bis 2009, Potsdam, October 2004.
- (30) Pöyry, Branchenstrategie Papier Brandenburg (Zusammenfassung) im Auftrag des Ministeriums für Wirtschaft des Landes Brandenburg vom November 2007.
- (31) E.g. seminars and practical training in Germany and abroad, technical training in hydraulics and pneumatics, specific training for operators of the Propapier PM2 machine.
- (32) State aid cases N 203/08 LIP — DE — Aid to Papierfabrik Hamburger Spremberg GmbH&Co, N 865/06 LIP — DE — Aid to Projektgesellschaft Papierfabrik Adolf Jass Schwarza GmbH, and SA.32063 (2011/NN) Poland — LIP — Mondi Świecie.
- (33) Regional block exemption regulation (see footnote 9).
- (34) Cf. State aid cases C 28/2005 Glunz AG; C 54/1996 Alitalia (Commission Decision 2001/723/EC (OJ L 271, 12.10.2001, p. 28)), SA.23839 (C 44/2007) FagorBrandt (Commission Decision 2013/283/EU (OJ L 166, 18.6.2013, p. 1)) and SA.28855(2012/C) ING restructuring aid.
- (35) Case 34/86 *Council v Parliament* [1986] ECR 2155, paragraph 47; Case C-415/96 *Spain v Commission* [1998] ECR I-6993, paragraph 31; and Case C-458/98 P *Industrie des poudres sphériques v Council* [2000] ECR I-8147, paragraph 82.
- (36) Case C-415/96 *Spain v Commission* [1998] ECR I-6993, paragraph 34.
- (37) Cf. Commission Decision 2006/262/EC of 21 September 2005 on State aid No C 5/2004 (ex N 609/03) which Germany is planning to implement for Kronoply (OJ L 94, 1.4.2006, p. 50).
- (38) See footnote 4.
- (39) See recital 3.
- (40) Inter alia, COMP/M.3935 — Jefferson Smurfit/Kappa (10 November 2005); COMP/M.2391 — CVC/Cinven/Assidomän (10 May 2001); COMP/M.2243 — Stora Enso/Assidomän/JV (22 December 2000); COMP/M.2020 — Metsä-Serla/MODO (4 August 2000).
- (41) State aid cases N 203/08 LIP — DE — Aid to Papierfabrik Hamburger Spremberg GmbH&Co, N 865/06 LIP — DE — Aid to Projektgesellschaft Papierfabrik Adolf Jass Schwarza GmbH, and SA.32063 (2011/NN) Poland — LIP — Mondi Świecie.
- (42) See footnote 38.
- (43) E.g. COMP/M.3935 — Jefferson Smurfit/Kappa; COMP/M.2391 — CVC/Cinven/Assidomän.
- (44) It should be noted in this respect that Progroup sells on the open market only recycled paper based CCM, i.e. testliner up to 150 g/m<sup>2</sup> and fluting made from recycled paper.
- (45) Since, as noted above, integrated producers are active in open market transactions not only because of their insufficient capacities but also for logistic needs and depending on their concrete demand for different subtypes of CCM, this method actually underestimates the size of the open market and thus represents a worst case scenario approach.
- (46) FEFCO is the umbrella organisation of European associations of corrugated board manufacturers.
- (47) Footnote 62 of the RAG defines “apparent consumption of the product concerned” as “production minus export plus imports”. Apparent consumption data was compiled by Pöyry for the purpose of the notification.
- (48) EU-27 data were used as a proxy.
- (49) The same reasoning leading to the same conclusion was followed by the Commission in its decisions on aid to other investments in the paper sector which took place over the same period: State aid cases N 203/08 LIP — DE — Aid to Papierfabrik Hamburger Spremberg GmbH&Co, and SA.32063 (2011/NN) Poland — LIP — Mondi Świecie.
- (50) On the basis of the worst case scenario approach presented in recital 167 of this decision.
- (51) Calculated as [ $< 250\,000$ ] t/a/(8 600 000 t/a — [ $> 365\,000$ ] t/a).

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- (52) The ECA report states that the average age of shut-down paper machines in Europe between 2000 and 2007 is 51 years (p. 55 and Appendix 2).
- (53) “The industry’s operating rates are an important measure of how healthy the market conditions are and give an indication for the direction of the product prices. The European operating rate was 92 % last year and is expected to increase in the next two years (...). The healthy demand growth in combination with limited new supply will tighten the market further.” (Deutsche Bank study, p. 19).
- (54) [OJ C 223, 16.9.2009, p. 3.](#)
- (55) Judgement of the Court of First Instance of 14 January 2009, Case T-162/06, *Kronoply v Commission*, point 80.
- (56) Cf. State aid cases N 203/08 LIP — DE — Aid to Papierfabrik Hamburger Spremberg GmbH&Co (aid of ca. EUR 183 000 per direct job, 200 direct jobs and number of indirect jobs not specified), and N 865/06 LIP — DE — Aid to Projektgesellschaft Papierfabrik Adolf Jass Schwarza GmbH (aid of ca. EUR 367 000 per direct job, 100 direct jobs and 100 indirect jobs).

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