COMMISSION

COMMISSION DECISION
of 4 October 2000
concerning State aid to Verlipack, Belgium

(notified under document number C(2000) 2926)

(Only the French and Dutch texts are authentic)

(Text with EEA relevance)

(2001/856/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

Having called on interested parties to submit their comments pursuant to those provisions and having regard to their comments,

Whereas:

I. **PROCEDURE**

(1) Following complaints received in 1997 concerning aid granted by the Walloon Region to Verlipack which did not appear to be compatible with the rules on State aid, the Commission registered the case on 18 November 1997 as non-notified aid.

(2) On 16 September 1998 the Commission decided on the basis of information formally transmitted by Belgium not to raise objections to the measures taken by the Walloon Region following an examination of the measures under Articles 87 et seq., of the EC Treaty and Article 61 of the EEA Agreement [1]. The decision found that the measures were compatible with the guidelines on Government capital injections [2] (hereinafter referred to as the 'guidelines') and, in particular, that the Walloon Region contribution was consistent with the actions of an investor operating under normal market economy conditions. Furthermore, the fact that a private investor, the Heye-Glas group (hereinafter referred as 'Heye') was acquiring a majority stake at the same time indicated prospects of future profitability and viability for the Verlipack group.

(3) According to the press and several complainants, Verlipack's production plants incurred fresh losses in 1998. Furthermore, according to one complainant, the private capital injection by Holding Verlipack I [3] on 11 April 1997 apparently originates from funds provided by the Walloon Region, the SRIW [4], in the form of two loans.

(4) By letters of 14 December 1998 and 13 January 1999, the Commission requested further information from the Belgian authorities on Verlipack's history and the alleged grant of two loans to Heye.

(5) By letter of 25 February 1999, received on 1 March 1999, Belgium supplied the details requested, on the basis of which the Commission was obliged to re-open the assessment of the package of measures granted in 1997 by the Walloon Region to Verlipack.

(6) On 19 May 1999 the Commission decided to initiate the procedure in respect of the aid granted to Verlipack, pursuant to Article 9 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty [5].

(7) By letter of 1 July 1999 the Commission informed Belgium of its decision to open the procedure provided for in Article 88(2) of the EC Treaty in respect of the aid in question.

(8) The Commission decision to open the procedure was published in the *Official Journal of the European Communities* [6]. The Commission invited interested parties to submit their comments on the aid in question.

(9) The Commission received comments on the aid from interested parties, which it forwarded to the Belgian authorities by letter of 3 December 1999, for their observations. The authorities responded by letter of 22 December 1999, which was registered as received on 3 January 2000.

[1] OJ C 29, 4.2.1999, p. 13.
[2] Bulletin EC 9-1984.
[3] Set up on 24 January 1997 by the Beaulieu group without the involvement of the Walloon Region.
[4] Société Régionale d'Investissement de Wallonie, a public limited company.
[5] OJ L 83, 27.3.1999, p. 1.
[6] OJ C 288, 9.10.1999, p. 24.

II. DESCRIPTION OF THE MEASURES

II.1. The recipient

(10) Until it was wound up on 18 January 1999, SA Verlipack was the largest Belgian producer of hollow container glass, with a 20 % share of the Belgian market and 2 % of the EU market. It employed 735 people in its factories at Ghlin, Jumet and Mol. The two Walloon plants, Ghlin and Jumet, are in development areas covered by a regional aid scheme provided for by the Belgian Law of 30 December 1970. [1] The limited companies Verlipack Ghlin, Verlipack Jumet and Verlipack Mol were set up in 1985, with Société nationale pour la restructuration du secteur du verre creux holding a 49 % stake, approved by the Commission [2].

(11) In 1989, the Walloon Region acquired, in accordance with the special Law of 15 January 1989, the non-voting shares in the Ghlin and Jumet plants, while the shares in the Mol plant were transferred to the Flemish Region. Following a number of capital increases by the private shareholder (Imcopack Wallonie and Imcopack Vlaanderen, owned by the Beaulieu group), the public shareholding was gradually reduced. Finally, in December 1996, the Walloon Region transferred its holdings in the two Walloon plants, valued at BEF 113 712 000, to the Beaulieu group. Thus Verlipack's Walloon plants temporarily became companies without a public shareholding.

(12) In September 1996, the German industrial group Heye-Glas concluded a technical assistance agreement with Verlipack. The agreement was subsequently extended to cover management and financial assistance on 11 April 1997. On the same date, Heye acquired a stake in Holding Verlipack I, set up on 24 January 1997 by the Beaulieu group, for BEF 515 million, giving it, after the capital increase in Holding I to a total of BEF 1,030 billion, a larger stake than the Beaulieu group. On 11 April 1997, Holding Verlipack II was set up by the shareholders of Holding Verlipack I and the Walloon Region (injection of BEF 350 million, i.e. 25,35 %) with capital totalling BEF 1 380 500 000.

(13) Given the arrival of Heye, the world leader in container glass technology, its financial commitment, a strategic plan providing for a major investment programme and the trend towards more buoyant markets, the Walloon Region could rely on the prospect of long-term profitability and viability of Verlipack.

(14) However, the new losses incurred in 1998 which, according to Verlipack, were due to overcapacity on the market in question, countered the very favourable prospects identified when the agreement on technical and financial assistance and management assistance was concluded with Heye.

(15) On 7 January 1999, the closure of the Mol plant (Flanders) and the application for a composition for the Jumet and Ghlin plants (Wallonia) were announced.

(16) On 11 January 1999, the Commercial Court of Turnhout declared Verlipack Mol (Flanders) bankrupt and, on 18 January 1999, the Commercial Court of Mons declared that the six companies of the glassmaking Verlipack group were bankrupt (the plants at Ghlin and Jumet, Verlipack Belgium, Verlipack Engineering, Verlimo and Imcourlease).

II.2. The aid

II.2.1. *Measures covered by the Commission decision of 16 September 1998*

(17) When Holding Verlipack II was set up by its shareholder Holding Verlipack I, which has a capital of BEF 1,030 billion held in equal proportions by the Beaulieu group and the German group Heye (which holds one extra share), the Walloon Region injected BEF 200 million. Following the conversion of the equity loan of BEF 150 million, its stake rose to BEF 350 million, or 25,35 % of the capital of Holding Verlipack II.

II.2.2. *Measures not covered by the Commission decision of 16 September 1998*

(18) The details sent by the Belgian authorities on 25 February 1999 show that the Walloon Region took extra measures when Heye acquired a holding in Verlipack. Following the decisions taken on 8 January and 12 March 1997 by the SRIW management board, two loans of BEF 250 million were granted to Heye, 'i.e. the amount of the cash injected by Heye into Holding A (the same amount that was injected into Holding B and subsequently into the Verlipack operating companies)'.

(19) The loans in question consisted of:

(20) — a debenture loan of BEF 250 million granted on 27 March 1997 for five years at a fixed rate of 5,10 %, plus a 1 % risk premium, to be used as necessary to finance the recapitalisation of the Ghlin and Jumet plants and investment in the three operating plants of the Verlipack group, including the Mol plant in Flanders.

[1] OJ L 312, 9.11.1982, p. 18.
[2] Aid N 123/85.

(21) A conditional loan write-off clause stipulated that 'if, on the date on which payment of a tranche of the loan becomes due, Holding 2 … and the three operating companies, SA Verlipack Jumet, SA Verlipack Ghlin and SA Verlipack Mol are declared bankrupt, the amounts owed by the Company as from that due date inclusive need no longer be repaid to SRIW, the latter undertaking in the circumstances to write off the loan provided that the Company has until then regularly honoured the due dates of both the principal and the interest. This clause shall not however apply if the bankruptcy is due to a deliberate policy decision by the majority shareholder Heye resulting in the relocation of production to a third country'.

(22) — a loan granted on 28 March 1997 for ten years at 'the six-month BIBOR rate in force on the first working day of each half-year for which it is due, … plus 1,5 %. …However, the Company may at any time, from the sixth year, decide to opt for a fixed interest rate of 7 % per annum for the remaining period of the loan.'

(23) The financial allocation clause in the loan agreement provides that 'the full amount … is to be used as necessary to finance the operations described in the Annex to this Agreement'. The clause was 'to result in a cash increase in the capital of SA Verlipack Ghlin of at least BEF 400 million and … in SA Verlipack Jumet of at least BEF 300 million and in investments by the three operating companies of the group in accordance with the investment plan …'.

(24) The immediate collectability clause in the loan agreement enabled SRIW to demand the immediate repayment of its loan in the event of, *inter alia*, 'significant inaccuracy of the information provided; failure, whether or not partial, of the Company to satisfy a legal or contractual obligation relating to the loan; failure to implement by 31 July 1997 at the latest the allocation clause (financing operations) or if at least 80 % investments planned have not been carried out by 31 December 2000 at the latest …; the voluntary liquidation of SA Verlipack Jumet, SA Verlipack Ghlin and SA Verlipack Mol …'..

(25) — Lastly, the Walloon Region granted the Beaulieu group payment facilities for the repurchase of 25 911 stocks and shares in the Verlipack group under the December 1996 agreement. Payment was in 'instalments of 20 % from 2001 to 2005' and, no interest would be charged on the amounts due on the dates provided for in the above-mentioned agreement.

II.3. **Reasons given by the Commission for initiating the procedure**

(26) Following the communication from Belgium of 25 February 1999 confirming that two loans of BEF 250 million each were granted by the Walloon authorities to Heye to finance its stake in Verlipack, the Commission expressed doubt that the Walloon Region had, when it injected BEF 350 million into Verlipack, complied with the principle of a private investor operating under normal market economy conditions.

(27) If the Commission does not have the information that it needs to assess public authorities' holdings under the guidelines, it may have to revoke its decision under Article 9 of Regulation (EC) No 659/1999. The capital injection by the Walloon authorities is no longer concomitant with the injection by a private investor as the latter used public resources.

(28) A private investor would not have acted like the Walloon Region and acquired a stake of BEF 350 million (23,35 %) on the one hand and, on the other, lent BEF 500 million to Heye to finance its majority acquisition in Verlipack. Taking the two loans into account, the Walloon authorities contributed a total of BEF 850 million to Verlipack.

(29) As regards the allocation of the two loans of BEF 500 million, the two agreements and the decisions of the SRIW management board of 8 January 1997 stipulated that the loans were to be used to increase the capital of the Ghlin and Jumet plants and for investments in accordance with the two-stage investment plan (1997 to 1999 and 2000 to 2001). The Commission took the view in its decision of 19 May 1999 that the recipient of the aid corresponding to the two loans was Verlipack.

(30) The Commission considered that the terms on which the loans were granted were not those of a private investor operating under market economy conditions. On the one hand it involved a debenture loan with a debt write-off clause in the event of bankruptcy and, on the other, a second loan which was to be repaid only from the fourth year, i.e. from 28 March 2000.

(31) The Commission also concluded that the measures taken by the Belgian authorities could not be regarded as rescue aid as they did not satisfy the conditions provided for [1].

[1] Eighth Competition Report, point 228.

(32) Furthermore, as there was no restructuring plan or realistic forecasts of future operating conditions, especially as regards market trends, the Commission concluded that the aid to Verlipack could not be approved under the Community guidelines on State aid for rescuing and restructuring firms in difficulty [1].

(33) On the basis of the information available to the Commission, the aid to Verlipack cannot be regarded as aid to facilitate the development of certain economic activities or of certain economic areas.

(34) Trade between the Member States on the market for container glass in which Verlipack operates is subject to fairly strong competition. In addition, according to statements made by the management of Verlipack, the winding-up was the result of a fall in prices due to overcapacity in glass production on the European market. Lastly, the Commission noted that the aid granted by Belgium was liable to alter the conditions of trade to an extent contrary to the common interest.

(35) The Commission also expressed doubt concerning the possible benefit to Beaulieu of the payment facilities granted when it acquired the preference shares, without voting rights, and the profit shares for BEF 113 723 000. Following the winding-up of Verlipack, Beaulieu did not in fact make any payments to the Walloon Region.

III. **COMMENTS FROM INTERESTED PARTIES**

(36) Following the invitation to submit comments under Article 88(2) of the EC Treaty, the Commission received comments from three complainants and the private investor.

(37) The first interested party, hoping that light would be shed on the matter, forwarded a document of 27 February 1997, signed by Robert Collignon, then Minister-President of the Walloon Government, concerning the 'Setting-up of the holding company: Beaulieu group (Verlipack), Heye Glas and Walloon Region on the basis of a budgetary allocation of BEF 350 million (decision of the Walloon Government of 12 December 1996)'.

(38) According to that document, the two Walloon plants were incurring losses at 31 August 1996 estimated at BEF 184 million by the end of 1996 and due to:

— the continuing slump on the European market, which led to a slump in selling prices,

— the poor quality of the products made by Verlipack for several years, owing in particular to malfunctions in some of the furnaces,

— inadequate management,

— the loss of important markets owing to the above-mentioned quality problem and a loss of confidence in the company and its current shareholders, seen as wishing to disinvest from the sector.

(39) It is also clear from the document that, despite the contribution of over BEF 2 billion and considerable investments, the majority shareholder Beaulieu failed to achieve adequate quality and productivity. Whilst the agreement concluded on 1 September 1996 between Beaulieu and Heye enabled a spectacular recovery in the quality of glass produced and in productivity at the two Walloon plants, the losses nevertheless remained very high.

(40) However, the comments sent to the Commission do not contain any information concerning the two loans of BEF 500 million that would allow it to determine the compatibility of the loans with the common market.

(41) A second interested party expressed its continuing concern regarding the aid that had been and possibly would be granted to Verlipack. It was particularly concerned by the acquisition of the Ghlin plant by Mr Dominique Balcaen that had allowed the plant to remain in operation [2]. According to the interested party, one of the furnaces at Ghlin will have to be replaced within one or two years to enable production to continue in the medium-term. The cost of the replacement would require an investment of some BEF 200 million to BEF 300 million. The complainant, however, questions the ability of the new owner to finance such an investment without further State aid.

(42) The Commission's attention was drawn to the fact that the container glass industry continues to face problems of overcapacity and its characterised by strong competition and a considerable amount of trade between Member States. Any fresh aid to Verlipack would be harmful to other firms in the container glass sector. Finally, in view of the history of State aid to Verlipack and the obvious attempts of the Walloon authorities to camouflage State aid by granting loans to a third party, the Commission is required to inform all governments and recipients of aid that such behaviour cannot be tolerated.

(43) The private investor, Heye, stated in the first place that, as regards the procedure, it was informed of the Commission decision of 16 September 1998 only through the notice published in the *Official Journal of the European Communities* of 9 October 1999 and that it had not had access to the original text of the decision.

[1] OJ C 368, 23.12.1994, p. 12.

[2] Glass factory.

(44) Secondly, Heye pointed out that the two loans of BEF 500 million granted on 27 and 28 March 1997 by the Walloon Region 'had to be transferred in full to Verlipack Jumet SA and Verlipack Ghlin SA, operating the plants of Jumet and Ghlin respectively, in accordance with the terms of the loan agreements. The funds were transferred to the operating subsidiaries through two successive capital increases in Verlipack Holding I, first, and Verlipack Holding II, second. They were eventually allotted to capital increases in the operating subsidiaries'.

(45) Heye has stated that it informed the Region as early as March 1997 (i.e. before the loan agreements were concluded) of its concerns that the proposed measures might constitute State aid and ought to be notified to the Commission. It summarised the attitude of the Walloon authorities as follows: 'They maintained that there was no State aid in the present instance and that, if this were not the case, they were accustomed to notifying State aid plans to the Commission and would see to it'.

(46) Furthermore, according to the Walloon authorities, in view of the interest rate charged on the two loans, in any event for the first few years, the amounts concerned could not possibly constitute State aid. In their view, the measure was similar to one taken by a private investor, and derogations from the common law on State aid control were applicable in view of the geographical location of Verlipack's plants.

(47) Heye had no reason to doubt these statements, made by the representatives of a public undertaking. Nor was it under any obligation to inquire as to the exact content of the notification, as this is not required of a recipient or, *a fortiori*, third parties [1].

(48) The investor stated that it had played only a limited part in drafting the notification to the Commission and had provided all the information requested to the Walloon authorities, 'from the moment at which the notification actually takes place, the recipient may legitimately expect it to be complete and accurate, especially as it carried out by a public authority which is bound by an obligation of reasonable cooperation with the Community institutions under Article 10 of the EC Treaty'. It therefore considered that neither it nor the recipient firms should be reproached for the fact that the Walloon authorities failed to reveal the existence of the two loans in the notification that resulted in the decision of 16 September 1998.

(49) As to the substance of the Commission's decision of 16 September not to object to the capital injected by the Walloon authorities, it noted that the statement that '... Heye, when it acquired its shares in the capital of Verlipack, did not wish to commit own funds' did not reflect the true situation. When the loans were granted, Heye agreed that Holding II would invest BEF 2 452 billion in the three Verlipack plants, in accordance with a phased plan valid until 2002, a copy of which was attached to its comments. The funds earmarked for the investments are significantly higher than the BEF 500 million lent to it by SRIW.

(50) In addition to the capital contribution of BEF 500 million lent by the Walloon authorities, Heye began to implement the plan and invested BEF 100 million on 27 March 1998 and BEF 200 million on 19 June 1998. Proof of the payments, made from own resources and loans granted on market terms by its banker, were attached to the comments. Thus it seems that the investor contributed a total of BEF 800 million to the capital increases in Verlipack.

(51) According to Heye, the Walloon authorities did not in fact allocate any other funds apart from the two loans of BEF 500 million and the capital contribution of BEF 350 million.

(52) Heye considers that, as it has fulfilled its commitments, i.e. investment in Verlipack in accordance with a phased plan on the one hand and the transfer of a furnace located in Germany with an annual output of 50 000 tonnes to a site in Wallonia on the other, it has demonstrated the viability of the restructuring plan drawn up at the time. The plan had a reasonable chance of succeeding and leading to the recovery of Verlipack. The difficulties that Verlipack encountered thereafter, which led to the bankruptcy of most of the members of the group in January 1999, allegedly stemmed from external circumstances, more specifically the rapid fall in the price of container glass.

(53) According to Heye, it was not possible in 1997 to forecast the trend in prices, which had indeed, in the general opinion of the industry, reached their lowest point that year. Heye then provides confidential figures in support of the prices anticipated in 1997.

(54) Lastly, given Heye's undertaking to carry out an investment plan totalling some BEF 1,8 billion for the Walloon sites alone, it considered that 'the measures taken by the Walloon authorities on behalf of the Verlipack group could have been taken by a private investor of a comparable size to that of the bodies administering the public sector' [2].

[1] Case C-39/94 SFEI [1996] ECR I-3579, point 73.

[2] Case C-305/89 Alfa Romeo [1991] ECR I-1603, points 18 and 19.

(55) Heye emphasised the difference between, on the one hand, firms used only to transfer funds, such as in the present case and, on the other, firms that have benefited from such transfers and thus become recipients within the meaning of Community rules on State aid [1]. According to Heye which, moreover, incurred heavy losses from the Verlipack operation, even if a Commission decision were to require Belgium to recover the aid, no such decision could be taken with regard to Heye under Article 14 of Regulation (EC) No 659/1999.

(56) Heye attached to its a comments a 'statement of events', which it had lodged with the Mons Commercial Court in January 1999 and which had formed one of the annexes to the application for a composition.

IV. **COMMENTS FROM BELGIUM**

IV.1. **Comments on the initiation of the procedure**

(57) The comments from the Belgian authorities dated 29 September 1999 referred first to the circumstances of the intervention by the SRIW, namely the granting of two loans, not notified to the Commission in the course of its investigation leading to the decision of 16 September 1998. According to the Commission, 'in the context of its negotiations with the Beaulieu group then with the Walloon Region, the Heye group applied in 1996 to SRIW for financing for its capital investments in Verlipack'. At the time, SRIW had reminded Heye that its role was ' to contribute to the financing of industrial or commercial activities and not to allocate subsidies, a role played by the Walloon Region through the different mechanisms at its disposal' [2].

(58) The Belgian authorities then listed the many credibility factors, including the financing granted by the two private shareholders and bankers, the signing of the assistance agreement, the reputation and professional competence of Heye and the restructuring plan for Verlipack and its favourable prospects, which made it clear that SRIW, like the Walloon Region, had shown sufficient caution before taking its decision.

(59) Whilst the bankruptcy, according to Belgium, is an unfortunate and unpredictable consequence of a deterioration which occurred after the public and private-sector injections into Verlipack, there are no new factors that would point to the conclusion that the Belgian public and private-sector partners that placed their trust in Heye made an error of judgement such that it could be said that, at the time, they failed to act in accordance with the principles guiding a private investor operating under normal market economy conditions.

(60) The Belgian authorities referred in this connection to the abovementioned letter from SRIW to Heye stating that 'it will no longer be a "high risk" company' (Verlipack) and that 'therefore, we do not regard it as exaggerated to ask Heye to cover 50 % of the risk that Heye regards as small'.

(61) The Belgian authorities then wondered whether 'Heye had been reckless with regard to its partners not belonging to the glass industry by presenting them with industrial, commercial and financial projections that were too optimistic or seriously incorrect'. The public authorities, like Beaulieu and the banks, according to Belgium, had been misled by their new partner, 'for which they can obviously not be blamed when they assessed the case before them'. The Belgian authorities concluded their comments concerning the SRIW decision to finance Heye by stating that the public authorities had behaved like a private investor in their examination of the case and in view of the information provided by Heye which appeared to be completely credible regarding the future of Verlipack. According to the Belgian authorities, the fact that bankruptcy occurred 22 months later does not mean that, in March 1997, SRIW, like the Walloon Region, did not act like a private investor.

(62) As regards the terms of the loan and the debenture loan, which had not been notified to the Commission during the inquiry that resulted in the decision of 16 September 1998, the Belgian authorities commented first on the reference rate of 7,21 % applicable in Belgium in the first half of 1997.

(63) The interest rate on the five-year debenture loan of BEF 250 million granted by SRIW to Heye on 27 March 1997 was 5,10 %, plus a risk premium of 1 %.

(64) The rate at which the 10-year loan was granted on 28 March 1997 with a three-year grace period is equivalent to the six-month BIBOR rate in force on the first working day of each half-year for which it is due, plus 1,5 % (which corresponds to a rate of 4,92 % for the period from 28 March 1997 to 31 September 1997 and 5,30 % for the period from 1 October 1997 to 30 September 1998).

[1] Joined Cases C-329/93, C-62/95 and C-63/95 *Germany* v *Commission* [1996] ECR I-5151, point 56.

[2] The letter of 21 January 1996 from SRIW to Heye was attached to the comments.

(65) The Belgian authorities pointed out that, according to a study carried out for the Commission by KPMG 'on the method for setting the reference rates applicable to the various aid schemes for businesses in the Union', the particularly high reference rate did not correspond at the time to the market rates in force. Following that study, the Commission amended the method for fixing the reference rate in a letter of 18 August 1997 to the Member States [1] and noted that 'the rate on a public loan having a duration of five years may be lower than the EMI rate and yet not contain any aid element'. The reference rate applicable from 1 August 1997 was 5,55 %. [2]

(66) As regards the terms of the loans, Belgium concluded that they did not contain any state aid elements and that the bankruptcy of Verlipack's operating companies is not relevant either to their returns or to their recovery, as the debtor was solvent. Furthermore, the loans are to be the subject of legal recovery proceedings before the Liège commercial court.

(67) As regards the debt write-off clause accompanying the debenture loan of 27 March 1997, Belgium referred to the obligation on Heye to repay in full the capital, interest and penalties for failure to comply with the fund allocation clause. According to the Belgian authorities, the write-off is conditional, under Article 2 of the debenture loan agreement. The allocation clause provides that 'the full amount is intended to finance as appropriate the operations described in the annexes to this agreement' and 'is intended to result in a cash increase in the capital of Verlipack Ghlin of at least BEF 400 million and …in a cash increase in SA Verlipack Jumet of at least BEF 300 million and in investments for the three operating companies of the group in accordance with the investment plan …'. Belgium also referred to the fact that the abovementioned agreement [3] was validly terminated before the events entailing immediate collectability of the loan occurred, i.e. the bankruptcy of Verlipack Holding II. According to the comments from Belgium, the write-off clause is not applicable owing to the fact that 'Verlipack Holding is not bankrupt at the present time' [4].

(68) As regards the question whether the debt write-off clause constitutes aid or not, the Belgian authorities pointed out that the cover of BEF 250 million obtained by Heye through SRIW involved only a 'very small risk' which explained the risk premium of 1 %. They acknowledged that the rate of 6,10 % could have been fixed at a maximum of 6,50 %.

(69) Lastly, as regards the loans granted by SRIW to Heye, the Belgian authorities stated that 'there are no grounds for concluding that Heye, in view of its results and its solvency, could not have financed its capital injection in Verlipack by having recourse to financial institutions other than SRIW, on similar financial terms, with the possible exception of the return on the debenture loan'.

(70) Under the plan, at least 80 % of the investments were to be carried out by 31 December 2000. According to Annex 14 of the comments from the Belgian authorities, a total of BEF 438,4 million was invested in 1997 and 1998 at Mol, Jumet and Ghlin in accordance with an undertaking given by Heye to invest up to BEF 2,452 billion in the three plants. However, according to the same comments, investment in Jumet and Ghlin totalled BEF 294,5 million, excluding the investment of BEF 143,9 million in the Mol plant in Flanders, included in the total investments.

(71) As regards the undertaking given by the banks to finance the investments, the Belgian authorities referred to their letters of 28 August 1997, 2 April 1998 and 25 February 1999, stating that the amount owed to the banks by the Verlipack group at 30 September 1997 totalled BEF 995 million. The letters referred to by the Belgian authorities are in the possession of the Commission (Crédit Lyonnais Belgium to Verlico, 29 November 1996; Kredietbank to Verlico, 22, 23 August and 29 November 1996). The financial support from Verlico (Beaulieu group) of BEF 1 billion was confirmed on 11 April 1997.

(72) The Belgian authorities then turned to the conclusion reached by the Commission, on the basis of the information in its possession, in its decision of 19 May 1999 when assessing whether BEF 500 million could be regarded as aid for the restructuring of Verlipack. At the time, it had stated that the conditions of the guidelines had been satisfied. It had based its view on a realistic and detailed restructuring plan, a business plan for the period 1997 to 2000 that would place Verlipack on a stable footing and involved a structural reorganisation, a new industrial strategy, synergy of the groups, on improvement in quality and an investment programme of BEF 2,452 billion. The Belgian authorities also drew attention to the fact that Verlipack's two Walloon sites were located in an assisted area under Article 87(3)(c).

[1] SG(97)D/7114.
[2] Against 7,21 % before.
[3] On 20 January 1999 according to the memo of 25 February 1999 sent in the course of the Commission's investigation leading to the initiation of the procedure under Article 88(2) of the EC Treaty.
[4] Judgment of 31 May 1999 of the Mons Commercial Court rejecting the statement of bankruptcy.

(73) As regards the Commission's preliminary assessment of the measures not covered by its decision of 16 September 1998, Belgium argued first that the Commission 'should apply individually to each form of intervention', i.e. the two loans granted by SRIW to Heye, 'the necessary criteria for assessing their respective compliance and whether each measure constitutes aid and, if so, whether the aid is compatible with the Community rules'. Especially 'in view of the fact that the recipient of the loans is a sound company rather than a firm undergoing restructuring'.

(74) The Belgian authorities then stated their view that the capital injections by the Walloon Region represented a risk taken by a shareholder whose investment is linked to the results of the company in which it has a stake, Verlipack Holding II. The SRIW for its part, in granting loans to Heye, also took a risk concerning the solvency of its debtor Heye.

(75) According to the Cityflyer judgment of 30 April 1998 [1] referred to by the Belgian authorities, there is an important difference between the two, since a sum provided in the form of a contribution to share capital is transferred on a permanent basis whereas a sum provided by way of loan, being repayable, is made available only temporarily. The Belgian authorities consider that Heye will have to repay the amounts borrowed, despite having lost its entire stake in Verlipack which the loans enabled it to acquire.

(76) According to the Belgian authorities, Heye never questioned the value of its investment in Verlipack as it regarded the risk as small and, during a period of difficulty, it maintained its support for Verlipack, in particular through two further capital injections of BEF 100 million on 30 March 1998 (capital increased to BEF 1 330 500 000) and BEF 200 million on 26 June 1998 (capital increased to BEF 1 630 500 000). The notarised acts of the capital injections were attached to the communication from Belgium. According to the act of 26 June 1998, not only Heye but SA Worldwide Investors of Luxembourg underwrote the capital of Verlipack Holding II to the tune of BEF 100 million.

(77) As regards the Commission's doubts concerning the behaviour of the Walloon Region as a private investor acting under normal market economy conditions, i.e. acquiring a share in the capital of Verlipack and granting loans to Heye to finance its capital contributions, Belgium concluded that 'a private investor could very well have invested capital in Verlipack and granted loans to another firm (Heye) without having to globalise its risk, since it concerned two separate "debtors"', one solvent and the other bankrupt.

(78) Belgium challenged the Commission's view that the actual recipient of the aid corresponding to the two loans granted by SRIW was Verlipack. It considered that the allocation clause in the debenture loan agreement concerned a capital contribution by the debtor and the use of the capital for investment. It also stated that 'it was entirely in Heye's interest to borrow the capital it was going to invest in Verlipack and it was in the interests of SRIW to obtain a financial return from a company investing in the Walloon Region'.

(79) Furthermore, the Belgian authorities stated that Heye took the decision to restructure Verlipack and that it applied for and obtained the loans from SRIW to finance its capital contribution. Lastly, 'the theory that Verlipack is the actual beneficiary of the loans comes up against the fact that, if it became necessary to repay the aid, SRIW has no means of claiming repayment by Verlipack as its debtor is Heye'.

(80) As regards the transfer of the stake held by the Walloon Region to Beaulieu, the Belgian authorities estimated the nominal subscription value of the shares without voting rights and the profit shares held by the Walloon Region in Verlipack Ghlin and Verlipack Jumet at BEF 10 000. According to the transfer contract of 18 December 1996, Sowagep [2] held 5 087 preference shares without voting rights and 3 937 category I profit shares in Ghlin, and 2 923 preference shares without voting rights and 2 267 category I profit shares in Jumet. The Beaulieu group, through SA Ter Lembeek International, purchased the Ghlin shares for BEF 72 192 000 and the Jumet shares for BEF 41 520 000, or a total of BEF 113 720 000. The contract shows that the amount is payable on 31 December 2001, net/net, without interest.

(81) In view of the results of 30 April 1998, with turnover reaching BEF 1,195 billion, losses BEF 269,3 million and a cash-drain of BEF 107,3 million, the cashflow of the Verlipack group showed a deficit of BEF 376,8 million, which was overdue, unpaid and impossible to reduce in the short term. In order to resolve the situation, Heye, Beaulieu, the representatives of the Walloon Region and a number of banks met in order to examine different methods of relaunching the Verlipack restructuring plan. A relaunch agreement was concluded on 5 June 1998. [3]

[1] Case T-16/96 [1998] ECR II-757.

[2] *Société pour la gestion des participations de la Région wallonne dans des sociétés commerciales* (company managing Walloon Region holdings in commercial firms).

[3] At the same time as the Commission investigation was underway, which resulted in the decision of 16 September 1998.

(82) Under the agreement, the banks waived debts of BEF 73 million and agreed a fresh line of credit of BEF 100 million. Heye contributed BEF 200 million in cash at the time of the capital increase on 26 June 1998 and the Walloon Region converted its equity loan of BEF 150 million [1]. Sowagep undertook to find an investor for a cash contribution of BEF 100 million. The investor, Worldwide International, was finally found by Beaulieu and participated in the capital increase in Verlipack Holding II on 26 June 1998. Lastly, Beaulieu agreed to waive repayment of BEF 600 million of capital and interest, unless there was a return to better fortunes after 1 January 2002. The financial impact of the additional measures taken by Heye and Verlipack may be estimated at BEF 1 450 million.

(83) The total capitalisation of Verlipack Holding II after the increase on 26 June 1998 amounted to BEF 1 630 500 000, or 158 224 shares, of which the Walloon Region held 19 408, Heye 29 112, Worldwide Investors 9 704 and Holding Verlipack I (Beaulieu, Heye) 100 000.

(84) However, Sowagep failed to produce a new shareholder to take the place of Worldwide Investors. In an amendment of 20 November 1998 to the transfer contract of 18 December 1996, Beaulieu and Sowagep agreed that the payment of the price for the shares, totalling BEF 113 712 000, could take the form of either a payment or the transfer of 9 704 capital shares in Verlipack Holding II which had been issued in exchange for the contribution from Worldwide Investors.

(85) In December 1998, after acquiring the shares held by Worldwide Investors, Ter Lembeek International (Beaulieu group) sold 9 704 shares in Verlipack Holding II to the Walloon Region in settlement of its debt of BEF 113 712 000.

(86) Belgium thus claimed that 'Sowagep repaid the capital increase to Beaulieu as it had undertaken'. The difference of BEF 13 712 000 compared with the balance of the debt owed by Ter Lembeek International can be explained on the one hand by the return on the contribution Ter Lembeek agreed to make and, on the other, by the fact that the transfer in lieu of payment in December 1998 was in advance of the due date for repayment of the capital without interest, i.e. 31 December 2001.

(87) Lastly, the Belgian authorities considered that the fresh contribution made by the Walloon Region to Verlipack in December 1998 [2] in practice constituted a further capital increase in Verlipack of BEF 100 million (9 704 shares), financed by Beaulieu as repayment of its debt to the Walloon Region. The fresh contribution by the Region took place 15 months after its first measures, in the context of a recovery plan to which Verlipack's private-sector partners made a significant contribution.

(88) The development of Verlipack's capital since the arrival of Heye can be seen in the following table:

Date	Capital	Shareholders	Contribution in BEF	Shares	Total shares
18.12.1996	Walloon Region transfers 14 214 shares worth BEF 113 712 000 to the Beaulieu group				
24.1.1997	515 000 000	Beaulieu group		49 999	
11.4.1997	1 030 500 000	Heye group → Holding I	515 500 000	50 001	 100 000
11.4.1997	1 230 500 000	Walloon Region → Holding II (Holding I and Walloon region)	200 000 000	19 408	 119 408
30.3.1998	1 330 500 000	Heye	100 000 000	9 704	129 112
26.6.1998	1 630 500 000	Heye Worldwide Investors	200 000 000 100 000 000	19 408 9 704	 158 224
15.10.1998	1 780 500 000	Walloon Region	150 000 000 (*)	14 556	172 780
20.11.1998	Transfer of 9 704 shares in lieu of payment from Beaulieu to the Walloon Region in settlement of 1996 debts constituting, according to the Belgian authorities, a fresh capital increase.				

(*) Conversion of the equity loan, covered by the decision of 16 September 1998.

[1] See also the Commission decision of 16 September 1998.

[2] I.e. several weeks before the declaration of bankruptcy in January 1999.

IV.2. **Observations concerning the comments from other interested parties**

(89) On 22 December 1999 Belgium responded to the comments from interested parties following publication of the Commission letter of 1 July 1999 in the *Official Journal of the European Community*.

(90) Belgium first commented on relations between the Walloon Region and Heye. It considered that, as the capital was contributed by the Walloon Region to Verlipack, direct cooperation with the representatives of Heye 'was not necessary as Heye was not at the time involved in the European Commission procedure'. On the other hand, Heye apparently 'participated actively via its management and its board' through Verlipack, which was then part of the Heye group. It is clear from the annexes to the comments that the correspondence concerning the case was between the Walloon Region, through its lawyers, and Verlipack Belgium. The Belgian authorities are surprised in this connection that Heye 'was not kept informed by its subsidiary of the progress of the Commission procedure and was not aware of the favourable Commission decision of 16 September 1998'.

(91) As to Belgium's failure to notify the public measures and Heye's ignorance of the fact that might constitute State aid which should have been notified to the Commission, the Belgian authorities justified their behaviour as being consistent with the private investor principle. As to the two SRIW loans, the authorities considered that 'the terms on which they were granted conformed to market conditions'.

(92) The Belgian authorities also considered that their communication of 2 April 1998 responding to the Commission's request for information 'cannot be regarded as prior notification of a plan to grant aid'. Consequently, Heye 'cannot invoke the protection of a legitimate expectation that the aid is lawful insofar as the public measures in question were not granted in accordance with the procedure in Article 88 of the Treaty if, against all possibility, the Commission were to decide that the measures constitute State aid that is incompatible with the common market'.

(93) On the other hand, Belgium agrees with Heye that the measures taken by the Walloon authorities are consistent with the behaviour of a private investor.

(94) As regards the statement by Heye that it did not benefit from the public funds lent by SRIW, the Belgian authorities referred to their argument concerning the actual recipient of any aid element contained in the two loans. Furthermore, it considered that 'this argument is clearly used by Heye in order to avoid having to repay any aid'.

(95) With regard to the comments from the interested party concerned by the continuation of activities at Ghlin after the acquisition of the plant, the Belgian authorities claimed that if 'the Walloon Region plans to grant assistance to the new company operating from the former Verlipack Ghlin plant, it will apply the procedural rules in Article 88 of the Treaty, in accordance with Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty'.

(96) Lastly, the Belgian authorities considered that 'the Commission should quite simply ignore the document [1] sent by an anonymous person, on the one hand because it cannot identify the author and cannot therefore treat them as an interested party under the procedure and, on the other hand, because from an ethical standpoint the very fact that the document was sent anonymously should entail its rejection'.

(97) The Commission would draw the attention of the Belgian authorities in this connection to Article 6(2) of Regulation (EC) No 659/1999 which states that 'if an interested party so requests, on grounds of potential damage, its identity shall be withheld from the Member State concerned'.

V. **ASSESMENT OF THE AID**

(98) The capital injected by the Walloon Region in April 1997 into Verlipack and the two loans granted by SRIW in March 1997 to Heye to finance its capital contribution to Verlipack stem from public resources. Under Article 87(1) of the EC Treaty and Article 61(1) of the EEA Agreement, aid granted by States or thorough State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings is, insofar as it affects trade between Member States, incompatible with the common market.

(99) Under the guidelines on public authorities' holdings, there is a presumption that there is State aid where the authorities' intervention takes the form of acquisition of a holding combined with other types of intervention which need to be notified pursuant to Article 88(3) of the EC Treaty. It can be assumed that the two loans granted by SRIW to Heye to finance the latter's stake in Verlipack constitute aid which, together with the capital injected by the Walloon Region into Verlipack, should have been notified. The Commission regrets that Belgium did not notify the two loans, totalling BEF 500 million, to the Commission to enable it to assess the measures in accordance with Article 88(3) of the EC Treaty. In failing to notify the measures, the Belgian authorities failed to fulfil their obligations under the Treaty.

[1] Document dated 27 February 1997, signed by R. Collignon, then Minister-President of the Walloon Government concerning the composition of the holding: Beaulieu group, Heye Glas and Walloon Region.

(100) In addition, the lack of such decisively important information prevented the Commission from applying the rules on State aid correctly and efficiently and may result in it revoking its decision of 16 September 1998.

V.1. **Compatibility with the private investor principle**

(101) Under the guidelines on public authorities' holdings there is no State aid where the injection of fresh capital into firms is carried out in circumstances that would be acceptable to a private investor operating under normal market economy conditions. This was the conclusion drawn by the Commission in its decision of 16 September 1998 on the basis of information officially transmitted by the Belgian authorities in the course of the assessment of their concurrent, minority holding in Verlipack, amounting to BEF 350 million. According to the information acquired by the Commission after its decision, however, Heye had not provided its own risk capital but funds stemming from state resources.

(102) On the other hand, aid granted by a State that does not correspond to the actions of a private investor favours the recipient firm and may affect trade between Member States and distort or threaten to distort competition under Article 87(1) of the Treaty.

(103) Under the guidelines, such would be the case where the injection of capital into companies whose capital is divided between private and public shareholders makes the public holding reach a significantly higher level than originally and the relative disengagement of private shareholders is largely due to the companies' poor profit outlook. Furthermore, aid may be involved where the financial position of the company, and particularly the structure and volume of its debt, is such that a normal return on the capital invested cannot be expected within a reasonable time.

(104) In 1996 the Ghlin and Jumet plants experienced significant operating losses and a sharp drop in turnover compared with preceding years. The Commission notes, however, that the measures taken by the Walloon Region in April 1997 were accompanied by contributions from the banks and that they relied on a business plan and an extensive investment programme, drawn up by Heye. It seems that, at the time of its intervention, the Walloon Region could expect an eventual return from Verlipack. Nevertheless, the Commission is surprised that Belgium is now wondering whether Heye misled those partners, including the Walloon Region, that 'did not belong to the glass sector'. The Commission notes that the Walloon Region has been a shareholder of the Verlipacks Walloon production plants since 1989, when it held 49 % of their capital, and was therefore fully aware of the results achieved by Verlipack since then and of the continuing weakness of the European market [1].

(105) However, the Walloon Region was aware that there was no private risk capital, that having been provided by a Walloon public-service body.

(106) The Commission notes the relative disengagement on the part of Heye at the time of its acquisitions in Holding II in April 1997. According to the Belgian authorities, it was Heye that instigated the borrowing of the necessary sum. In its letter of 21 November 1996, SRIW asks Heye 'to cover 50 % of a risk that Heye regards as minor'. In view of Heye's credibility, the Commission believes that the sole reason why the group called on a public financial institution to finance its entry into Verlipack was to offset the risk to a maximum through the terms of the loan agreements concluded with SRIW.

(107) The Commission doubts that Heye, whose previous relationship with Verlipack was limited to technical assistance, would in fact have taken a financial holding in that company without the public resources that covered almost the whole of its capital contribution. The Commission notes in this respect that Verlipack's financial position prior to Heye's arrival could not have indicated viability.

(108) It must be concluded that the capital contribution of BEF 350 million benefited Verlipack, whilst the loan was granted to Heye to finance its acquisition of a stake in Verlipack. The allocation clauses in the two agreements specifically stipulate that Heye agreed (i) to recapitalise the Ghlin and Jumet plants and (ii) to finance investments in the three Verlipack plants, including the Mol plant (Flanders).

(109) The Commission then notes that Heye was unable to use the funds for any purpose other than to transfer them immediately, through Holding II, to the Verlipack plants and thus did not benefit from the public funds.

[1] See the document of 27 February 1997.

(110) A recipient of aid, which may have to be repaid, is not necessarily the firm to which the public authorities granted the funds directly but rather the firm that actually benefited from the aid. This is upheld in the case law of the Court of Justice [1], which distinguishes between, on the one hand, firms that acted merely as a conduit for the funds and, on the other, firms that derived an advantage from the aid such that they qualify as recipients under the Community rules on monitoring State aid.

(111) In view of the allocation clauses aimed at financing the recapitalisation of Verlipack, through the funds lent to Heye, the Commission considers that the funds only transited through Heye and through Holding II to Verlipack. Consequently, Verlipack must be regarded as the recipient of the loans from which it alone benefited. The same argument means that the Commission must apply the abovementioned case law to Holding II as well.

(112) In view of the foregoing, the Commission considers that a lender would not on the one hand have acquired a shareholding for BEF 350 million and, on the other, lent risk capital of BEF 500 million covering 50 % of the risk in the event of Verlipacks profit outlook proving unfavourable.

(113) However, according to the first indent of paragraph 3.2 of the guidelines, an injection of fresh capital into a firm may be acceptable to a private investor 'where the recipient company's development potential, reflected in innovative capacity from investment of all kinds, is such that the operation may be regarded as an investment involving a special risk but likely to pay off ultimately'. The investment plan (1997 to 2001) provided for the installation of new furnaces, machines, cold-end equipment and measures to protect the environment, for a total cost of BEF 1,754 billion for the two plants in Wallonia, of which 16 % was carried out in June 1998. The investment plan does not indicate that the new furnaces were replacing existing ones. Nor have the Belgian authorities provided evidence that the investments could have produced innovation capacity in addition to rationalisation and improved control of processes and products. The abovementioned derogation in the guidelines is therefore not applicable in the present case.

(114) The Commission concludes that Belgium, in providing Verlipack with fresh capital and in granting the two loans, did not act like a private-sector investor operating under normal market economy conditions.

[1] Cases C-329/93, C-62/95 and C-63/95 *Germany* v *Commission* [1996] ECR I-5151, paragraph 56.

V.2. **The loans granted by SRIW**

(115) The debenture loan of BEF 250 million contains a write-off clause in the event of Verlipack being wound up. Heye was not therefore running any risk in respect of that amount, which accounted for half its capital injection into Verlipack. The Commission does not agree with the Belgian authorities that Heye would have obtained 'equivalent terms' on the market, despite its acknowledged creditworthiness and solvency. No lender would have agreed to write off BEF 250 million to refinance Verlipack, its operating results before the arrival of Heye very clearly pointing up the groups difficulties.

(116) Consequently, the debenture loan of BEF 250 million granted to Heye to finance its capital injection in Verlipack constitutes aid to Verlipack within the meaning of Article 87(1) of the Treaty.

(117) The Commission notes that the BEF 250 million loan was granted in March 1997 at 4,92 % for the period from 28 March to 31 September 1997 and at 5,30 % for the period from 1 October 1997 to 30 September 1998. However, the comparison between market conditions and those accompanying the loans in question must relate to the period when the loans were granted, namely 27 and 28 March 1997. The reference rate applicable in Belgium at the time was 7,21 %. On the basis of a 10-year duration, a three-year grace period and to the extent that the interest subsidy is variable, the loan contains an element of aid of 2,85 % gross, corresponding to BEF 7,125 million. Furthermore, the Commission notes that the loan agreement does not require Heye to give any collateral for the loan from SRIW. Thus, whilst bearing in mind the letter from Heyes bankers confirming its solvency, the Commission doubts whether a private financial institution would have taken such a risk without any security.

(118) In view of the foregoing, the Commission considers that the behaviour of SRIW in connection with the loan is not consistent with the actions of a private investor and that the loan contains an element of aid.

V.3. **Exemption under Article 87**

(119) The guidelines stipulate that, where it is apparent that a public authority injects capital by acquiring a holding in a firm in circumstances that would not be acceptable to a private investor operating under normal market economy conditions, the case has to be assessed in the light of Article 87 of the EC Treaty.

(120) The capital contribution of BEF 350 million to Verlipack and the debenture loan of BEF 250 million to Heye for Verlipack stem from State resources and constitute aid within the meaning of Article 87(1) of the Treaty, in addition to an aid element of BEF 7,125 million. The aid is not compatible with the common market under Article 87(2) of the Treaty as it does not constitute aid having a social character, granted to individual consumers, and is not intended to make good the damage caused by natural disasters or exceptional occurrences. Nor is the exemption in Article 87(2)(c) applicable. Similarly, the aid cannot be regarded as compatible with the common market under Article 87(3)(a), (b) and (d) as it is not intended to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment within the meaning of Article 87(3)(a) and the Commission communication on the method for the application of Article 87(3)(a) and (c) to regional aid. ([1]) Furthermore, the aid is not intended to promote the execution of a project of common European interest or to remedy a serious disturbance in the economy of a Member State or to promote culture and heritage conservation.

(121) Thus the Commission's next step is to determine whether the aid qualifies for exemption under Article 87(3)(c) of the Treaty. In this context, the exemption should be examined in the light of the frameworks and guidelines in which the Commission has published its interpretation of the exemption in question.

V.4. **Restructuring aid**

(122) In its decision of 19 May 1999 to initiate proceedings, the Commission had already examined the compatibility of the aid under the exemption in Article 87(3)(c) of the Treaty and the application of the exemption on the basis of the Community guidelines on state aid for rescuing and restructuring firms in difficulty ([2]) (hereinafter the 'Community guidelines'). According to the guidelines, the Commission takes the view that restructuring aid may contribute to the development of economic activities without adversely affecting trade to an extent contrary to the common interest if certain conditions are met: (i) a restructuring plan satisfies all the general conditions, and in particular a return to long-term viability, (ii) there are no undue distortions of competition, (iii) the aid is in proportion to the restructuring costs and benefits and (iv) the plan is implemented in full.

(123) Under the guidelines, restructuring aid should normally be needed only once and should allow the firm in difficulty, after restructuring, to operate on the strength of its own resources without requiring further State assistance. In view of the foregoing, however, Verlipack obtained, in April 1997, a capital contribution of BEF 350 million, financing of BEF 500 million through two loans granted to Heye and, in December 1998, a fresh injection of BEF 100 million through the write-off of the Beaulieu debt to the Walloon Region.

(124) According to the Belgian authorities, the conditions of the Community guidelines in force at the time were met. They point out that the Verlipack plants in Wallonia were located in an assisted area under Article 87(3)(c) of the Treaty.

(125) With the exception of a business plan and an investment plan with a budget of BEF 1,8 billion for the two plants in Wallonia, which cover the period 1997 to 2001, as well as financing granted by the banks involving a reduced interest rate and the rescheduling of current debt repayments, Belgium never submitted a realistic and detailed restructuring plan. The business plan forecast a positive operating result as from 1998. The forecasts, however, were not based on realistic assumptions, especially as regards market trends. A 'Heye group strategy for Verlipack' attached to the letter from SRIW of 18 December 1996, which constituted the basis of the financing of the injections by Heye-Glas, proposed to alter the product mix in favour of particularly promising segments and/or niches. It is also clear from the information available that the proposed investment in Verlipack was to have increased production in the three plants by 26 % on average in the period from 1997 to 2001, compared with production in 1996. Given the overcapacity in the market, however, the restructuring plan should have provided for a cut in production capacity in order to prevent undue distortions of competition.

(126) Lastly, the business plan on which the Belgian authorities based their capital injection into Verlipack and the additional indirect financing in the form of the two loans granted to Heye was not implemented in full, as is clear from the bankruptcy of Verlipack in January 1999. The aid cannot be regarded as compatible with the common market under the Community guidelines.

V.5. **Investment aid**

(127) The aid may be analysed from the standpoint of aid intended to facilitate the development of certain economic areas. The Ghlin and Jumet plants are located in an assisted region under Article 87(3)(c) of the Treaty which benefits from the maximum ceiling of 25 % net, or 35 % gross. ([3])

([1]) OJ C 212, 12.8.1988, p. 2.
([2]) OJ C 368, 23.12.1994, p. 12.
([3]) N 307/93/A - Commission decision of 8 June 1994 on a review of development areas in Hainaut, programming of objective 1, 1994-99.

(128) Under the guidelines on national regional aid [1] (regional aid guidelines), an individual ad hoc aid payment made to a single firm may have a major impact on competition in the relevant market, and its effects on regional development are likely to be too limited.

(129) There is no doubt that the measures taken by the Belgian authorities to assist Verlipack constitute aid within the meaning of Article 87(1) of the Treaty and that the aid is liable to distort competition and affect trade between Member States. In order to qualify for exemption under Article 87(3)(c) of the Treaty, the aid must facilitate the development of the assisted region and must not affect trade to an extent contrary to the common interest.

(130) Verlipack operated in the market for hollow container glass, of which its share was 20 % in Belgium and 2 % in the European Union. With a market share of 13 %, the container glass industry takes third place in the packaging sector, after plastic with 35 % and paper-board, with 32 % [2]. The period 1996 to 1998, when Belgium granted the aid to Verlipack, was affected by a fall in prices which, according to Heye and the sector in general, was not forseeable in 1997. The rapid downward trend in prices continued as a result of competition from other packaging products (PET, cardboard and cans) and the collapse of the Russian market. Given the economic situation, the investment in Verlipack had the effect of increasing its production. Any aid to that firm was thus liable to affect Verlipack's position on the market with regard to its competitors in the EU.

(131) The total cost of planned investments in the Walloon plants was BEF 1,8 billion. According to Belgium and Heye, BEF 294,5 million was invested in 1997 and 1998. Heye stated that the funds came from its own resources. Accordingly, the aid granted by the Walloon Region (an injection of BEF 350 million) and by SRIW (borrowing and loan totalling BEF 500 million) was not intended for investments in Verlipack. The aid therefore does not qualify for exemption under Article 87(3)(c) of the Treaty.

(132) Similarly, the aid cannot be regarded as an initial investment or as aid for job creation linked to the carrying-out of an initial investment project under the abovementioned guidelines.

(133) Regional aid aimed at reducing a firm's current expenses (operating aid) is normally prohibited [3]. Exceptionally, however, such aid may be granted in regions eligible under the derogation in Article 87(3)(a) provided that it is justified in terms of its contribution to regional development and its nature and its level is proportional to the handicaps it seeks to alleviate. The Commission concludes, however, that the region in which the two Walloon plants are located is not covered by Article 87(3)(a) and that the exception in the abovementioned Article is not applicable.

(134) In view of the foregoing, the aid to Verlipack does not qualify for exemption under Article 87(3)(c) and (a).

V.6. **Fresh capital injected by the State as part of the relaunch in June 1998**

(135) As part of the procedure initiated on 19 May 1999, Belgium described the development of Verlipack in the months preceding and following the Commission decision of 16 September 1998. The Commission notes that, in view of the deterioration in the firm's position at the end of May 1998, fresh efforts had to be made by the partners (banks, Beaulieu group and Heye) under a relaunch agreement concluded on 5 June 1998. A fresh capital increase in Verlipack was decided on 26 June 1998 with a contribution from Heye [4] of BEF 200 million for 19 408 new shares, and an injection by Worldwide Investors of Luxembourg, the investor found by Beaulieu, of BEF 100 million, in exchange for 9 704 new shares.

(136) In the autumn of 1998, however, the involvement of the private investor Worldwide Investors ended with the sale of its shares to the Beaulieu group, which in turn transferred them to the Walloon Region. The transfer was in lieu of payment [5] of the amount owed by Beaulieu to the Walloon Region for the shares acquired in December 1996, valued at BEF 113 712 000, the repayment of which, without interest, was to start on 31 December 2001. The Commission notes that the withdrawal of the private investor and the transfer in lieu of payment of a debt that was to start being repaid only on 31 December 2001 took place several weeks before Verlipack petitioned for bankruptcy.

[1] OJ C 74, 10.3.1998, p. 9.
[2] *Verre-avenir*: Key figures concerning the container glass industry.
[3] See paragraph 4.15 of the regional aid guidelines.
[4] In 'full knowledge of the rules of procedure and financial position of the Verlipack Holding II SA'.
[5] Annex of 20 November 1998 to the transfer agreement of 18 December 1996 between the Walloon Region and the Beaulieu group on the acquisition of 14 214 shares.

(137) According to the Belgian authorities, the transfer in December 1998 by Beaulieu in lieu of payment of its debts to the Walloon Region should be regarded as a fresh capital injection in Verlipack of BEF 100 million.

(138) The Commission would remind the Belgian authorities that, in their letter of 10 April 1998 replying to the Commission letter of 26 January 1998, they announced their intention to grant Verlipack BEF 100 million, in the form either of a capital contribution or of a long-term loan. They also specified that 'they would not implement the project without prior notification to the Commission and without authorisation'. If the Belgian authorities consider that the fresh support given by the Walloon authorities to Verlipack in December 1998 in fact constitutes a further injection of capital into Verlipack of BEF 100 million, they have failed in their undertaking not to implement any plans without notifying the Commission in advance and without authorisation.

(139) The Commission also draws attention to its letter of 14 December 1998 in which it reserved 'its position as regards any further intervention by the Walloon authorities in favour of Verlipack'. That position was repeated in its letter of 13 January 1999. On 4 February 1999, the Belgian authorities stated that they 'had never considered financing the composition period in view, in particular, of the terms of the recent Commission decision' ([1]). The Commission also notes that the Belgian authorities, in their reply to the comments of the interested parties communicated to the Commission, announced the same intention should they decide to grant support for the new firm operating from the former Verlipack Ghlin site.

(140) As this is a fresh measure by the Walloon Region and is connected with the repayment of the debt owed to the Region by Beaulieu for its acquisition of the shares in the Ghlin and Jumet plants in 1996, the details of which were not notified to the interested parties, the Commission does not at this stage have all the information it needs to assess the compatibility of the measure with Article 87. It has therefore informed Belgium in a letter of 5 July 2000 that it has entered the new measure in the register of non-notified aid under number NN 73/2000 with a view to determining its compatibility with the common market.

([1]) Decision of 16 September 1998.

VI. **CONCLUSIONS**

(141) The capital of BEF 350 million (EUR 8 676 273) injected into Verlipack by the Walloon Region together with the two loans also stemming from public resources is regarded as aid under Article 87(1) of the Treaty because the capital was contributed by the Walloon Region in circumstances that would not be acceptable to a private investor operating under normal market economy conditions.

(142) The loan of BEF 250 million (EUR 6 197 338) granted by SRIW to Heye, the recipient of which, however, was Verlipack, constitutes aid under Article 87(1) because the acceptance of a write-off clause in the event of Verlipack's winding up cannot be regarded as the behaviour of a private investor.

(143) The loan of BEF 250 million granted by SRIW to Heye, the recipient of which, however, was also Verlipack, contains an aid element of BEF 7,125 million. As no collateral was pledged, the behaviour of SRIW does not conform to the private investor principle.

(144) The aid does not qualify for exemption under Article 87(3)(c), pursuant to the Community guidelines on aid for rescuing and restructuring firms in difficulty, since Belgium failed to submit a specific, detailed restructuring plan backed up by realistic forecasts and the business plan and the investment plan were not implemented in full.

(145) Nor can the aid be regarded as investment aid as the investments stemmed from Heye's own resources and the aid does not qualify for exemption under Article 87(3)(a) and (c) of the Treaty.

(146) The aid amounts to BEF 350 million for the capital contribution and BEF 250 million for the loan, i.e. a total of BEF 600 million, plus the aid element contained in the loan of BEF 250 million, which amounts to BEF 7,125 million, giving a grand total of BEF 607 125 000.

(147) In view of the foregoing, it must be concluded that the BEF 350 million of capital injected by the Walloon Region can no longer be regarded as concomitant with the capital injected by Heye, as BEF 500 million of the contribution of BEF 515 million came from public funds and was intended for Verlipack, the sole beneficiary. Hence the Commission decision of 16 September 1998 not to raise objections to the capital injected into Verlipack by the Walloon Region must be revoked under Article 9 of Regulation (EC) No 659/1999,

HAS ADOPTED THIS DECISION:

Article 1

The Commission decision of 16 September 1998 not to raise objections in respect of the capital contributed to Verlipack is hereby revoked under Article 9 of Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty.

Article 2

The State aid totalling EUR 8 676 273 (BEF 350 million) granted by Belgium to Verlipack is incompatible with the common market.

Article 3

The State aid totalling EUR 6 197 338 (BEF 250 million) granted by Belgium to Verlipack is incompatible with the common market.

Article 4

The State aid totalling EUR 6 197 338 (BEF 250 million) granted by Belgium to Verlipack contains an element of State aid amounting to 176 624 (BEF 7,125 million) that is incompatible with the common market.

Article 5

1. Belgium shall take the necessary steps to recover from the recipient the aid referred to in Articles 2 to 4, which was granted to it unlawfully.

2. Recovery shall be effected in accordance with the procedures of national law. The sums to be recovered shall bear interest from the date on which they were made available to the recipient until their actual recovery. The interest shall be calculated on the basis of the reference rate used to calculate the grant equivalent of regional aid.

Article 6

Belgium shall inform the Commission within two months of the date of notification of this Decision of the measures it has taken to comply herewith.

Article 7

This Decision is addressed to the Kingdom of Belgium.

Done at Brussels, 4 October 2000.

For the Commission

Mario MONTI

Member of the Commission