COMMISSION DECISION

of 8 July 1999

on State aid granted by Germany to Gröditzer Stahlwerke GmbH and its subsidiary Walzwerk Burg GmbH

(notified under document number C(1999) 2264)

(Only the German text is authentic)

(Text with EEA relevance)

(1999/720/EC, ECSC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

Having regard to the Treaty establishing the European Coal and Steel Community, and in particular Article 4(c) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Protocol 14 thereto,

Having regard to Commission Decisions No 3855/91/ECSC of 27 November 1991 [1] and No 2496/96/ECSC of 18 December 1996 [2] establishing Community rules for state aid to the steel industry,

Having given notice to the parties concerned to submit their comments in accordance with the abovementioned provisions, and having regard to those comments,

Whereas:

1. **Procedure**

(1) By letter dated 6 June 1997 Germany notified the Commission, under Article 88(3) of the EC Treaty, of the financing measures that preceded and accompanied the privatisation of Gröditzer Stahlwerke GmbH (Gröditzer) and its subsidiary Walzwerk Burg GmbH (Burg).

(2) By letter dated 5 August 1997 the Commission informed Germany that it had decided to initiate the procedure laid down in Article 6(5) of Decision No 2496/96/ECSC in respect of the state aid involved. The Commission decision to initiate the procedure which was published in the *Official Journal of the European Communities* [3]. The Commission gave notice to interested parties to submit their comments on the measures.

(3) Germany supplied the Commission with further information and papers by letters dated 23 September and 13 November 1997; 24 July, 14 August and 14 October 1998; and 7 and 20 January, 1 February and 29 March 1999. Meetings between the Commission and Germany took place in January 1998, on 1 December 1998, and on 11 March and 23 and 29 April 1999.

(4) The Commission has received observations from interested parties; it forwarded these to Germany, and Germany commented by letter dated 27 April 1998.

2. **Detailed description of the measures**

2.1. ***Notification***

(5) In the notification of 6 June 1997 Germany stated that in the years 1992 to 1996 Gröditzer received financing amounting to DEM 263,7 million. This was made up of DEM 207,3 million in shareholder loans provided by the successive public shareholders in the company, DEM 53,4 million in bank loans guaranteed by the Treuhandanstalt privatisation agency and its successor the Bundesanstalt für Vereinigungsbedingte Sonderaufgaben (BvS), and DEM 3 million as an outright grant. A further DEM 8,4 million was paid to Gröditzer separately under the joint Federal Government/*Länder* regional development scheme, the *Gemeinschaftsaufgabe Verbesserung der regionalen Wirtschaftsstruktur*. Germany also informed the Commission that the last public shareholder, Beteiligungs-Management-Gesellschaft mbH (BMGB), had sold Gröditzer and its wholly owned subsidiary Burg to Georgsmarienhütte GmbH (Georgsmarienhütte) on 1 January 1997. The sale of Gröditzer and Burg had cost BMGB a total of DEM 393 million, mainly as a result of the waiver of the

[1] OJ L 362, 31.12.1991, p. 57.
[2] OJ L 338, 28.12.1996, p. 42.
[3] OJ C 395, 31.12.1997, p. 5.

shareholder loans and the redemption of bank loans. Germany stated that Georgsmarienhütte had submitted the best offer, taking into account its commitments in respect of jobs, investment and the transfer of technology.

2.2. *The initiation of the procedure*

(6) The Commission decided to initiate the procedure laid down in Decision No 2496/96/ECSC (the sixth Steel Aid Code). A letter was sent to Germany on 5 August 1997, and was published in the *Official Journal of the European Communities* ([4]).

(7) In the letter initiating the procedure the Commission argued that it had to be assumed at that stage that the shareholder loans of DEM 207,3 million constituted aid, as they were free of interest and the company had provided no security; the guaranteed bank loans of DEM 53,4 million likewise appeared to constitute aid, as the premium was only 0,5%. The compatibility of the DEM 8,4 million in regional aid had also to be examined. Turning to the privatisation itself, the Commission doubted whether the sale, at a negative price, was in accordance with the private investor principle. On the figures available it appeared that it would have been less costly to wind up the company. Nor was it clear that the privatisation procedure had been open, transparent and unconditional. Lastly, the privatisation agreement appeared to commit BMGB to providing investment aid for Gröditzer.

2.3. *Total state resources transferred prior to privatisation*

(8) On the basis of the notification and the additional information that Germany has provided in the course of the procedure, the Commission has established that Gröditzer received the following financing prior to its privatisation:

(million DEM)

	Shareholder loans	Guaranteed bank loans	Outright-grants	Total
Investment measures	43,5	53,4	12,5	109,4
Social measures	30,0	—	31,3	61,3
Operational measures	133,8	—	—	133,8
	207,3	53,4	43,8	304,5

The 'outright grants' column includes not only the DEM 3 million notified and the DEM 8,4 million in regional aid, but also DEM 28,3 million for social measures and DEM 4,1 million in tax incentives: these sums were identified by Germany in the course of the procedure.

(9) The figures break down as follows.

2.3.1. *Investment measures*

(10) Gröditzer received a total transfer of state resources of DEM 109,4 million towards an investment programme costing DEM 110,2 million. Details of the investment programme have been supplied to the Commission; they show that taking the company's business as a whole there was investment every year from 1992 to 1996. The sum of DEM 109,4 million is made up of three items:

(a) DEM 43,5 million was in the form of shareholder loans; these loans were free of interest, and no schedule was drawn up for their repayment;

(b) DEM 53,4 million was in the form of loans provided by banks that were 100% guaranteed by the successive public shareholders in Gröditzer;

(c) outright grants amounted to DEM 8,4 million in regional aid and DEM 4,1 million in tax incentives for investment under the applicable legislation, the Investment Allowances Act (*Investitionszulagengesetz*).

As the legal basis of the shareholder loans and guarantees, Germany has cited the general restructuring obligation imposed by Article 25 of the German Unification Treaty and paragraphs 2 to 6 of the Treuhand Act.

(11) As regards the expenditure to which this investment aid related, Germany has informed the Commission that DEM 13,3 million was invested in steelmaking, while DEM 96,9 million was invested in production facilities falling outside the scope of the ECSC Treaty. The various investments were described in detail in the decision to initiate the procedure.

2.3.2. *Social measures*

(12) Social measures totalled DEM 61,3 million. This comprised the following.

(a) DEM 26,1 million was paid towards a social plan comprising redundancy and early retirement

([4]) See footnote 3.

schemes and an employment pool. These costs would as a rule have been borne by the company, but in view of Gröditzer's financial difficulties they were covered by shareholder loans provided by EREL Verwaltungs GmbH & Co management KG (EREL).

(b) BMGB paid Gröditzer a sum of DEM 28,3 million to cover the costs of other social measures on top of the social plan. The main such measures were a reduction of working hours and training for redundant staff. According to Germany, the various public shareholders financed such measures for all the East German companies for which they were responsible.

(c) DEM 6,9 million was to finance employment measures under paragraph 249 of the Employment Promotion Act (*Arbeitsförderungsgesetz*). Under that Act a scheme was set up to employ redundant or dismissed staff of current and former Treuhand companies in environmental clean-up activities. As a rule the public authorities and the companies concerned each contributed to the cost of such measures; the figure of DEM 3 million which had been quoted embodied the share falling to Gröditzer, which owing to its financial difficulties it was unable to pay.

2.3.3. *Operational measures*

(13) Shareholder loans of DEM 133,8 million were used to cover operational measures. The notification stated that aid for operational measures amounted to DEM 166,8 million, but in the course of the procedure it has become clear that out of that figure DEM 33 million was in fact used for social measures; these are the sums referred to in recital 12 at points (a) and (c).

(14) On 14 August 1998 Germany submitted to the Commission a report prepared by KPMG ([5]). The report allocated the DEM 133,8 million between Gröditzer's different product areas on an *ex post* basis, by establishing the cash-flow requirement of each of them (the EBDIT-Ergebnis) for the years 1991 to 1996. KPMG's findings were based on Gröditzer's internal bookkeeping system. The German Government has endorsed KPMG's conclusions.

(15) KPMG divided the money between the operational measures as follows.

(a) DEM 49 million covered the accrued operating losses of three of Gröditzer's four divisions, namely the forge, the ring-rolling mill and the foundry. Total losses here amounted to DEM 62 million, but this was partially offset by an operating profit of DEM 13 million at the steelmaking plant.

(b) DEM 18 million was for overheads.

(c) DEM 40 million was needed to comply with contractual obligations and to settle claims which arose mainly from decisions to stop investment programmes originating in the GDR period.

(d) DEM 17 million was for site clean-up and clearance operations.

(e) DEM 9 million covered miscellaneous costs.

(16) Out of the sums referred to at points (b) to (e) in recital 15, KPMG assigned a total of DEM 3,6 million to the steelmaking plant. It assigned the rest to the non-ECSC sectors.

2.4. ***Financial measures in connection with the privatisation***

(17) Gröditzer and its subsidiary Burg were sold to Georgsmarienhütte on 1 January 1997. According to the notification the total cost or negative purchase price of the privatisation was DEM 393 million. The main costs were the waiver of shareholder loans, the non-recovery of subsidies, and the redemption of the guaranteed bank loans (see recital 5).

(18) However, the total cost also included new funds provided by the seller, the publicly owned BMGB:

(a) DEM 37,5 million was provided as 'equity assistance' (Eigenkapitalhilfe). According to the notification, this was to be used to finance a DEM 43,5 million investment programme in 1997 and 1998. But according to the privatisation agreement it was to be used for operating purposes.

(b) DEM 20,8 million was to be paid as 'bridging finance' (Zuschüssen zur Zwischenfinanzierung), to be offset against regional aid; DEM 16,3 million of this was for Gröditzer and DEM 4,5 million for Burg. Between its privatisation and 10 January 1999 Gröditzer received regional aid amounting to DEM 13 million. Under the privatisation agreement Gröditzer remains entitled to the remainder of the DEM 16,3 million, that is to say DEM 3,3 million.

([5]) 'Stellungnahme zur Finanzmittelverwendung für die Jahre 1991 bis 1996 der Gröditzer Stahlwerke GmbH, Gröditz'.

2.5. ***Burg***

(19) Burg is a separate company that operates in the non-ECSC sector. It was sold to Gröditzer by its public shareholder EREL at the time of privatisation; it had never previously been a Gröditzer subsidiary.

3. **Comments from interested parties**

(20) On 30 January and 2 February 1998 comments were submitted to the Commission by three interested parties belonging to the same group, namely Max Aicher GmbH & Co., Neue Maxhütte Stahlwerke GmbH and Lech Stahlwerke GmbH. They argued that sale at a negative price had provided Georgsmarienhütte with a cash injection which enabled Georgsmarienhütte to improve its financial position and to finance acquisitions. The conditions associated with the sale of Gröditzer also distorted competition.

4. **Comments from Germany**

(21) Germany commented on the initiation of the procedure in a letter of 23 September 1997, and provided further information in the papers referred to in recital 3. These comments have been taken into account here.

(22) Replying to the comments from interested parties, on 7 May 1998, Germany stated that the sale of Gröditzer had not affected Georgsmarienhütte's cash position. Under the privatisation agreement Georgsmarienhütte had undertaken not to sell Gröditzer's assets. It would not currently be able to do so in any event, as the sale of shares was in suspense, pending the outcome of the Commission's assessment of the aid granted to Gröditzer. The two companies' prices were determined on an arm's length basis, and there was no common cash management. Georgsmarienhütte supported the position taken by Germany.

5. **Assessment**

5.1. ***Which Treaty is applicable to Burg and Gröditzer?***

5.1.1. *Burg*

(23) As stated in the decision to initiate the procedure, Burg is a separate, non-ECSC company that was sold to Gröditzer by its public shareholder at the time of privatisation. Before privatisation it was not a Gröditzer subsidiary. Since privatisation it has served as a steel service centre for Gröditzer.

(24) Burg has therefore to be considered under the EC Treaty. Germany has submitted that given Burg's size the financial measures from which it benefited did not have to be notified on the basis of the arrangements governing the Treuhandanstalt's operations, which had been approved by the Commission, most recently in its decision on aid measure N 786/94, letter reference (95) D/1062 ([6]). The Commission will accordingly consider Burg's position only with respect to the privatisation and in so far as it enters into the total cost of liquidation.

5.1.2. *Gröditzer*

ECSC rules on steel undertakings; initiation of procedure

(25) Gröditzer is an undertaking engaged in the production of liquid steel and ingots, which are steel products within the scope of Annex I to the ECSC Treaty, and it therefore falls under Article 80 of the ECSC Treaty. It is also subject to levies under Article 49 of the ECSC Treaty.

(26) It is worthwhile recalling the position of ECSC steel undertakings in the new *Länder*, which has been addressed in a number of decisions. Until 1995 these undertakings qualified for certain exemptions from the strict requirements of Decision No 3855/91/ECSC (the fifth Steel Aid Code), which among other things allowed them to receive regional investment aid. Decisions were also taken under Article 95 of the ECSC Treaty, with the unanimous assent of the Council, approving a wide range of aid payments to EKO Stahl and SEW Freital, in order to enable them to return to viability. A vital consideration was that they were to be privatised on the basis of far-reaching rescue and restructuring measures.

The aid measures in Gröditzer's case were not notified to the Commission. This was contrary to the arrangements governing the Treuhandanstalt, under which aid had to be notified in advance if the company operated in a sensitive industry. Notification took place only after the company had been privatised in 1997, and after the aid in the form of shareholder loans and the like had been paid. As Gröditzer is an ECSC

([6]) Under the arrangements governing the Treuhandanstalt, aid to Treuhandanstalt companies in non-sensitive sectors did not have to be notified if in the period 1992 to 1994 the company employed less than 1 500 people and net aid amounted to less than DEM 150 million. In 1995 these thresholds changed to 250 employees and DEM 50 million. Burg had an average workforce of 125, and the total aid paid to it from 1992 to 1997 was DEM 56 million.

undertaking, the only aid measures for which it qualified in 1997 were those permitted by the Steel Aid Code in force at the time, that is to say aid for research and development, environmental measures and closure. This means that ECSC undertakings could receive state aid of other kinds, such as operating aid or regional investment aid, only on the basis of Article 95 of the ECSC Treaty.

(27) As the Commission made clear when it decided to initiate the procedure, the principle that aid benefiting an ECSC steel-producing undertaking has to be assessed under the ECSC Treaty results unconditionally from the ECSC Treaty itself [7]. It applies whether or not an ECSC undertaking also manufactures non-ECSC products.

(28) The Commission has accepted, however, that by way of exception to this rule certain aid to an ECSC undertaking may be assessed under the relevant provisions of the EC Treaty. But the aided activities must be covered by the EC Treaty, and must be completely separate from the activities falling within the scope of the ECSC Treaty.

(29) When it initiated the procedure, the Commission took the view that these conditions did not appear to be satisfied. As Gröditzer was one company and did not keep separate accounts, the Commission considered that there was a danger of spillover and that it was not possible to differentiate the state aid received so as to allocate it between the various ECSC and non-ECSC activities.

The German reply

(30) In its response to the initiation of the procedure, Germany did not contest the Commission's view that Gröditzer was an ECSC undertaking engaged in steel production. But Germany did consider that it was possible to allocate the financial measures between the company's ECSC and non-ECSC activities.

(31) Germany argues that that a yearly average of 6 to 7% of the ECSC steel products manufactured by Gröditzer has been sold to outsiders, a situation which continues today. The other 93 to 94% is used by Gröditzer itself as input for its own forging, casting and ring-rolling mill facilities. Here the steel is processed into non-ECSC steel products. Consequently, aid to this plant affects competition only in respect of products which are within the scope of the EC Treaty. It should therefore be assessed under the state aid rules of the EC Treaty.

As far as the investment measures are concerned, Germany contends that the relevant fixed assets can be related to specific production facilities, so that the only investment that should be assessed under the ECSC Treaty is that in facilities manufacturing ECSC products, which amounts to DEM 13,3 million. All other investment aid should be assessed under the EC Treaty.

Turning to the social plan and the operating measures, Germany refers to the KPMG report mentioned in recital 14, and endorses its conclusions on the allocation of aid between ECSC and non-ECSC facilities.

(32) Germany therefore considers that financing in respect of activities not directly related to the production of ECSC steel products should be assessed under the state aid rules of the EC Treaty. In a letter of 29 March 1999 Germany stated that all aid to Gröditzer should be considered under the state aid rules of the EC Treaty.

The Commission's view

(33) The ECSC rules on state aid lay down rules for aid measures that distort competition between the recipient undertaking and its competitors on the markets in ECSC products. In the same way, the state aid rules in the EC Treaty apply to aid measures that distort competition between undertakings on the markets in EC products.

As a rule, aid to an ECSC undertaking will be assessed under the ECSC Treaty. In some circumstances, however, the EC Treaty may apply to aid to non-ECSC activities carried on by an ECSC undertaking, provided they are clearly separate from the same undertaking's ECSC activities.

In order to ascertain whether the activities assisted in this case are in fact clearly separate, the forms of aid granted will have to be considered individually.

Investment aid

(34) Gröditzer is indeed a single company which does not keep separate accounts for its various activities, and this does make it more difficult to ascribe aid to its different areas of business, but it is nevertheless true that the aided investment related to fixed assets in particular production facilities.

Gröditzer's ECSC and other production processes are physically separated. Steel made in the steel plant

[7] Judgment of the Court of First Instance of the European Communities in Joined Cases T-129/95, T-2/96 and T-97/96 *Neue Maxhütte v Commission*, 21 January 1999, not yet reported.

proceeds to other facilities on Gröditzer's premises, namely the forge, ring-rolling mill and foundry. The end products of these plants ([8]) are different from the end products of the steelmaking plant, and are sold on different relevant markets. As they are manufactured in dedicated facilities, the production processes are not integrated, and there is physical separation between them. This makes it possible to distinguish between ECSC and EC activities in the case of the investment aid.

Operating aid and social measures

(35) But this is not true of the operating measures and the social measures. Here there is no direct link between the loans or grants given and the activity being financed. Aid measures can be assessed separately under the ECSC and EC Treaties only where a distinction can be drawn between aid towards ECSC activities and aid towards other activities. In Gröditzer's case there is no separate accounting or bookkeeping to facilitate such a distinction. In cases like this, where there is a real danger of a spillover from one activity to another, it has to be concluded that aid to an ECSC undertaking must be assessed under the ECSC rules.

(36) And indeed, such a spillover between ECSC and non-ECSC activities has in fact occurred at Gröditzer. The individual loans and grants were not tied at the time they were given to the specific activities that they served to finance. The report drawn up *ex post* by KPMG contradicts the notification with respect to the assignment of DEM 166,8 million in aid for operating measures and social measures (see recital 12, points (a) and (c), and recitals 13 to 16):

	Notification	KPMG
Social aid	103	33
Loss compensation	40	49
Site clearance	17	17
Settlement of claims	—	40
Financing costs	—	18
Miscellaneous	—	9
Unspecified	6	—
Total	166	166

([8]) The main products of the ring-rolling mill are coils, flanges and tyres; of the foundry, machine parts; and of the forge, bars, forgings, hollow forgings, and crankshafts.

(37) This clearly shows that resources were being provided to Gröditzer for operational purposes without any clause or mechanism for allocating them between ECSC and non-ECSC activities. Allocation was left entirely to the discretion of the company; there were no *ex ante* criteria for a rational separation between the different production areas.

(38) Of Gröditzer's total steel output, 93% was not sold on the market but processed into end products within the company. In Gröditzer's internal pricing and bookkeeping system the steelmaking plant transferred its products downstream against full repayment of its direct and indirect costs, regardless of the fact that the company was selling its end products at a heavy loss. It appears from the figures provided when the procedure was initiated that Gröditzer has not made a profit since 1990; it accrued losses of more than DEM 317 million over the years 1992 to 1996. In each of those years, operating costs far exceeded turnover, by an average of DEM 30 million a year.

(39) The assignment of profits and losses in the internal bookkeeping system is therefore arbitrary; no account is taken of the fact that the production process as a whole is loss-making. The KPMG report does show the results for Gröditzer's various branches of activity in the years 1991 to 1996 on the basis of the internal bookkeeping system, but it also shows that 7% of Gröditzer's production, namely its steel production, operates at a profit, while the other 93%, accounted for by the forge, ring-rolling mill and foundry, operate at a loss. The cost accounting applied to its business by Gröditzer hardly seems logical.

(40) In these circumstances the forge, the foundry and the ring-rolling mill can continue only by virtue of the operating aid they receive. This means that Gröditzer has been able to devote its own resources in the first place to the steelmaking plant, that is to say the ECSC production area. The steelmaking plant has enjoyed the benefit of the aid given to the downstream EC activities.

(41) It follows from the foregoing that the evidence provided to show a separation between the ECSC and EC activities from an accounting point of view is insufficient to demonstrate that operating aid to those activities should be considered under the two Treaties. Unlike the investment aid, there is no clear separation (*vollkommene Trennung*) between the company's different activities.

Conclusion

(42) The operating aid and social aid provided by Germany are subject to the state aid rules in the ECSC Treaty.

There is overcapacity in the steel industry, and strict discipline must be observed.

In the case of investment in fixed assets which are used by Gröditzer for the production of EC products, the EC Treaty aid rules apply: see recital 34.

Aid to investment in fixed assets used by Gröditzer for the production of ECSC products is subject to the state aid rules in the ECSC Treaty.

5.2. ***Assessment of the financial measures preceding privatisation: general***

(43) The notification identified investment aid in the form of guaranteed bank loans of DEM 53,4 million, shareholder loans of DEM 43,5 million, and regional aid of DEM 8,4 million under the joint Federal Government/*Länder* scheme paid in 1994. On 14 October 1998, Germany informed the Commission that an investment allowance (*Investitionszulage*) had been granted in the years 1992 to 1995 to cover the investments up to 1994.

(44) Gröditzer is a firm in difficulty, as it has accrued substantial losses since it was set up. Successive public shareholders have provided loans with no obligation in respect of repayment and interest. It is clear that a private investor would never have advanced such loans to Gröditzer. The shareholder loans therefore constitute state aid in their entirety.

(45) As the Commission made clear in its communication to the Member States on public undertakings in the manufacturing sector [9], where state guarantees are given to firms in difficulty there is state aid equal to the entire amount of the loan guaranteed. In the course of the procedure Germany informed the Commission that the premiums were equal to 0,25% and that no risk assessment took place. The Commission is of the opinion that in view of Gröditzer's financial difficulties a premium of 0,25% is extremely low. The guarantees therefore constitute state aid in their entirety.

(46) As explained in recital 34, the investment aid has to be assessed under two different treaties. The investment aid relating to ECSC plant has to be assessed under Article 4(c) of the ECSC Treaty and the Steel Aid Code applicable at the time it was granted. The investment aid relating to EC plant has to be assessed under the rules of Articles 87 and 88 of the EC Treaty and the rules applicable to investment aid at the time it was granted. A detailed assessment is set out below.

5.2.1. *Assessment of the investment aid to the ECSC steel plant*

(47) According to Article 4(c) of the ECSC Treaty, subsidies or aids granted by states, in any form whatsoever, are incompatible with the common market and accordingly prohibited. Exceptions to this rule are made in the successive Steel Aid Codes.

(48) Germany states that of the investment in the steelmaking plant DEM 0,5 million was financed by investment allowances. The remainder was financed by shareholder loans and guaranteed bank loans. Regional aid under the joint Federal Government/*Länder* scheme was not used to cover investment in the steelmaking plant.

(49) Part of the investment aid was granted during the lifetime of the fifth Steel Aid Code. Article 5 of the Code stated that aid granted to steel undertakings for investment under general regional aid schemes could be deemed compatible with the common market provided that the undertaking was located in the territory of the former GDR and that the aid was notified by 30 June 1994 and was approved and paid by 31 December 1994 (for investment allowances under the Investment Allowances Act 1990, the deadline for payment was 31 December 1995).

(50) The aid was notified only on 6 June 1997. The Court of First Instance confirmed in *Preußag Stahl v Commission* that the notification and approval deadlines of the Fifth Steel Aid Code were binding on the Commission [10]. The Commission is consequently prevented from considering any of this aid, as it was notified after 30 June 1994, and could not be assessed by 31 December 1994. The question whether there were elements of the aid that might have been eligible in substantive terms is thus irrelevant.

(51) The investment aid amounting to DEM 13,3 million which has been assigned to the steel plant is therefore incompatible with the ECSC Treaty and the Steel Aid Code.

5.2.2. *Assessment of the aid to investment in the non-ECSC production facilities*

(52) The investment in the non-ECSC facilities amounted to DEM 96,9 million, and the total aid granted for this investment amounted to DEM 96,1 million. The aid included DEM 8,4 million in regional aid and DEM 3,6

[9] OJ C 307, 13.11.1993, p. 3.

[10] Case T 129/96 [1998] ECR II-629.

million in investment allowances, with the remainder financed through shareholder loans and guaranteed bank loans. The shareholder loans and bank loans were granted under the general provisions of the Unification Treaty and the Treuhand Act.

(53) On 14 October 1998 Germany informed the Commission that in the period under consideration the joint Federal Government/*Länder* regional development scheme did not apply to Treuhand companies. When granting and guaranteeing these loans, therefore, the Treuhandanstalt and its successors were acting as a de facto regional aid authority, and the loans were a substitute for regional investment aid.

(54) The Commission recalls that in the period under consideration the ceiling for regional investment aid under the joint Federal Government/*Länder* scheme, including any aid granted under other regional aid schemes, was 35% gross.

(55) Germany on the other hand contends that under the successive arrangements governing the activities of the Treuhandanstalt ([11]) a higher amount could be granted for investment aid.

(56) This argument cannot be accepted. Gröditzer is a steel undertaking, and the fifth Steel Aid Code allowed investment aid to be given to steel undertakings only if the aid was declared exempt from the general prohibition, for a limited period of time and up to a maximum intensity of 35%. This was confirmed in the *EKO Stahl* case ([12]), and reiterated in the Commission's report on the implementation of the fifth Steel Aid Code in 1994 ([13]).

Furthermore, Gröditzer operates in a sensitive sector for purposes of the successive Treuhandanstalt arrangements. The framework for certain steel sectors not covered by the ECSC Treaty ([14]) explains that the concept of a sensitive sector takes in not only ECSC steel production but also the preliminary processing of ECSC steel, which includes such things as forging and casting. Gröditzer operates in both of these areas, and is thus clearly in a sensitive sector.

(57) Under the Treuhandanstalt arrangements, aid to firms in sensitive sectors had to be notified in all circumstances. The Treuhandanstalt arrangements did make provision for exceptions to the notification requirement, but specifically excluded these sensitive sectors, and clearly stated the Commission had to assess aid to these sectors under the rules in force, such as the guidelines on state aid for rescuing and restructuring firms in difficulty ([15]) and the guidelines on national regional aid ([16]).

(58) As had been explained, the possibilities for approving aid in the ECSC sector are limited. Gröditzer is an ECSC company, and there is no legal basis for permitting it rescue and restructuring aid under that Treaty. Where restructuring aid has been allowed to other ECSC firms, by decisions taken under Article 95 of the ECSC Treaty, the overriding consideration has been a return to viability in a context of privatisation. In Gröditzer's case no restructuring plan showing a return to viability has ever been submitted.

(59) Moreover, Germany itself considers that the investment aid was granted as regional aid or as a substitute for regional aid.

(60) The Commission therefore takes the view that the only legal basis on which the investment aid can be assessed is that provided by the guidelines on national regional aid in force at the time the aid was granted. Gröditzer's EC activities are in a sensitive sector, and under the framework for certain steel sectors not covered by the ECSC Treaty the regional aid ceilings apply here too.

(61) The Commission is consequently of the opinion that the overall regional investment aid ceiling of 35% cannot be exceeded.

(62) The Commission concludes that aid with an intensity of more than 35% would constitute an unacceptable distortion of competition. All the investment aid towards EC activities must therefore be assessed on the basis of the ceilings for regional investment aid approved in connection with the joint Federal Government/*Länder* regional scheme. The total intensity of aid which was admissible under that scheme and any other regional aid schemes at the time in question was 35% gross.

(63) The Commission consequently finds that of the aid paid to cover investment in Gröditzer's non-ECSC activities, which amounted to DEM 96,1 million, 35% can be declared compatible with the common market under Article 87(3) of the EC Treaty; this is equal to DEM 33,7 million. The remainder, amounting to DEM 62,4 million, is incompatible with the common market under Article 88(2) of the EC Treaty.

([11]) Commission letter SG(91) D/17825, 26.10.1991; Commission letter SG(92) D/17613, 8.12.1992, and communication regarding aid measure E 15/92, 15.10.1992; and Commission letter SG(95) D/1062, 1.11.1995.
([12]) Notice in case C 35/94, (OJ C 1, 17.1.1997, p. 7).
([13]) SEC(95) 1309 final, p. 10 to 11.
([14]) OJ C 320, 13.12.1988.
([15]) See most recently OJ C 368, 23.12.1994, p. 12.
([16]) See most recently OJ C 74, 10.1.1998, p. 9.

5.3. ***Assessment of the social measures***

(64) The social measures totalled DEM 61,3 million, as explained in recital 12.

(65) The money granted for employment promotion measures under Paragraph 249 of the Employment Promotion Act (DEM 6,9 million) does not constitute state aid ([17]).

(66) The Commission does not accept the German argument that a sum of DEM 28,3 million paid towards the social plan constitutes a general measure, since it was granted to a specific undertaking out of resources that were not available to all undertakings without distinction. This means that the social aid totals DEM 54,4 million.

(67) It has already been explained that all the social aid has to be assessed under the ECSC Treaty. According to Article 4(c) of the ECSC Treaty, subsidies or aids granted by states, in any form whatsoever, are incompatible with the common market and accordingly prohibited. Exceptions to this rule are made in the successive Steel Aid Codes. The aid under consideration here was granted during the lifetime of the fifth Steel Aid Code. The sixth Steel Aid Code contains identical provisions.

(68) In order to qualify for aid under the Steel Aid Code, social measures must be paid to workers made redundant or accepting early retirement; they must arise from the total or partial closure of steel plants that have been in regular production up to the time of notification of the aid, and they must not exceed the payment levels customary in the Member States on 1 January 1991.

(69) According to the information provided by Germany, production capacity at Gröditzer fell from 285 000 t per year in 1989 to 150 000 t per year in 1996. Annual steel production fell to 69 000 t. Between 1990 and the end of 1996 about 4 300 of the 5 000 employees left the company owing to the reduction in capacity. The funding provided was used to finance redundancy and early retirement schemes and short-time working and training facilities for the benefit of former Gröditzer employees. Thus all the social measures were aimed at staff who ultimately left the company.

(70) The Commission is therefore of the opinion that these measures are compatible with the common market.

([17]) Commission letter SG(95) D/341, 13.1.1995.

5.4. ***Assessment of the operational measures***

(71) A sum of DEM 133,8 million, financed by shareholder loans, was paid to cover operational costs in the years 1992 to 1996. Its breakdown is detailed in recitals 13 to 16.

(72) As has already been explained, all this aid has to be assessed under the ECSC Treaty. According to Article 4(c) of the ECSC Treaty, subsidies or aids granted by states, in any form whatsoever, are incompatible with the common market and accordingly prohibited. Exceptions to this rule are made in the successive Steel Aid Codes, but the Codes do not permit operating aid. In recitals 35 to 41 it has been explained why the operating aid cannot be considered as intended for a particular purpose, especially as it was not earmarked on any rational basis in advance. This aid is consequently incompatible with the ECSC Treaty and the Steel Aid Code.

(73) The Commission notes that after privatisation a sum of DEM 9,6 million was used to repay part of the shareholder loans. The total amount of the loans granted for operational purposes is therefore DEM 124,2 million.

5.5. ***Assessment of the measures taken in connection with the privatisation***

5.5.1. *Summary of the arguments put forward by Germany*

(74) The German view that the privatisation did not comprise any state aid rests on two arguments.

(a) In the first place, even if Georgsmarienhütte's bid did involve a cost, in the form of a negative purchase price, this outcome was nevertheless advantageous to the public shareholder which was selling the company, since the costs entailed by a liquidation of Gröditzer would have been higher. A private investor would have sold Gröditzer on the same basis.

(b) In the second place, Georgsmarienhütte's bid was the best to emerge from an unconditional, open and transparent procedure. Georgsmarienhütte was the only bidder to have submitted a business plan that satisfied the seller's demands. Germany refers to the Commission policy according to which a sale following a privatisation process that is open, transparent and unconditional does not constitute aid.

5.5.2. *The cost of privatising Gröditzer*

(75) The first argument put forward by Germany is that although the price secured was negative, privatisation

was still more advantageous than liquidation. The cost of liquidating Gröditzer would have been DEM 475 million gross, or DEM 381 million net after deduction of the liquidation value of Gröditzer's assets ([18]).

(76) The total cost of privatising Gröditzer proved to be DEM 340 million. Germany accordingly contends that privatisation was still the cheapest option. Thus the price arrived at satisfied the private investor test.

(77) According to the KPMG liquidation report sent by Germany, the cost of liquidating Gröditzer would have been DEM 475 million, breaking down as follows:

(a) liabilities: DEM 418 million (shareholder loans DEM 196 million; guaranteed bank loans DEM 49 million; other liabilities DEM 26 million, and provisions for miscellaneous costs DEM 147 million);

(b) cost of the liquidation itself: DEM 57 million (mainly operating and running-down costs incurred during the liquidation process).

(78) But the Court of Justice held in the *Hytasa* case that a private shareholder in a limited company was liable for the debts of the company only up to the liquidation value of the company's assets ([19]). According to the liquidation report, the liquidation value of the assets was DEM 94 million. This sum was available to satisfy all the debts of the company in the order in which they were ranked under the applicable German insolvency law. The cost of liquidation was therefore limited to DEM 94 million.

(79) The figure of DEM 475 million assumes full satisfaction of all debts by the public authorities, which would necessitate further funding. As the Court held in the same judgment, this calculation is incorrect. The Court found that, even if guided by prospects of viability in the long term and considerations of image and reputation, a private investor would not consider contributing capital to a company which was to be sold off, especially if the injection was linked to the sale of the undertaking, as in that case there was no hope of profit even in the long term, and the operation would be costlier than selling the assets ([20]). This reasoning applies in cases of liquidation too.

(80) The Court also held that a distinction had to be drawn between the obligations which the state had to assume as owner of the share capital of a company and its obligations as a public authority. In Gröditzer's case Germany has cited as items in the total cost of liquidation a series of costs to the shareholder which are in fact costs that the state has to bear in its capacity as a public authority. These are:

(a) the repayment of DEM 49 million in guaranteed bank loans. These guarantees were provided by the Treuhandanstalt and the BvS. Both bodies were federal institutions owned directly by the state. At the time of the privatisation they were not the state shareholders; these were in the first place EREL and later BMGB, both of which were also likewise federal institutions under direct state control ([21]). Any guarantee claims on loans that could not be repaid out of the company's assets would therefore be made not on the shareholder EREL but on the Treuhandanstalt or the BvS as state institutions;

(b) a provision of DEM 15 million for existing environmental damage (*Altlasten*, see recital 83); a sum of DEM 22 million towards costs arising out of a social plan that are not required by any binding obligation, and a provision of DEM 87 million for the cost of site clearance, that is to say demolishing all buildings, completely clearing the site, and selling the site to a third party despite the fact that the selling price would amount to no more than DEM 9 million.

Given Gröditzer's financial situation, it is unlikely that a private investor would have provided additional funding towards a social plan. And if the sale value of the land was only DEM 9 million, a private investor would not have decided to clear the site. Even if Gröditzer was under a legal obligation to clear the site, the shareholder would not have injected additional funding when the company was to be liquidated. Costs of that kind would have been borne by the state.

(81) Germany contends that in the event of insolvency German law classes shareholder loans as equity (*Eigenkapitalersatz*, equity substitution), which means that they cannot be claimed back from the assets. Shareholder loans constitute capital that the shareholder

([18]) The KPMG liquidation report describes the situation on 30 June 1996. Privatisation did not take place until February 1997, so that there is a small difference between the figures given and the figures for privatisation. The public seller considered in the report, EREL, had also been succeeded in the meantime by BMGB.

([19]) Joined Cases C-278/92, C-279/92 and C-280/92 *Spain v Commission* [1994] ECR 1-4103.

([20]) Same judgment, paragraph 26.

([21]) This division was the result of the decision to dissolve the Treuhand in 1994; its activities were shared between three separate organisations. The Guarantees were transferred to the BvS, while management, and shareholdings, were transferred to EREL, and later BMGB.

has made available to the company, and cannot be recovered in a liquidation.

The Commission remains of the opinion that in accordance with the case-law of the Court of Justice the cost of liquidation comprises only the liquidation value of the assets, that is to say DEM 94 million. But even if the shareholder loans were to be included in the cost of liquidation at full value, the total would still be DEM 292 million (assets DEM 94 million + shareholder loans DEM 198 million) ([22]).

(82) The cost of privatisation was DEM 340 million, so that liquidation would have been cheaper. A private investor would have wound up the company.

(83) With regard to the DEM 15 million in environmental costs, the Commission sees an additional argument in the fact that in comparing the cost of liquidation with the cost of privatisation Germany has not used comparable figures. Germany has stated that in the event of liquidation the environmental costs would be borne by the shareholder. In the case of privatisation the costs arising out of existing environmental damage were covered by an exceptional arrangement laid down by the *Land* of Saxony. But the privatisation costs listed by Germany do not include any provision for existing environmental liabilities. For an objective comparison, the DEM 15 million for site clearance, at least, should either be excluded from the cost of liquidation or included in the cost of privatisation. If the cost of privatisation is taken to include the DEM 15 million made available, it rises to DEM 355 million.

5.5.3. *The privatisation procedure*

(84) Turning to the second argument, Germany has informed the Commission that on 12 June 1996 the public shareholder instructed two investment banks, M. M. Warburg & Co. and Freyberg Hambros, to search for a candidate. In September 1996 both banks issued a memorandum with information on Gröditzer and its subsidiary Burg, on the basis of which bids were to be made. A total of 23 potentially interested investors asked for supplementary information. Three of these, Georgsmarienhütte, Industrial Technology and JPS, were selected as having the necessary technical and financial background. Bilateral negotiations were entered into with those three.

(85) Germany has submitted a synopsis of the state of negotiations with the three parties with a view to a takeover to take place on 1 January 1997 (*Angebotssynopse für GSW vor Endverhandlungen mit GMH*).

(86) According to the information supplied by Germany, Georgsmarienhütte was awarded the contract mainly because it was the only company to provide a business plan as requested. Its offer was also the best in both financial and conceptual terms. The German authorities have forwarded Georgsmarienhütte's business plan (*Unternehmenskonzept Gröditzer Stahlwerke GmbH*).

(87) The Commission considers that the procedure was not unconditional. The memoranda issued by the investment banks did not call for any binding bid. Potentially interested parties were asked to submit a business plan in which they were to put forward detailed commitments regarding jobs to be created or saved, future investment and financing. Those selected were to be invited to bilateral negotiations, and the commitments entered into would have a decisive influence on the purchase price. The memoranda expressly mentioned the possibility that state aid might be granted. No concrete bid was sought, and no parameters or ceilings were laid down for the assessment of bids.

(88) The Commission also considers that the procedure was neither open nor transparent. Negotiations were entered into with three parties on the basis of documentation that did not comprise an open call for bids, meeting clear requirements, but merely an invitation to open individual negotiations regarding commitments to be entered into by both seller and buyer, which were to be finalised through a negotiation process which was not clearly defined.

The commitments ultimately entered into influenced the purchase price negotiated. Any differences between positions in the final negotiations were therefore necessarily due to the methods chosen. The Commission considers that Georgsmarienhütte's offer and business plan did not constitute a binding bid.

(89) In these circumstances, where differences between the offers were inherent in the procedure chosen, Georgsmarienhütte was the only candidate of the three to be given a final opportunity to close the negotiations and to adapt its final position to the seller's requirements.

(90) The Commission is accordingly of the opinion that the privatisation did not take place on the basis of an open, transparent and unconditional procedure. The German argument that tendering was open, transparent and unconditional cannot be accepted.

([22]) An exact valuation of the shareholder loans would require a thorough analysis of the undertaking and its prospects.

5.5.4. *The amount of aid to Gröditzer to be taken into consideration*

(91) In line with its established practice, the Commission considers that when a sale is made on terms unacceptable to a private investor the whole of the negative sales price constitutes aid.

(92) The bulk of the negative sales price consists of the waiver, redemption or partial takeover of loans and the non-recovery of subsidies. These measures have been assessed above ([23]). In order to calculate the state aid component in the privatisation, account must also be taken of the financial measures referred to in recitals 17 and 18. The commitments entered into by the seller BMGB in the agreement for the privatisation of Gröditzer amounted to:

(a) DEM 37,5 million in subsidies for investment and operating purposes;

(b) DEM 16,3 million in the form of loans to be paid back on receipt of regional aid under the joint Federal Government/*Länder* regional scheme at a later stage; but to date only DEM 13 million has been paid out.

(93) These measures were taken pursuant to the privatisation agreement which entered into force on 1 January 1997. The total is DEM 53,8 million. Of this figure DEM 50,3 million has been paid. A further DEM 3,3 million in aid has been committed as a residual loan under the privatisation agreement, but has not yet been paid.

(94) As regards the allocation of these sums, Germany has indicated that in 1997 and 1998 a total of DEM 33 million was invested in Gröditzer. Of this figure DEM 1 million went to steel production, DEM 32 million went to plant covered by the EC Treaty, and the remaining DEM 17 million was used for operating purposes.

5.5.5. *Assessment of the aid to Gröditzer*

(95) The considerations set out in recitals 43 to 63 lead to the conclusion that the DEM 1 million invested in steel production and the operating aid of DEM 17 million are to be assessed under the Steel Aid Code. The investment aid for non-ECSC production plant, including regional aid under the joint Federal Government/*Länder* regional development scheme, are to be assessed in the light of the ceilings for regional aid.

(96) Under the sixth Steel Aid Code, neither general investment aid nor operating aid may be given to the ECSC steel industry. The amount concerned is DEM 18 million (DEM 1 million + DEM 17 million), and this is incompatible with Article 4(c) of the ECSC Treaty and with the sixth Steel Aid Code.

(97) Germany has supplied no data regarding the allocation of the sum of DEM 3,3 million that remains to be paid under the privatisation agreement, so that it cannot be concluded that this aid will be used to cover investment in the non-ECSC sector. This aid is therefore incompatible with the common market in coal and steel under Article 4(c) of the ECSC Treaty and under the sixth Steel Aid Code.

(98) The investment aid for non-ECSC production plant can be assessed under the relevant provisions of the EC Treaty. Under the applicable rules on regional aid, however, the total admissible intensity of this aid combined with other regional aid measures is only 35% gross. The relevant investment amounts to DEM 32 million, so that DEM 11,2 million can be declared compatible with the common market. The remainder, amounting to DEM 20,8 million, constitutes state aid incompatible with the common market.

5.5.6. *Aid to Burg*

(99) Additional aid to Burg in connection with the privatisation amounted to DEM 4,5 million in advance payments against future regional aid. As explained in recitals 23 and 24, the Commission should confirm that the aid to Burg remained within the limits set in the successive arrangements governing the Treuhand. This aid is therefore compatible with the common market.

5.6. ***Transfer of fixed assets***

(100) In order properly to implement a Commission decision requiring the recovery of state aid, the Member State must behave as a private creditor would, and with at least the same care that the Member State itself would exercise if it were collecting such things as tax or social security debts. Domestic law must be applied in the same way as it would be applied to a claim made purely under domestic law, and in such a way that collection is not rendered impossible or extremely difficult. As a general principle this means that the Member State must

([23]) The cost of the privatisation of Gröditzer amounted to DEM 340 million, including DEM 286 million for agreements ahead of privatisation providing for: a waiver of shareholder loans, DEM 198 million; redemption and continuation of guaranteed loans, DEM 53 million; grants towards social measures, DEM 28 million; non-recovery of subsidies under paragraph 249h of the Employment Promotion Act, DEM 7 million, and other items comprising the balance. The total is made up of this figure and the new aid of DEM 38 million and DEM 16 million.

seek to collect the debt at once and must use all available means to do so, where possible taking measures to enforce its claim against all available assets of the debtor, and seeking the liquidation of the debtor undertaking if the undertaking is unable to repay the debt.

(101) It is possible, indeed it is likely, that in a liquidation as a result of insolvency proceedings all the undertaking's remaining assets will be sold. In itself this raises no particular problem, as the sale takes place under the supervision of a liquidator who is required to seek the best possible result in the interest of the creditors, with the proceeds of the sale of the assets being used to satisfy their claims. Although the proceeds of the sale of the assets might not be sufficient to pay off all the undertaking's debts, and thus to ensure full repayment, a liquidation is not without importance in terms of competition. Competing undertakings, who might have suffered injury as a result of the incompatible state aid, will have the opportunity to fill the gap in the market left by the liquidated undertaking, and indeed themselves to buy the assets being sold with a view to using them more efficiently.

(102) After initiating the procedure in this case, and shortly before adopting its final decision, the Commission learnt that Gröditzer assets were being transferred to other undertakings controlled by the BvS, at their current value as Gröditzer assets, below the market price, or without any attempt to sell them on the open market. The object or effect of this proceeding may be to take these assets outside the reach of the Commission decision and to continue the weakest parts of the business. This would be in contradiction with the duty of Member States to ensure that the obligations imposed by a Commission decision are complied with.

(103) As with the collection of any debt, a Member State acting as an ordinary creditor must seek to ensure that there is no danger that the collection of the debt might be contested or annulled; to do so it must make use of all the means available under domestic law, for example under provisions governing fraud at the expense of creditors, or suspected agreements prior to insolvency proceedings.

(104) Moreover, in order to prevent evasion of its decision and to ensure that all distortion of competition is eliminated, the Commission has a duty if necessary to require that recovery proceedings should not be confined to the initial recipient, but should instead be extended to include any undertaking continuing the business of the initial undertaking using the transferred production plant, in so far as there are aspects of the transfer on either side which indicate that the business is in fact being continued. Examples of considerations of this kind, which the Commission would have to investigate, would be what is transferred (assets and liabilities, staff, consolidated assets), the purchase price, the identity of the shareholder or owner or the initial undertaking and of the buyer, the time at which the transfer takes place (after investigations have begun, after the initiation of the formal investigation procedure, or after the adoption of the final decision), and the commercial character of the transfer.

(105) Although Germany has informally denied that any agreements of the kind referred to will be put into effect, the Commission considers it necessary to make it clear in this Decision that the term 'the recipient' includes not just Gröditzer but also any other undertaking to which assets may have been transferred in order to evade the effect of this decision.

6. **Conclusions**

(106) The measures taken under paragraph 249 of the Employment Promotion Act to cover no more than DEM 6,9 million in employment promotion costs do not constitute state aid. Subsidies of DEM 54,4 million to cover the financing of the social plan and additional measures are compatible with Article 4(c) of the ECSC Treaty and the applicable Steel Aid Code.

(107) The Commission concludes that investment aid amounting to DEM 44,9 million which was made available to Gröditzer under different headings in the period 1992 to 1999 is compatible with the common market under Articles 87 and 88(2) of the EC Treaty.

(108) The Commission also concludes that before and after Gröditzer's privatisation Germany took a number of measures in respect of the company which were unlawful. The amount of state aid involved totalled DEM 242,4 million. This figure breaks down as follows.

(a) A sum of DEM 155,5 million has to be assessed under the ECSC Treaty; it is made up of the following:

I. DEM 13,3 million in investment aid for steel production in the years 1992 to 1996;

II. DEM 1,0 million in investment aid for steel production in the years 1997 to 1998;

III. DEM 124,2 million in operating aid in the years 1992 to 1996;

IV. DEM 17,2 million in operating aid in the years 1997 to 1998.

This aid is incompatible with Article 4(c) of the ECSC Treaty and with the applicable Steel Aid Code. Germany must recover it.

(b) Investment aid in excess of the 35% ceiling for regional aid, which amounts to DEM 83,2 million (DEM 62,4 million before privatisation and DEM 20,8 million in the course of privatisation), has to be assessed under the EC Treaty. It is incompatible with the common market under Articles 87 and 88(2) of that Treaty. Germany must recover this aid.

(c) A further sum of DEM 3,3 million which Germany plans to grant to Gröditzer has to be assessed under the ECSC Treaty. It is incompatible with Article 4(c) of that Treaty and with the Sixth Steel Aid Code. It must not be granted,

HAS ADOPTED THIS DECISION:

Article 1

The payment of DEM 6,9 million by Germany to Gröditzer Stahlwerke GmbH (Gröditzer) in order to cover the cost of measures under paragraph 249 of the Employment Promotion Act does not constitute state aid within the meaning of Article 4(c) of the ECSC Treaty.

Article 2

The following measures which Germany has taken in respect of Gröditzer in order to finance a social plan and additional measures for the benefit of redundant Gröditzer employees are compatible with the common market in coal and steel:

(a) financing in the form of loans granted by Gröditzer's successive public shareholders, namely the Treuhandanstalt, EREL and BMGB, which amounted to DEM 26,1 million;

(b) a sum of DEM 28,3 million paid by BMGB.

Article 3

Investment aid granted to Gröditzer totalling DEM 44,9 million constitutes state aid compatible with Article 87(a) of the EC Treaty; this aid breaks down as follows:

(a) DEM 8,4 million under the joint Federal Government/*Länder* scheme for the improvement of regional economic structures (*Gemeinschaftsaufgabe Verbesserung der regionalen Wirtschaftsstruktur*) in 1994

(b) DEM 3,6 million in investment aid in the form of tax concessions under the Investment Allowances Act (*Investitionszulagengesetz*) in the years 1992 to 1995

(c) DEM 32,9 million in bank loans carrying a 100% guarantee from the Treuhandanstalt and the Bundesanstalt für Vereinigungsbedingte Sonderaufgaben (BvS), shareholder loans granted by Gröditzer's successive public shareholders in the years 1992 to 1996, and regional aid paid under the joint Federal Government/*Länder* scheme for the improvement of regional economic structures in the years 1997 to 1999.

Article 4

Investment aid to Gröditzer amounting to DEM 83,2 million, consisting of bank loans carrying a 100% guarantee from the Treuhandanstalt or the BvS, shareholder loans granted by the Gröditzer's successive public shareholders in the years 1992 to 1996, and regional aid under the joint Federal Government/*Länder* scheme for the improvement of regional economic structures paid in the years 1997 to 1999 are incompatible with the common market under Articles 87 and 88(2) of the EC Treaty.

Article 5

Measures taken by Germany in respect of Gröditzer totalling DEM 155,5 million, comprising investment aid of no more than DEM 14,3 million and operating aid of no more than DEM 141,2 million (being a payment of DEM 17,0 million under the privatisation agreement and funding of DEM 124,2 million financed by means of bank loans carrying a 100% guarantee from the Treuhandanstalt or the BvS and by means of shareholder loans granted by Gröditzer's successive public shareholders), constitute state aid incompatible with the common market in coal and steel.

Article 6

The aid that Germany plans to grant to Gröditzer under Article 9(2) of the agreement of 27 February 1997 governing the sale of shares in Gröditzer to Georgsmarienhütte GmbH, amounting to DEM 3,3 million, in the form of loan as advance payments against regional aid to be received, is incompatible with the common market in coal and steel.

Article 7

1. Germany shall take the measures necessary to recover from the recipient the aid referred to in Articles 4 and 5, which was granted to it unlawfully.

2. Recovery shall be effected in accordance with the procedures of national law in so far as national law does not

render it impossible or unduly difficult. The sums to be recovered shall bear interest from the date on which they were made available to the recipient until their actual recovery, at the reference rate used for calculating the grant equivalent of regional aid.

3. For the purposes of this Article the term 'recipient' comprises not only Gröditzer but any other undertaking to which assets have been transferred in such a way as to deprive paragraph 1 of effect.

Article 8

Walzwerk Burg GmbH benefits under an existing aid arrangement. Accordingly, no further procedural steps are envisaged.

Article 9

Germany shall inform the Commission, within two months of notification of this Decision, of the measures taken to comply with it.

Article 10

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 8 July 1999.

For the Commission
Monika WULF-MATHIES
Member of the Commission