COMMISSION

COMMISSION DECISION
of 28 November 2001
which Germany implemented in favour of the steel company for Georgsmarienhütte Holding GmbH

(notified under document number C(2001) 3734)

(Only the German text is authentic)

(Text with EEA relevance)

(2002/259/EC, ECSC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(1) 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 Article 62(1)(a) thereof read in conjunction with protocol 14,

Having regard to Commission Decision No 2496/96/ECSC of 18 December 1996 establishing Community rules for State aid to the steel industry [1],

Having called on interested parties to submit their comments pursuant to the provisions cited above [2],

Whereas:

1. PROCEDURE

(1) By letter dated 23 July 1999, Germany informed the Commission that a management service contract was concluded between the German public authority 'Bundesanstalt für vereinigungsbedingte Sonderaufgaben' (hereafter: BvS), the company Gröditzer Stahlwerke GmbH and its subsidiaries and Georgsmarienhütte Holding GmbH.

(2) By letter dated 29 July 2000, the Commission informed Germany that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty and Article 6(5) of Commission Decision No 2496/96/ECSC (hereinafter referred to as the Steel Aid Code) in respect of the aforementioned measure. The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* [3]. The Commission invited interested parties to submit their comments on the measure.

(3) The Commission received no comments from third parties.

(4) On 11 October 2000, 6 February 2001, 6 June 2001 and 22 August 2001 Germany responded to the opening of procedure and to letters of the Commission of 11 December 2000, 12 April 2001 and 14 July 2001.

2. DETAILED DESCRIPTION OF THE MEASURE

(5) Gröditzer Stahlwerke GmbH and its subsidiaries [4] (hereafter: Gröditzer) are located in Saxony. Since 1990 Gröditzer has been owned by the Treuhandanstalt (THA) and its public successors, respectively EREL Verwaltungs GmbH und Co. Management KG (EREL), Beteiligungs-Management-Gesellschaft mbH (BMGB) and lastly the BvS.

[1] OJ L 338, 28.12.1996, p. 42.
[2] OJ C 3, 6.1.2001, p. 31.
[3] See footnote 2.
[4] On 20 April 1999 Gröditzer Stahlwerke GmbH sold its assets and liabilities — and thus its economic operations — to the newly created Edelstahl Gröditz GmbH and Stahlwerk Gröditz GmbH which are subsidiaries of Stahl Gröditz Holding GmbH. The sole shareholder of Stahl Gröditz Holding GmbH is BvS. In the meantime Stahl Gröditz GmbH sold the shares in these two subsidiaries to Gröditzer Stahlwerke GmbH.

(6) On 25 February 1997 BMGB entered into an agreement 'Kauf- und Abtretungsvertrag über Geschäftsanteile' (hereafter: privatisation agreement) with the Georgsmariënhütte group ([5]) in order to privatise Gröditzer to the latter.

(7) Over the years before its privatisation Gröditzer received important amounts of State aid, mainly from THA and its successors in the form of guarantees and shareholders' loans. New aid has been paid under the privatisation agreement. The privatisation agreement provided therefore that GMH would obtain legal ownership in Gröditzer only after approval, by the Commission, of State aid paid and to be paid to Gröditzer. Article 17 of the privatisation agreement provided however that GMH was entitled to manage the affairs of Gröditzer, while awaiting the transfer of legal ownership.

(8) Under Article 17 of the privatisation agreement, GMH received an annual concern fee of DEM 232 000 for its management services. This fee did not include the costs for the secondment of its managers to Gröditzer.

(9) On 8 July 1999 the Commission adopted Decision 1999/720/EC, ECSC in respect of the State aid to Gröditzer Stahlwerke GmbH and its subsidiary Walzwerk Burg GmbH ([6]). The Commission decided, *inter alia*, that State aid of DEM 239 million was incompatible with the ECSC and the EC Treaty and had to be recovered.

(10) As a consequence of this decision GMH and the BvS, the legal successor of initial contractor BMGB, terminated the privatisation agreement, which thus ceased to exist.

(11) At the same time BvS undertook steps to recover the incompatible aid from Gröditzer. As this led to a heavy indebtedness of Gröditzer, insolvency was applied for by BvS, its largest creditor. Gröditzer Stahlwerke GmbH was declared in provisional insolvency by the Dresden bankruptcy Court on 20 September 1999 and in insolvency on 17 January 2000. On the same date its subsidiaries Stahlwerke Gröditz GmbH and Edelstahl Gröditz GmbH were declared in provisional insolvency.

([5]) Legally the parties to the agreement were Georgsmariënhütte GmbH and Georgsmariënhütte Verwaltungsgesellschaft mbH at Georgsmarienhütte, and Bladenhorster Grundstückverwaltungsgesellschaft mbH, at Castrop-Rauxel. GMH Holding GmbH was created in 1998 as a holding company after an internal restructuring of the Georgsmariënhütte group. It took over the general coordination tasks of the Georgsmariënhütte group. In context of the management service contract the term GMH applies to Georgsmariënhütte Holding GmbH.

([6]) OJ L 292, 13.11.1999, p. 27.

(12) On 23 July 1999 the German authorities informed the Commission that, in view of the termination of the privatisation agreement, which left Gröditzer without management and group infrastructure, a new management services contract (hereafter: management contract) was concluded between BvS, Gröditzer and GMH. The management contract entered into force (retroactively) as of 1 July 1999.

(13) Under the management contract GMH provided a number of management services such as incorporation in the GMH sales-, purchasing- and distribution network, insurance and availability of know-how. Therefore:

(a) GMH seconded three managers to Gröditzer. This involved DEM 80 000 per month of personnel costs and some DEM 20 000 per month for other costs;

(b) consisted the total fee for the management services of GMH of two additional elements:

(i) under paragraph 12(2) of the management contract GMH received a fee of 1 % of the turnover of Gröditzer;

(ii) GMH received a fee calculated on the basis of the improvement of the operating result of Gröditzer (paragraph 12(3) of the management contract): GMH received 15 % of improvements up to DEM 1 million and 30 % of improvements beyond DEM 1 million;

(c) the BvS agreed a number of complementary obligations. It agreed to be jointly and individually responsible for payment of all fees that Gröditzer had to pay under the management contract to GMH (paragraph 12(5) of the contract);

(d) paragraph 18 of the management contract foresaw further that BvS would pay the fees for another three months in case the receiver would exercise its right to terminate the contract under paragraph 103 of the German Insolvency Act;

(e) the BvS undertook also to offer the receiver in the insolvency of Gröditzer an insolvency loan in order to continue the management contract in case the receiver would like to terminate the contract for financial reasons (paragraph 19 of the contract).

(14) From 1 July until 31 December 1999 the total fees paid by Gröditzer amounted to DEM 1,7 million These consisted of DEM 520 000 for the secondment of three managers, the fee based on 1 % of the turnover amounting to DEM 738 000 and the result related fee amounting to DEM 445 000.

(15) From 1 January until 31 March 2000 the total fees amounted to DEM 685 000. These consisted of DEM 240 000 for the secondment of three managers and the fee based on 1 % of the turnover amounting to DEM 445 000. The receivers and GMH agreed also that the result related fee was not to be paid in this period, as an insolvency fee according to paragraph 183 SGB III was paid ([7]).

(16) The management contract for Gröditzer Stahlwerke GmbH was terminated with opening of insolvency procedure in January 2000 and in respect of its subsidiaries on 1 April 2001, when their insolvency proceedings were opened.

(17) At the same time the receivers concluded a new management service agreement with GMH which involves a total fee of DEM 100 000 for the secondment of three managers. This agreement was valid until 30 June 2000. In the meantime it was extended until 31 December 2001.

3. THE INVESTIGATION PROCEDURE

(18) The formal investigation procedure was initiated as the Commission had doubts whether BvS and Gröditzer concluded the terms of the management contract at market conditions. The doubts applied in particular to the fees, as it appeared that they were in comparison 10 times as high as the fee paid by Gröditzer to GMH under the privatisation contract. The Commission had therefore doubts whether the terms of the management contract might not contain State aid to GMH and whether such aid would be compatible with the EC Treaty and the ECSC Treaty.

4. COMMENTS FROM GERMANY AND OTHER INTERESTED PARTIES

(19) In its reply to the opening of procedure, Germany reiterates its position already transmitted in the preliminary investigation, that the BvS agreed the terms of the management contract on market conditions. The conclusion of the management contract, without tender procedure for interim management, was justified by circumstances: urgent action was required as the company found itself, due to the termination of the privatisation agreement, without management. As it was difficult to find an available interim management providing comparable service, the only alternative to the concluded contract would have been to close the company and liquidate it in the insolvency proceedings. This alternative would have resulted in a reduction of turnover and in consequence to a lower return for the creditors, including BvS ([8]).

(20) Germany also submitted information indicating that a comparison of the terms of the management contract with the privatisation agreement is not possible. The privatisation agreement was signed under the perspective that GMH would obtain legal ownership in Gröditzer. It did not include the costs for the secondment of managers. The pre-existing fee was therefore not based on actual costs. An additional return was expected to materialise with the improvement of the operating result of Gröditzer. The management contract was concluded after the privatisation agreement ceased to exist. GMH could not foresee whether it could acquire Gröditzer at a later stage. Therefore the fees were negotiated at arms length. In the interest of all parties, the fee also had to include a bonus for improvements in result and turnover.

(21) Moreover, an expert appraisal, conducted on the request of GMH, was submitted on the question whether a private investor would have agreed to the management agreement under comparable conditions. The experts confirmed in their appraisal that, after the privatisation agreement ceased to exist, an interim management was necessary in order not to reduce the value of the company. They concluded that the management agreement with GMH was the best solution available to BvS. As to the fees and accessory obligations, the experts found that the total remuneration of GMH, including the result-related fee, is comparable to the remuneration of other interim managers in the same sector ([9]).

(22) As to the accessory BvS obligations the experts confirmed that, in cases where a company is facing insolvency proceedings, an interim manager would always request a guarantee from the shareholder or the creditors of the company. The risk of default of receiving payment for its service would otherwise be, due to the imminent insolvency, too high.

(23) Germany stated further that the other accessory obligations agreed by BvS in form of the loan to the receiver and payment of the fee for another three months after termination of the contract would not be implemented in favour of GMH. It also informed the Commission that GMH decided on 18 October 2000 that it would not make use of the joint and individual liability as provided under paragraph 12(5) of the management contract or any other accessory BvS obligations as provided with the management contract ([10]).

(24) No comments from other interested parties were received.

([7]) According to Germany, the insolvency fee would otherwise have improved the result, thereby unduly favouring GMH.

([8]) This was supported by an expert appraisal conducted on behalf of the receiver who had to decide whether he would try to sell the company as a going concern or in parts. The value of the assets was estimated with DEM 17 million whereas their value in a going concern sale would be DEM 103 million.

([9]) McKinsey & Company; 1 August 2001.

([10]) Although some of the fees were not paid to GMH before the insolvency proceedings of Gröditzer were opened. These fees were registered by GMH as claims in the insolvency proceedings.

5. ASSESSMENT OF THE MEASURE

(25) The Commission considers that GMH Holding GmbH is not an ECSC steel company. However, it is a mere holding company of a group of which the majority of the turnover is generated by ECSC steel companies. It cannot be excluded that the ultimate beneficiaries of the measures may be ECSC steel companies. The measure is therefore assessed according to Article 88(3) EC Treaty and Article 6 of the Steel Aid Code.

(26) BvS is a public institution, which is part of the German administration. It signed the management service contract not only in its quality as public shareholder and representative of Gröditzer, but, at the moment of signature, also as largest creditor of Gröditzer and under an obligation to recover debts from Gröditzer pursuant to Decision 1999/720/EC, ECSC.

(27) The fee for the management service provided by GMH under the management contract was to be paid by Gröditzer. The Commission notes therefore that the fees derive from State resources and represent insofar a transfer of State resources to GMH.

(28) In view of the above the Commission must assess whether the terms of the management service contract are comparable to the terms of such a contract in a market economy or whether they involve State aid in favour of GMH. This applies to both the fees and the accessory BvS obligations (individual liability of BvS; the BvS commitment on three months payment in case of insolvency and the BvS commitment for an insolvency loan to continue the management contract).

(29) As far as the reason to enter into the contract is concerned, the German authorities contend that, due to the termination of the privatisation contract after adoption of Decision 1999/720/EC, ECSC, an urgent solution needed to be found in order to continue Gröditzer's business. Interim management was not readily available and the need to decide, at short notice, necessitated entering into the management service contract. The alternative to the concluded contract would have been to close the company and liquidate it in the insolvency proceedings.

(30) The Commission notes that concluding the management contract was a favourable alternative for BvS and Gröditzer in comparison to the option of closing and liquidating the company. Nevertheless, considering the absence of any call for tenders for the management contract the Commission must scrutinise whether the management contract is in conformity with market conditions. Both the fees and the accessory BvS obligations must therefore be examined under State aid rules.

5.1. Fees agreed by BvS under the management contract

(31) As for the remuneration of GMH for its management services, the Commission noted in the opening of procedure that the fees appeared to be 10 times higher as the pre-existing fee under the privatisation agreement. It was therefore doubtful whether the fees complied with market conditions.

(32) The doubts of the Commission did not apply to the costs for the secondment of the three managers (paragraph 12(1) of the management contract). By also taking into account the size of the company and the services provided by the managers, this part of the fee appeared to be appropriate. The market conformity of this fee was confirmed by the information submitted in the investigation procedure. The receivers of Gröditzer also confirmed it by concluding, in April 2000, a new management contract with GMH, which involves the same fee for the secondment of three managers.

(33) The Commission notes that the fee for the secondment of three managers appears to be in conformity with the market.

(34) From the information submitted by Germany in the investigation procedure it appears that a fixed fee of 1 % of turnover is comparable to the fees a company would pay to a sales agent in the same sector. Paragraph 6 of the management contract foresees that GMH had to provide Gröditzer, among other management tasks, with excess to its purchase-, distribution and sales services. Insofar GMH took over the task of a sales agent for Gröditzer.

(35) As to the result-related fee according to paragraph 12(3) of the management contract it appears from the information submitted that a rate up to 30 % on the annual improvement of the result would be in conformity with the market. The total rate paid by Gröditzer for July 1999 to December 1999 amounted to DEM 445 000 which represents 28 % of the improvements in results for this period.

(36) The Commission notes that a result-related fee would be normally based on Ebitda (earnings before interest, tax, depreciation and amortisation) or cash flow and not, as in this case, on a pure improvement of results. Otherwise the fee could be payable on the sole basis of increase in turnover.

(37) The Commission also notes that the result-related fee is, in its amount, not exceeding the fees paid under alternative interim management. The difficulties of the company at the point in time when the contract was concluded and the improvements of cash flow and Ebitda under the management of GMH must also be taken into account.

(38) The Commission notes further that the pre-existing situation under the privatisation agreement was different to the situation under the management contract. Under the privatisation agreement GMH was to obtain legal ownership in Gröditzer. The fees for the provided management did not include the costs for the secondment of the managers from GMH to Gröditzer. It appears therefore that the concern fee was not based on full costs. On the contrary, when the management contract was concluded, insolvency of Gröditzer was imminent. GMH could not foresee whether it could acquire Gröditzer at a later stage at all. It could not expect an additional return by obtaining legal ownership of Gröditzer under the management contract. The pre-existing fees can therefore not be used as a benchmark for the fees paid by Gröditzer under the management contract.

(39) For assessing the market conformity of the total remuneration of GMH, the Commission compares the total remuneration of GMH with the remuneration of other interim management for a similar company in a comparable situation.

(40) The Commission notes that, according to the submitted expert appraisal, interim management are typically reimbursed either by a daily fee for the managers, by a total fixed fee (comparable to the remuneration of a receiver) or, as in this case, by a combination of a turnover- and result related fee.

(41) The experts established that remuneration of GMH on the basis of a daily fee would have led to an annual fee of some DEM 2,8 million. Remuneration on the basis of a fixed fee would have led to an annual fee of at least DEM 3,6 million. The remuneration of GMH on the basis of the concluded management contract amounted for the period 1 July 1999 to 31 December 1999 to DEM 1,7 million which amount to an annual fee of DEM 3,4 million.

(42) The Commission notes that a fee solely based on a daily fee would have been in its amount less costly for Gröditzer. However, it also notes that a fixed fee would not have involved a bonus for the improvements of results or turnover.

(43) The Commission notes further that GMH took over a number of additional responsibilities in order to manage Gröditzer. It was to provide Gröditzer with management tasks such as planning, budgeting and controlling. It also was to provide know-how, access to its purchasing network (with better conditions for Gröditzer) and marketing support. Furthermore, it was to act as a sales agent for Gröditzer.

(44) By taking into account the management services provided, the imminent insolvency of Gröditzer and the improvements of results the Commission considers the total remuneration of GMH under the management contract as being in conformity with the market.

5.2. **Accessory obligations agreed by BvS under the management agreement**

(45) In its opening procedure the Commission also expressed doubts as to the accessory BvS obligations, as the privatisation agreement did not comprise any obligation of BvS to guarantee fees like the concern fee. It was doubtful to the Commission whether such an onerous accessory obligation was granted at market conditions. The same reasoning applied to the BvS obligations under Article 18 of the management contract (to pay the fees three months after termination of the agreement, by the receiver, pursuant to paragraph 103 German insolvency act) and to the third accessory BvS obligation under paragraph 19 of the management contract (offer of an insolvency loan to the receiver in order to finance the continuation of the contract, should the receiver decide to terminate the contract for financial reasons).

(46) The individual BvS liability: The Commission notes that GMH renounced its entire claim under the individual BvS liability. As stated by GMH, it will not hold BvS liable for any unpaid amounts resulting from the management contract. The Commission notes therefore on the basis of the submitted information that no payments will be made under the individual BvS liability.

(47) According to Germany the guarantee of BvS was requested by GMH in order to make sure that it would finally be remunerated for its services provided under the management agreement. The guarantee did insofar only effect the decision of GMH whether or not to take up the management contract.

(48) On the basis of the submitted information the Commission notes that the claims of GMH under the management contract needed to be secured. Otherwise the risk of default, due to the imminent insolvency of Gröditzer at the time when the management contract was concluded, was very high. A company not securing its claims in the same situation would otherwise incur the risk of providing management without payment.

(49) The Commission notes furthermore that the other accessory BvS obligations were finally not implemented in favour of GMH.

(50) By also taking into account the total remuneration and the specific circumstances of the contract the Commission comes to the conclusion that the accessory BvS obligations did not favour GMH.

6. **CONCLUSION**

(51) The Commission finds that the measure assessed above does not constitute State aid in the meaning of Article 87(1) of the EC Treaty or Article 4(c) of the ECSC Treaty,

HAS ADOPTED THIS DECISION:

Article 1

The measure, which Germany has implemented for Georgsmarienhütte Holding GmbH in relation to the management contract with Gröditzer Stahlwerke GmbH and its subsidiaries, does not constitute aid within the meaning of Article 87(1) of the EC Treaty or Article 4(c) of the ECSC Treaty.

Article 2

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 28 November 2001.

For the Commission

Mario MONTI

Member of the Commission