COMMISSION DECISION

of 20 December 2001

on the measure which Germany is planning to implement in favour of the steel company Georgsmarienhütte Holding GmbH

(notified under document number C(2001) 4510)

(Only the German text is authentic)

(Text with EEA relevance)

(2002/286/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(2) thereof,

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

Having regard to the Agreement on the European Economic Area, and in particular 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 31 August 2000 Germany notified the Commission of an asset sale between the receivers of the steel company Stahl Gröditz and its subsidiaries on the one side and two subsidiaries of the Georgsmarienhütte Holding GmbH (hereafter GMH) on the other side ([3]).

(2) By letter dated 8 June 2001, 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 called on interested parties to submit their comments.

(3) The United Kingdom Steel Association, the United Kingdom Permanent Representation and the beneficiary company GMH sent comments in the context of the procedure. On 7 August 2001 and 23 August 2001, the Commission forwarded these comments to Germany, which made its comments thereon by letter dated 23 August 2001 and 20 September 2001.

(4) Germany responded to the opening of procedure by letter dated 17 July 2001 and 19 October 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.

(6) On 25 February 1997 BMGB entered into an agreement 'Kauf und Abtretungsvertrag über Geschäftsanteile' (hereafter: privatisation agreement) with the Georgs-

([1]) OJ L 338, 28.12.1996, p. 42.
([2]) OJ C 199, 14.7.2001, p. 4.
([3]) The buyers of the assets are Einhundertvierzigste KOPA Vermögensverwaltungsgesellschaft mbh and Einhundertvierundvierzigste KOPA Vermögensverwaltungsgesellschaft mbh, which are two subsidiaries of Georgsmarienhütte Holding GmbH. In context of the asset sale the term GMH refers also to this two subsidiaries.

([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 subsidies 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 this two subsidiaries to Gröditzer Stahlwerke GmbH.

marienhütte 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. The privatisation agreement provided however that GMH was entitled to manage the affairs of Gröditzer, while awaiting the transfer of legal ownership.

(8) 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.

(9) As a consequence of this decision GMH and the BvS, the legal successor of initial contractor BMGB, terminated the privatisation agreement.

(10) In view of the termination of the privatisation agreement, which left Gröditzer without management, a new management contract was concluded between BvS, Gröditzer and GMH ([7]).

(11) At the same time BvS undertook steps to recover the incompatible aid from Gröditzer. As this led to a heavily 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 Stahlwerk Gröditz GmbH and Edelstahl Gröditz GmbH were declared in provisional insolvency.

(12) The management contract was terminated with the opening of insolvency proceedings against the subsidiaries on 1 April 2000. At the same time a new management contract was concluded between the receivers of Gröditzer and GMH. The validity of this contract was in the meantime extended until 31 December 2001.

(13) On 31 August 2000 Germany notified a going-concern asset sale of Gröditzers assets by its receivers to GMH.

(14) In order to sell the assets, the receiver of Gröditzer conducted a public tender. The bidding procedure was described by Germany as follows:

(15) In December 1999 the sale of assets of Gröditzer was announced in national and international press (FAZ; FT). Potentially interested parties (on the basis of a shortlist of some 120 companies all over the world) were directly contacted. The value of the assets was estimated and published by the provisional receiver of Gröditzer Stahlwerke GmbH as DEM 103 million ([8]).

(16) The deadline to submit offers was set at 29 February 2000 with a possibility of due diligence investigations in January/February 2000. On 17 February 2000, the deadline to submit offers and to undertake due diligence investigations was extended until 14 March 2000 as a result of the resignation and replacement of the receiver in the insolvency of Gröditzer Stahlwerke GmbH. The newly appointed receiver published the extended deadline in the same press as the asset sale was announced before. On 25 February 2000 a letter to all potential interested parties also communicated the extended deadline. The bidders were also informed that a take-over of cash, bank deposits or liabilities was not possible as an asset deal was involved.

(17) Several companies showed interest in the assets of Gröditzer and arranged due diligence investigations. Four companies made an offer for all assets. One of these offers was rejected as it was received after the deadline 14 March 2000 ([9]). No offer was received for single assets.

— Edelstahl GmbH JP Schumacher (hereafter Schumacher), a Düsseldorf based steel trading company made an offer on 25 February 2000. The offer was DEM 13 million including take-over of liabilities,

([5]) Legally the parties to the agreement were Georgsmarienhütte GmbH and Georgsmarienhütte 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 Georgsmarienhütte group.

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

([7]) On 28 November 2001 the Commission took a final decision on the terms of the management contract. It concluded that the measure did not contain State aid to GMH.

([8]) Estimated in November 1999 by the certified Auktionshaus Dechow and Mr Rolf A. Hartmann for a going-concern asset sale out of insolvency. The value of the assets in a break-up sale was estimated as DEM 18 million.

([9]) Höltger Edelstahl & Partner offered DEM 20 million for the assets of Gröditzer.

— GMH made an offer on 24 February 2000 of DEM 15 million including take-over of liabilities of approximately DEM 31 million. On 13 March 2000 GMH revised its offer, excluding liabilities, to DEM 45 million,

— Max Aicher group (hereafter Aicher group) made an offer on 14 March 2000 of DEM 35 million including an envisaged additional take-over of liabilities and cash.

(18) The creditor's committee asked on 30 March 2000 the receivers of Gröditzer and its subsidiaries to negotiate bilaterally with the three parties who made an offer until the deadline expired. The best possible offer for the creditors was then to be chosen. Bilateral negotiations on the basis of a draft sales contract took place between April and June 2000. During these negotiations the bidders were again informed, that insolvency law prohibited a take over of liabilities as it could favour certain creditors.

(19) Schumacher informed the receivers in May 2000 that from his offer approximately DEM 23 million had to be deducted as he envisaged costs for the take over of staff as provided by the German law, for certain other fees and for unspecified burdens of the past. This would have led to a negative sales price. The receiver informed Schumacher again on 5 June 2000 that the asset sale had to follow German insolvency law, which did not provide for a negative sales price. As no reaction of Schumacher was received, the receiver considered the negotiations as failed.

(20) On 21 June 2000 the Aicher group withdrew from its offer by a letter. As reason it stated that it needed its financial capacity to bid for the assets of Bayerische Maxhütte as the receiver had put them for sale.

(21) GMH remained the only bidder. The negotiations were concluded on 7 July 2000 and resulted in an approximate purchase price of DEM 59 million ([10]).

(22) The (various) sales contracts contain a clause that their entry into force is subject to Commission approval. This clause also states that the contractual parties shall request a Commission decision which ensures, that the buyer will not be liable for responsibilities of the seller resulting from recovery of incompatible aid.

([10]) The final sales price will be adjusted to take into account the value of claims and inventories on the day the sales contract enters into force. The claims will be valued at 80 % and the inventories with DEM 26,3 million, provided the value differs not by more than 10 %.

3. THE PROCEDURE

(23) The formal investigation procedure was initiated as the Commission had doubts

(a) whether the sales procedure could be regarded as open, transparent and unconditional and whether therefore the final sales price offered from GMH could be regarded a market price;

(b) whether GMH did or would not benefit in the future from State aid by the award of the management contract; and

(c) whether GMH had benefited from the incompatible aid granted to Gröditzer in relation to its privatisation in some other way.

(24) The Commission had therefore doubts whether the asset sale might 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

(25) The United Kingdom Steel Association and the United Kingdom Permanent Representation support the initial doubts raised by the Commission. The United Kingdom steel association also submitted information indicating that the bidding procedure was not carried out in an open and transparent manner, as the opportunity to carry out a full and proper appraisal of the Gröditzer business was not given in a timely manner to all interested parties. The difference from the sales price to the expert estimate of DEM 103 million for the assets would therefore contain State aid to GMH. The United Kingdom Steel Association and the United Kingdom Permanent Representation indicate further that, in case the terms of the management contract are not market conform, they also would contain State aid to GMH. Moreover, as Gröditzer was already integrated in the GMH group since 1997, the incompatible aid granted to Gröditzer in relation to its privatisation should also be recovered from GMH.

(26) Germany and the beneficiary undertaking GMH provided the following comments:

(27) *Sales procedure:* The sales procedure was open, transparent and unconditional. It was conducted by the receivers of Gröditzer who have to obtain the best result in the interest of all creditors, including the State. The sales procedure was similar to sales procedures previously approved by the Commission. All bidders had enough time and information to conduct due

diligence in order to prepare their bids. A sale only on basis of the offers in the tender would not be possible, as the value of a company is, contrary to a sale of buildings, not static. Therefore negotiations had to take place. In the final negotiations GMH was not aware that it was the only remaining bidder. As the best and only offer was accepted, the price paid by GMH is to be considered the market price.

(28) *Management contract:* The management contract was concluded at market conditions. Therefore the contract did not contain State aid to GMH.

(29) *Spill over:* The incompatible aid in relation to the privatisation of Gröditzer was not used in the interest of GMH. Gröditzer was never integrated into the GMH group. GMH never obtained legal ownership. The right to manage Gröditzer was limited as important management decisions had to be taken by the board of managers (where only one out of 12 members came from GMH). Investments were undertaken as foreseen in the investment programs from 1993 and 1995, which was drafted by the public predecessors of BvS. Also the main part of the incompatible (operating) aid was used before the conclusion of the privatisation agreement.

(30) An expert appraisal, conducted on the request of GMH, was submitted on the question, whether GMH profited from the aid in relation to the privatisation of Gröditzer ([11]). The experts confirm in their appraisal that Gröditzer was neither legally nor economically integrated in the GMH group. They also confirm that the investments were undertaken on basis of the investment concept of the public predecessors of BvS. Business transactions between GMH and Gröditzer were conducted at arm length. The scope of concluded business is insignificant (between 2,6 and 5,6 % of Gröditzers turnover). As also no direct or indirect transfer of liquid funds to GMH took place, the experts find that GMH did not benefit from the State aid granted in relation to the privatisation of Gröditzer.

(31) *Recovery:* Germany and GMH submitted further information on the measures taken to comply with Decision 1999/720/EC, ECSC. Furthermore, as the entering into force of the sales contract is subject to Commission approval, Germany requested again a Commission position on the question, whether GMH is aid recipient in the meaning of Decision 1999/720/EC, ECSC.

([11]) Arthur Andersen, July 2001.

5. **ASSESSMENT OF THE MEASURE**

(32) 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 notified 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.

(33) BvS and its predecessors are public institution, which form part of the German administration. BvS is the sole shareholder and largest creditor of Gröditzer. It is also under an obligation to recover debts from Gröditzer pursuant to Decision 1999/720/EC, ECSC. The Commission notes therefore that, if the assets of Gröditzer were sold at a price below market price, this would entail a transfer of state resources to GMH.

(34) In view of the above the Commission must assess whether the assets were sold by the receiver at market price, either by selling them as a going concern or in a break up alternative. Otherwise the asset sale might involve State aid in favour of GMH.

5.1. **Were the assets sold at market conditions?**

(35) As far as concerns the sales procedure, the German authorities contend that the procedure was open, transparent and unconditional. It was conducted by the receivers of Gröditzer who have to obtain the best result in the interest of all creditors, including the state. By selling the assets as a going concern the more favourable alternative was chosen compared to selling the individual assets. As the best and only offer was excepted, the price paid by GMH is to be considered the market price.

(36) The Commission notes that the negotiated sales price for a going-concern asset sale is between the estimated market value (approximately DEM 103 million) and the estimated value for a break-up asset sale (approximately DEM 18 million). It appears that no bid was made for a break-up asset sale.

(37) Considering that the negotiated sales price (DEM 59 million) for a going concern sale does not correspond to the estimated market value (DEM 103 million), the Commission needs to establish whether the sales procedure was appropriate for achieving the market price for the assets.

(38) The investigation procedure was opened as the Commission had doubts whether the sales procedure was open, transparent and unconditional and that therefore the final sales price could be regarded a market price. GMH was managing the company since 1997. It was provided with the possibility to conduct its due diligence under operating conditions. Germany did not provide enough information as to the basis on which due diligence investigations were offered to the other bidders. Hence, the Commission could not conclude whether all bidders were offered sufficient time and information in order to prepare their bids. Furthermore, it was doubtful, whether the fact that the negotiations were only concluded after it appeared that GMH was the only remaining bidder, had a negative impact on the final sales price.

(39) The United Kingdom Steel Association and the United Kingdom Permanent Representation support the initial doubt raised by the Commission. The United Kingdom Steel Association also claims that the bidding procedure was not carried out in an open and transparent manner, as one of its members was not given the opportunity to carry out a full and proper appraisal of the Gröditzer business in a timely manner.

(40) Germany and GMH maintain that the receivers offered to all interested bidders the possibility to carry out a proper valuation of the assets in a timely manner as the basis for their bids. They indicated that every bidder had the possibility to conduct due diligence investigations between 7 January 2000 and 28 February 2000. At the same time visits to Gröditzer premises were offered. Germany also submitted a list of the information, which were provided to interested bidders in order to enable them to undertake a proper valuation of the assets.

(41) As to the comments of United Kingdom Steel Association, Germany indicated that the interested company in question visited Gröditzer on 21 February 2000. The receivers offered the necessary information for a proper appraisal of the assets. The company was also informed about the extended deadline for submitting a bid. However, on 1 March 2000 the company wrote to the receiver that, after having reviewed the gathered information, it would not provide a bid for the assets.

(42) On basis of the information available the Commission notes that the tender procedure including the way the call for tender has been announced, the possibility to bid for the assets in a break-up asset sale or as a going-concern, the time given to interested parties in order to carry out a proper valuation of the assets can be considered as an open tender procedure.

(43) The Commission also notes that no other condition than the take over of staff, as provided by German law (Subsection 613a Civil Code), were imposed on the buyer in the sales procedure. According to the information provided by Germany, every bidder was made aware that in a going-concern asset sale the legal consequences of Subsection 613a would have to be applied. Accordingly, every buyer was aware of the additional costs, which might be associated with the application of this article. The buyer could reflect these costs by adjusting its offer for the assets. Thus the final offer shall take into account these costs for the buyer.

(44) The Commission takes into account that according to information provided by Germany interested bidders had the possibility to conduct due diligence investigations between 7 January 2000 and 28 February 2000 at the premises of Gröditzer. This possibility was later extended until 14 March 2000. About 10 companies showed an interest in the due diligence investigations. It also appears from the submitted information that the bidders were offered the necessary information in order to enable them to undertake a proper valuation of the assets.

(45) The Commission notes further that the interested member of United Kingdom Steel Association wrote on 1 March 2000 to the receiver that it would not submit a bid in the sales procedure. It did not indicate that its decision was influenced by the sales procedure. In view of this and the information provided the Commission considers that all interested bidders were given an opportunity to carry out a proper valuation of the assets as the basis for their bids.

(46) The Commission notes that the bidding procedure led to a situation where GMH remained as the sole bidder. According to the information available, the circumstances, under which the two other bidders Max Aicher group and JP Schumacher withdrew appears to be independent from the sales procedure or the fact that GMH was managing Gröditzer since 1997. The Commission takes the view that the mere fact, that the other bidders withdrew shall not lead to the conclusion that the assets were not sold to the highest bidder.

(47) The Commission notes furthermore that the negotiations with GMH increased the sales price from DEM 45 million to 59 million DEM. Thus the sales price shifted in the direction of the evaluated market price. Due to the increase of the sales prices, the amount of aid, which can be recovered in the insolvency, should also increase.

(48) In view of the above and by taking into account the final sales price, the Commission concludes that the sales price can be considered to be the market price for the assets of Gröditzer.

5.2. **Does the management contract contain State aid?**

(49) In the opening procedure the Commission noted further that GMH might, by the award of the management contract, have benefited from incompatible aid which could have had an influence on the outcome of the sales procedure.

(50) The Commission took on 28 November 2001 a final decision on the question whether the management contract contains aid to GMH. In its decision it comes to the conclusion that the award of the management contract did not contain State aid to GMH. Insofar GMH did not benefit from State aid granted to Gröditzer by the award of the management contract.

5.3. **Did GMH benefit from the incompatible aid granted to Gröditzer?**

(51) The Commission had further doubts whether GMH did or might benefit in the future from the illegal and incompatible aid granted to Gröditzer. The doubts related to the fact that neither the privatisation agreement nor the management contract was awarded to GMH following an open, transparent and unconditional procedure. Both agreements provided however that GMH could manage and integrate Gröditzer since 1997 into its group.

(52) The United Kingdom Steel Association and the United Kingdom Permanent Representation supported this initial doubt of the Commission, stating that GMH benefited from the incompatible aid to Gröditzer as it was managing it since 1997.

(53) In its comments Germany and GMH reiterate their position that Gröditzer was never integrated into the GMH group. They also indicated that GMH never obtained legal ownership or economic control. Moreover, Germany submitted an expert appraisal from which it appears that GMH did or would not benefit from the incompatible aid granted to Gröditzer in relation to its privatisation.

(54) The Commission notes that, according to the submitted expert appraisal, all business transactions between Gröditzer and GMH were conducted at 'arm length'. The scope of these transactions was with 2,6 % — 5,6 % of Gröditzers turnover and 3 % of its material costs rather insignificant.

(55) The Commission also takes into account that investments at Gröditzer were mainly undertaken on basis of the investment plans of EREL and BMGB, both public predecessors of BvS. Both investment concepts were drafted before the privatisation agreement with GMH was concluded. It does not appear that they were undertaken for purposes, which are in GMH's rather than Gröditzers interest.

(56) By also taking into account that no other direct or indirect transfer of liquid funds of Gröditzer to GMH took place the Commission considers that, on basis of the information provided by Germany, GMH does not benefit from the incompatible aid granted to Gröditzer in relation to its privatisation.

5.4. **The recovery**

(57) On 19 October 2001 Germany submitted information on the recovery of the incompatible aid of DEM 239 million. It indicated again that the sales contract would only enter into force in case the 'buyer of the assets of Gröditzer is not, in respect of the Commission Decision 1999/720/EC, ECSC, responsible for liabilities of the seller or its legal predecessors resulting from the recovery of incompatible aid.' Germany requested therefore again a Commission position on the question whether GMH would be liable for the recovery claim of Gröditzer.

(58) The Commission recalls that the question of who is recipient of the incompatible aid granted to Gröditzer Stahlwerke GmbH was laid down in the Commission Decision 1999/720/EC, ECSC. It was explicitly stated in that decision that the term 'recipient' comprises not only Gröditzer Stahlwerke GmbH but also any other undertaking to which assets have been transferred in such a way as to deprive the recovery of incompatible aid of effect.

(59) As stated already in the opening decision, the Commission cannot take in the present case a final position on the question, whether Germany has taken all the measures to comply with Commission Decision 1999/720/EC, ECSC.

(60) The Commission reiterates that it will cooperate with Germany on basis of Article 10 EC Treaty in view of the implementation of that decision.

6. **CONCLUSION**

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

HAS ADOPTED THIS DECISION:

Article 1

The measure, which Germany is planning to implement in favour of Georgsmarienhütte Holding GmbH, does not constitute aid within the meaning of Article 87(1) of the EC Treaty or Article 4(c) of the ECSC Treaty.

Implementation of the measure is accordingly authorised.

Article 2

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 20 December 2001.

For the Commission

Mario MONTI

Member of the Commission