II

*(Acts adopted under the EC Treaty/Euratom Treaty whose publication is not obligatory)*

# DECISIONS

# COMMISSION

## COMMISSION DECISION

## of 11 December 2007

## on State aid C 51/06 (ex N 748/06) which Poland has implemented for Arcelor Huta Warszawa

*(notified under document number C(2007) 6077)*

**(Only the Polish version is authentic)**

**(Text with EEA relevance)**

(2008/406/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 regard to Protocol No 8 of the Accession Treaty *on the restructuring of the Polish steel industry* [1],

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

Whereas:

### I. PROCEDURE

(1) In 2002 a restructuring plan (also referred to as the individual business plan) was presented to the Polish authorities by Arcelor Huta Warszawa (hereinafter AHW), then still Huta L.W. Sp. z o o (hereinafter HLW). The plan was revised in March 2003 (hereinafter 2003 IBP).

(2) The process of steel restructuring in Poland started in June 1998, when Poland presented a first Restructuring Programme for the Iron and Steel Industry to the Community in order to comply with Article 8(4) of Protocol 2 of the Europe Agreement with Poland (hereinafter referred to as Article 8(4)), which allowed, exceptionally, State aid to be granted for restructuring in the steel product sector during the first five years after the entry into force of the Agreement.

(3) On 5 November 2002, the Council of Ministers of the Republic of Poland approved the Restructuring and Development Programme for the Polish Iron and Steel Industry until 2006 and, on this basis, on 25 March 2003 it adopted its final National Restructuring Programme (hereinafter NRP). This plan essentially allows for State aid of up to PLN 3,387 billion (EUR 846 million) [3] to be awarded to the Polish steel industry for restructuring in the period from 1997 to 2006.

(4) The NRP was submitted to the Commission, which assessed it on 25 March 2003 and, on the basis of its assessment, made a proposal for a Council Decision to extend the grace period (initially due to expire in 1997)

[1] OJ L 236, 23.9.2003, p. 948.
[2] OJ C 35, 17.2.2007, p. 41.

[3] Assuming that EUR 1 = PLN 4.

for the granting of State aid to the Polish steel sector under the Europe Agreement until the end of 2003, subject to the beneficiaries achieving viability by 2006. The proposal was approved by the Council in July 2003 ([4]).

(5) The EU thus allowed Poland, by way of derogation from EU's rules ([5]), to grant restructuring aid to the steel industry. This was finally laid down in Protocol No 8 to the Act of Accession, on the restructuring of the Polish steel industry (hereinafter Protocol No 8) ([6]). It confirms acceptance of State aid of not more than PLN 3,387 billion being granted to the eight companies indicated, including HLW, up to the end of 2003, provided that restructuring is completed no later than 31 December 2006 ([7]). The NRP allocates PLN 322 million of restructuring aid to HLW (see Table 8), which is confirmed in greater detail in the 2003 IBP and which is to be implemented according to point 9(a) and (h) of Protocol No 8.

(6) In order to ensure compliance with its conditions, Protocol No 8 sets out detailed provisions for implementation and monitoring. Inter alia Poland had to provide bi-annual monitoring reports, and independent evaluations were carried out by an independent consultant in 2004, 2005 and 2006. Company reports for HLW/AHW have so far been presented in February 2004, April 2005, May 2006 and June 2007. They were discussed with the Polish authorities and the beneficiaries and accepted by the Commission services and the Polish authorities.

(7) The IBP of HLW was amended in 2005 by AHW (hereinafter 2005 IBP) and the Commission's approval sought according to point 10 of Protocol No 8.

(8) By letter dated 6 December 2006, the Commission informed Poland that it had decided to initiate the procedure laid down in Article 88(2) EC in respect of potential misuse of aid.

([4]) Council Decision of 21 July 2003, OJ L 199, 7.8.2003, p. 17. Cf. Commission Decision in Case C 20/04, OJ L 366, 21.12.2006, p. 1, points 23 et seq.

([5]) Cf. Communication from the Commission on Rescue and Restructuring aid and closure aid for the steel sector OJ C 70, 19.3.2002, p. 21, which prohibits restructuring aid to the steel industry.

([6]) See footnote 1.

([7]) According to the latest monitoring report of June 2007, PLN 2,727 billion of aid has been disbursed. Out of the eight beneficiaries, three companies, namely Technolgie Buczek (cf. Commission Decision of 23 October 2007 in Case C 23/06, not yet published), Huta Andrzej and Huta Batory have in the meantime gone into liquidation, while four companies, namely Polskie Huty Stali S.A. (now Mittal Steel Poland, see Commission Decision in Case N 186/05, Change of IBP of MSP), Huta Bankowa, Huta Labędy and Huta Pokój, have restored viability.

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

(10) Poland replied by letter of 2 March 2007. On 19 March 2007 the Commission also received comments from the beneficiary AHW, which it forwarded together with questions to the Polish authorities. After a meeting with the Polish authorities and the beneficiary in March 2007, further questions were sent to Poland on 2 April 2007 and 6 August 2007. On 4 June 2007 and 1 October 2007 Poland replied.

(11) Then, on 18 October 2007 the Commission services informed Poland about its preliminary assessment of the case and, after further exchanges between the Polish authorities and the Commission, on 16 November 2007 the Polish authorities indicated that the company intended to repay the aid, 'without prejudice to the legal situation'.

(12) The Polish authorities confirmed in a letter of 22 November 2007 that on 20 November AHW had paid 2007 EUR 2 089 768 into an account blocked in favour of the Polish Ministry of Finance. Under the conditions of the agreement, no one will have access to the money on the account until this Decision is adopted. On the date of its adoption the Ministry will receive the amount plus interest accrued as of 20 November 2007. If the decision is not issued by the end of February 2008, the money will revert to AHW.

## II. DETAILED DESCRIPTION OF THE AID

(13) AHW is a Polish steel producer which produces liquid steel and long products, especially quality and special steels (light and heavy section profiles).

(14) In 1991 the majority of shares in HLW were taken over by the Italian steel producer Lucchini and sold in 2005 to Arcelor, which merged with Mittal Steel in 2006 ([9]).

([8]) See footnote 2.

([9]) See Commission Decision Mittal/Arcelor of 2 June 2006, Case No COMP/M.4137.

1. **The restructuring programme of the 2003 IBP**

(15) The Commission understands that HLW was facing serious financial constraints at the time of the adoption of the business plan. It was not getting any additional moneys from its mother company Lucchini, which was, according to Poland, in a profound financial crisis, and it was unable to sell its own valuable assets due to regulatory problems. Therefore, between 1997 and 2003 the company was very short of cash, which was reflected in the restructuring plan ([10]).

(16) In order to restore viability, HLW's 2003 IBP therefore set several core restructuring tasks (in point 3.2) among which the most important were:

(a) Asset restructuring and financial restructuring in order to obtain funds for the implementation of this programme, ensure financial liquidity and reduce financial costs.

(b) Implementation of investments in order to further improve the quality and mix of the manufactured products and increase competitiveness of the enterprise, cost reduction […].

(c) Further improvement of environmental protection standards.

(a) *Investments*

(17) The 2003 IBP (point 3.3) stated its industrial strategy to be 'to focus on the gradual improvement of its product mix through a significant reduction of the production of merchant bars and billets and the development of production with a focus on speciality and engineering steels'. To this end, HLW expected ' … to pursue a programme of gradual investments in the following areas of the plant: medium rolling mill, forging shop, drawing mill, ingot-casting bay', while the narrow strip mill was to be closed.

(18) In order to pursue the above strategy, the company planned an investment programme of [between PLN 150 million and PLN 220 million] (*), which was indicated in the 2003 IBP as follows:

*Table 1*

**Planned steel production investments (= table 21 of the 2003 IBP)**

| In PLN 1 000 | 2002 | 2003 | 2004 | 2005 | 2006 | Total |
|---|---|---|---|---|---|---|
| Steel-shop | | | | | […] | […] |
| Hot rolling mills | […] | […] | […] | […] | […] | [approx. 95 %] |
| General | […] | […] | […] | […] | […] | […] |
| Drawing mill | […] | […] | […] | […] | […] | […] |
| Total | […] | […] | […] | […] | […] | [PLN 150-220 million] |

(19) As indicated in point 4.4 of the 2003 IBP, the investments focused on modernisation of the hot rolling mills (see Table 22 of 2003 IBP). This comprised the modernisation of the medium section mill, as well as the replacement of the reheating furnaces of the blooming mill and the heavy section mill. The timing for implementation of the investments was indicated in Table 23 of the 2003 IBP, which indicated that investments were almost all to be commenced in 2002.

(b) *Employment restructuring*

(20) Under the 2003 IBP (point 4.11), the company planned to reduce the number of its employees from 1 249 to 850. The 2005 IBP now states that the workforce will be reduced to 700 employees. The 2003 IBP allocated PLN 4,03 million for the employment restructuring, of which PLN 1,5 million was to be supported by specially earmarked State aid, PLN 1,17 million by the PHARE programme and PLN 1,34 million by the company ([11]).

([10]) Cf. information submission of Poland of 4 June 2007, points 19, 30, 55.

(*) Parts of this text have been hidden so as not to divulge confidential information. These have been indicated with a dotted line in square brackets. The total investment programme amounts to between PLN 150 million and PLN 220 million. In order to make the decision easier to follow, further confidential financial information is given as an approximate percentage of the amount of PLN 150-220 million (taking PLN 150-220 million as 100 %).

([11]) 2003 IBP, p. 66, Table 35.

(c) *Financial restructuring*

(21) The 2003 IBP also provided for financial restructuring and asset restructuring, which, according to the plan (point 3.2), concerned 'repayment of short-term loans and the sale of unnecessary assets not connected with production.'

(22) The 2003 IBP (point 4.7) provided for the restructuring of debt of PLN 513 369 million (according to the balance sheet this was the total of long-term and short-term liabilities). It was intended to finance this from future profits and asset restructuring. Proceeds of PLN 363 million were expected from the latter in 2004 and 2005, PLN 60 million of which was to cover new debts.

(23) In detail, the Commission understands that the 2003 IBP specified the following measures for financial restructuring: firstly, public debt had been waived resulting in aid of PLN 21,5 million (see 4.12.2); secondly, HLW had, since 2000, been conducting some ongoing asset restructuring by selling non-productive assets, and this was supposed to generate funds to finance the investment programme.

(24) The asset restructuring must be seen against the background that HLW's assets had already been the subject of a financial transaction described by HLW as a 'sale and leaseback transaction'. In 2000 the company had obtained a PLN 250 million loan basically collateralised by a pledge on land and buildings belonging to the company. This concerned productive and non-productive assets. Repayment was to take place in two payments a year until 2010. The transaction was necessary because HLW was in need of cash but could not sell off its non-productive assets immediately. This was to be done in the course of the coming years and would result in cash generation and the reduction of financial costs.

(25) According to the 2003 IBP, the asset restructuring was to concern the non-productive assets (points 4.7 and 4.8). Apparently at the end of 2001 a first part (53 hectares) of the 100 hectares was sold. However the sale of other non-productive assets was delayed because AKR (*Agencja Kapitałowo Rozliczeniowa S.A.* — a company whose shareholders are the Industry Development Agency and the State Treasury) had difficulties in regulating the legal status of the part of the land not connected with production.

(26) As funds were not available from the sale of land, a bridging loan guaranteed by the State for PLN 300 million was envisaged. The loan was supposed to be used for investments and to cover short-term liabilities (PLN 219 million in total). In addition, PLN 53 million was allocated to bringing forward investments originally planned for after 2006 (this 219 + 53 million add up, together with 10 % financing costs (i.e. 27 million), to 299 million). Consequently, of the total funds of [PLN 150-220 million] planned for investments, at least PLN […] million (i.e. PLN […] million — PLN 53 million) should be included in the PLN 219 million. The remaining amount of PLN […] million (PLN 219 million — PLN […] million) must therefore have been the costs of short-term financial restructuring.

(d) *Environmental restructuring*

(27) The 2003 IBP (point 4.9) also included a separate environment-related investment programme which consisted of implementation of an environmental management system in accordance with ISO 14001 (PLN 0,5 million), a number of investments under the umbrella of a land reclamation project with costs of PLN 50 million and modernisation of the power engineering department (for which no funds were allocated). The measures were to be commenced in 2002.

(28) The investigation indicated that some but not all of the measures indicated in the 2003 IBP were implemented according to the time schedule. In particular, the construction of a scrap-processing plant was postponed to 2007-08, and was not underway until summer 2007. Moreover the construction of a discard-processing plant was abandoned as the discard processing is run by a subcontractor ([12]), which is a more cost-efficient solution.

(29) However, the investigation also confirmed Poland's claim that the costs for the environmental restructuring were not to be paid under the restructuring plan, but were to be covered from own funds, such as proceeds from the asset restructuring.

(e) *Financing the restructuring*

(30) The 2003 IBP (4.12) identifies a financing gap of PLN 300 million (see also the cash flow statement, point 5.1). As no indication is given to the contrary, it can be assumed that this was the only financing required.

([12]) See ESC report for 2006 of July 2007.

(31) Point 4.12 indicates that the restructuring required financing of PLN 113,6 million in 2002 and PLN 105,3 million in 2003, as well as the PLN 21,9 million financing cost of borrowing these funds. Moreover, an additional PLN 53 million was allocated to bringing forward investments. However, there is no indication of what exactly the financing was needed for.

(32) After 2003 no more financing seemed to be necessary. Indeed in its 2005 IBP AHW, when describing the 2003 IBP confirms 'The […] Restructuring Programme assumed that series of actions of strategic and operational character would be taken, as a result of which significant improvement in the profitability of the activities was expected, and as a result, financial liquidity. The Restructuring Programme accepted that financial liquidity factors would gradually improve, starting from the year 2003.'

(f) *Conclusion as to the restructuring efforts under the 2003 IBP*

(33) The restructuring provided for in the IBP for which extraordinary support was required includes investment (PLN [150-220] million, including the PLN 53 million of investments brought forward), employment restructuring (PLN 4,03 million), some write off of public debt (PLN 21,5 million), some financial restructuring (PLN 81,5 million) and some financing costs for the loan (PLN 27,1 million), all totalling PLN 324,63 million.

(34) The restructuring was to be financed mainly from a State-guaranteed loan, which was intended to close a financing gap resulting from the delay of part of the asset restructuring. Therefore, in order to enable the company to carry out financial restructuring and investments in 2002/03 and possibly also 2004, the company was granted the bridging loan guaranteed by the State Treasury. The restructuring project was therefore clearly connected with a time schedule.

(35) However, the asset restructuring was not indicated in the 2003 IBP as leading to restructuring costs. It was, rather, an ongoing exercise, independent of the State aid-supported restructuring plan and clearly requiring no additional State funding. Also some measures not directly linked to restoring viability, such as the environmental measures, were financed through the asset restructuring and were, as is reiterated by Poland, thus pursued outside of the restructuring.

(36) Indeed, the only reason why the asset restructuring is mentioned is because it was to generate financing through the sale of the non-productive assets. However, the repayment of the sale and leaseback transaction is not mentioned.

2. **State aid**

(37) Out of the PLN 322 million aid (calculated as net grant equivalent) originally accepted in the NRP, AHW obtained the aid shown in the attached table submitted by Poland:

*Table 2*

**State aid approved and received in 2002 and 2003** (*)

| | NRP (in PLN 000) | State aid obtained (in PLN 000) | Difference (in PLN 000) |
|---|---|---|---|
| Total 2002-03 | 321 878 000 | 203 946 000 | 117 932 000 |

(*) Figures correspond to Table 36 of the 2003 IBP. Figures updated in line with the Polish and independent Monitoring Reports of June 2007, taking EUR 1 to be PLN 3,95.

(38) The aid was granted for three different purposes:

(a) PLN 0,33 million for employment restructuring (1,5 million had originally been planned),

(b) PLN 20,56 million for debt write-offs (21,5 million had originally been planned), which was used for general improvement of the company's financial situation.

(c) guarantee of a loan of PLN 183,2 million (EUR 46,3 million; PLN 299 million had originally been planned, and approved by the Commission).

(39) The State guarantee-supported loan was given to HLW by Bank Pekao S.A. on the basis of an agreement between HLW and the bank of 10 December 2003. The loan agreement indicates that the loan has to be repaid five years after the signing of the agreement, i.e. by 10 December 2008.

(40) AHW had applied for the guarantee in August 2003. It was granted by a decision of the Council of Ministers of 31 December 2003 and concerned a nominal value of EUR 46,3 million, plus interest and other associated costs of up to EUR 58,3 million. The Council of Ministers decision recognised that HLW would first need the aid in order to finance investments relating to the hot rolling mill and the property purchase costs under sale and leaseback agreement, and ordered that it should be used for this purpose. In detail:

(a) one part of the loan was intended for an amount of up to EUR 14 600 000 to finance production investments, investment connected with the rolling mill (medium) and rolling machine modernisation (cages). However, between 30.9.2004 and 28.2.2005 only EUR 2 854 355 was utilised in eight instalments. The repayment took place on 16.9.2005.

(b) the other part, for an amount of up to EUR 31 430 000, with which the company wanted to pay off the remaining part of the sale and leaseback agreement, was intended for debt restructuring by way of repurchase of production property (land and buildings). From 24.8.2004, the company utilised EUR 31 245 684, and repaid it 16.9.2005. According to the Polish authorities and the beneficiary, the loan was used to pay off the sale and leaseback agreement of 2000.

(41) Altogether, the company indicated that it had paid interest amounting to EUR 1 132 788,35, which it paid in tranches. To this end it was considered that the first interest tranche, paid on 30 December 2004, should be allocated to the respective loan portions drawn, whereas from that point onwards, the interest amounts could be distributed between the respective totals. The Polish authorities submitted that this led to the following split of the interest payments:

*Table 3*

**Interest paid**

| Date, interest paid | Total interest | Interest on the part of the loan used for repayment of the sale and leaseback agreement | Interest on the part of the loan used for investment |
|---|---|---|---|
| 30.12.2004 | EUR 371 931 | EUR 363 880 | EUR 8 051 |
| 30.6.2005 | EUR 536 522 | EUR 491 612 | EUR 44 910 |
| 16.9.2005 | EUR 224 336 | EUR 205 557 | EUR 18 778 |
| | EUR 1 132 788 | EUR 1 061 050 | EUR 71 738 |

(42) AHW also had the following items of expenditure connected with the guaranteed loan:

(a) a preparation fee of EUR 270 000,

(b) a State Treasury fee for granting the loan guarantee of EUR 583 300, paid on 30.4.2004 (1 % of the guarantee total amount of EUR 58 330 000, independent of the size of the loan actually granted),

(c) costs sustained by the bank for the loan contract and passed on to AHW: EU 55 947.

(43) HLW's 2003 loan application also indicates that the reduction of the loan (in relation to the amount approved under the 2003 IBP) was based on HLW's own initiative because it had already negotiated the loan. However, HLW reserved the right to apply for the remaining aid under the PLN 75 million ceiling, but never did so.

3. **Implementation of the 2003 IBP**

(44) It is not disputed that the 2003 IBP was only partly implemented. Between 2002 and 2004 HLW spent only PLN 58,7 million on the restructuring. Only PLN [approximately 25 % of the total investment amount shown in Table 1] million was spent out of the PLN […] million for investment in modernisation of the hot rolling mill envisaged for 2002 to 2004. Investments concerned only the modernisation of the medium section mill, while no investments were made in the reheating furnaces of the blooming mill or the heavy section mill. Moreover, less than half a million out of PLN […] million was invested in the steel plant and PLN […] million in other general investments (for details see columns for 2002, 2003 and 2004 in Table 4 below).

(45) The Commission has not been provided with any information as to whether financial restructuring was performed. However, from the 2005 IBP the Commission sees that the indebtedness of HLW on 30.6.2005 was about the same as that of HLW at the end of 2001 (see point 1.8 of the 2005 IBP). Moreover, HLW was able to achieve a positive operating result already in 2004. Hence, the Commission assumes that the company has achieved its planned short-term financial restructuring.

(46) The reports of the independent consultant in charge of the monitoring confirm that HLW was not viable in 2004, at the end of 2004 or the end of 2005. However, AHW was viable at the end of the restructuring period (end 2006).

(47) It is undisputed that the viability at the end of 2006 is due to a number of factors, which derive, apart from the partial modernisation of the rolling mill, above all from the boom in the steel sector, which had a very positive impact on the company's turnover. Moreover, with the takeover of HLW by Arcelor, a strong investor, all of HLW's liquidity problems had vanished. However, the company was not able to substantiate its general statement that the actual use of the guarantee for refinancing purposes was a cause of the company's achieving viability.

4. **Changes in the 2003 IBP**

(48) In 2005, the entry of a new owner resulted in a considerable change in the investment strategy. Instead of modernising the existing hot rolling mills, AHW now plans to build a new rolling mill with capacity to produce long products for construction applications. Apparently the mill will use square 160 mm CC billets as feedstock and its production range will be carbon steel reinforcing bars, round and flat bars, light sections and square and cross sections. Poland explains that this adaptation is a response to the development of the construction market, for which substantial growth is predicted for many years in the Warsaw area, which may give AHW a first-mover advantage due to its location in Warsaw.

(49) The new mill will be fully operational by mid-2008 and will replace the existing hot rolling mills, in which PLN [approximately 25 % of the total investment amount shown in Table 1] million has already been invested in modernisation. The total cost of the investment programme is summarised in the following table:

*Table 4*

**Costs for the new investment programme in the 2005 IBP**

| In PLN 000 | 2002 (*) | 2003 (*) | 2004 (*) | 2005 | 2006 | Total |
|---|---|---|---|---|---|---|
| Steel-shop | […] | […] | […] | […] | […] | […] |
| Hot rolling mills | […] | […] | […] | […] | […] | [approximately 120 % of the total investment amount shown in Table 1] |
| General | […] | […] | […] | […] | […] | […] |
| Total | […] | […] | […] | […] | […] | [approximately 140 % of the total investment amount shown in Table 1] |

(*) Investments already implemented under the 2003 IBP.

(50) Thus total investment costs will now be PLN [approximately 140 % of the total investment amount shown in Table 1] million, of which it is planned to allocate PLN [approximately 120 % of the total investment amount shown in Table 1] to the hot rolling mill, thus PLN […] million more than originally earmarked for investment. However, these costs include the PLN […] million for the medium section mill already completed. If these were subtracted from the PLN […] million, the cost of the new rolling mill would amount to PLN [less than 200] million.

## 5. **Capacity development**

(51) The development of AHW's capacity is illustrated in the following table:

*Table 5*

**Maximum production capacity per year in thousand tonnes**

| Production | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 | Remarks |
|---|---|---|---|---|---|---|---|---|
| Liquid steel | […] | […] | […] | […] | […] | [approx. 100 % of total mill capacity] | [idem] | No changes |
| Flat products | 20 | 20 | 20 | 20 | 0 | 0 | 0 | Stipulated by Protocol No 8 |
| Rolling mill — wire rod | 180 | 180 | 180 | 180 | 180 | 0 | 0 | Stipulated by Protocol No 8 |
| Rolling mill merchant bars light-sections profiles | […] | […] | […] | […] | […] | [approx. 40 %] | 0 | New strategy (*) |
| Rolling mill long heavy-sections profiles | […] | […] | […] | […] | […] | [approx. 60 %] | 0 | New strategy (*) |
| Rolling mill forged profiles | […] | […] | […] | […] | […] | […] | 0 | New strategy (*) |
| Cold-rolled strip | 30 | 0 | 0 | 0 | 0 | 0 | 0 | Stipulated by Protocol No 8 |
| New rolling mill | 0 | 0 | 0 | 0 | 0 | […] | [Approx. 70 %] | New strategy (not provided for in Protocol No 8) |

(*) Protocol No 8 does not provide for this capacity reduction.

(52) After the new rolling mill is fully operational in 2008, the old rolling mill will be closed. At no point before 2007 did the company's total production exceed the maximum capacity of […] tonnes. Thus the modification of the investment program will result in an additional reduction of the company's capacity by […] tonnes.

## III. **REASONS FOR INITIATING THE PROCEDURE**

(53) In its letter of 6 December 2006, the Commission indicated that AHW's restructuring plan had not been implemented and stated that it intended to investigate whether this constituted a misuse of the restructuring aid granted. In particular the Commission indicated that a large amount of the aid had not been properly used.

(54) Further, the Commission doubted whether it could accept the updated business plan under point 10 of Protocol No 8, as it concerns a new investment which might be useful but not necessary for the restructuring of the company.

## IV. **COMMENTS FROM POLAND**

(55) The Polish authorities insist that AHW used the State guarantee in accordance with the terms and conditions under which it was granted and explains that:

(a) Firstly, the repayment of the sale and leaseback transaction related to the investments, which were described only as a very general measure, without any investments being specified in detail.

(b) Secondly, it was part of the financial restructuring as the amount of restructuring costs was PLN 857 million, since they also consider losses and liabilities to be restructuring costs. Poland indicates that these consist of losses of PLN 150 million for the years 2002 and 2003, indicated in the forecasted balance sheet (p. 79, 2003 IBP). Moreover the company also had long-term and short-term debt of PLN 513,4 million. The additional costs come from the restructuring of employment and investments (PLN 190,5 million).

(c) Thirdly, the transaction was part of the asset restructuring which was provided for in the restructuring plan. The company therefore decided 'to replace the leaseback agreement with a less costly financial loan' in order to reduce its 'negative cash flow effects from existing financial debt'. Poland indicated that this was urgent as HLW was at the 'point of exhaustion of its financial resources'.

(56) The Polish authorities further claim that the sale and leaseback transaction also contributed to the viability of the company but do not substantiate this.

(57) The Polish authorities confirm that the timing of the aid was crucial. In fact they state that 'there was a need for State aid only in 2003/04' when there was essentially a financing gap ([13]).

(58) The Polish authorities reiterate that AHW has paid back the aid. The State guarantee was supposed to be only supplementary to the other collaterals for the loan. In fact a collateral in the form of a pledge on land and on all fixed assets was given to the bank, as well as seven bills of exchange. Moreover, Poland submitted details on various other financing instruments that HLW was also using at the time and consequently argues that HLW could have obtained financing on the market without the guarantee.

(59) The Polish authorities recall that Arcelor would not have bought the company unless it was certain that HLW was 'entitled to the State aid it had received for the restructuring process'.

(60) The Polish authorities underline that the modification of the plan will result in a broader investment programme than the one envisaged in the original plan and that all the investment was irrecoverably committed by the end of 2006 (i.e. by the end of restructuring period). The Polish authorities are thus of the opinion that the aid should not be considered misused and the proposed modification of the plan should be considered compatible with Community rules.

([13]) Letter of 4 June 2007, point 20.

(61) The Polish authorities indicate that the investment envisaged in the 2005 IBP, i.e. the replacement of the medium mill, was discussed as early as 1997. However from 1997 to 2003 the company had insufficient cash flow to finance this investment. Only when Arcelor took over the company were sufficient funds available for the financing ([14]). Furthermore Poland argues that the product range was only broadly defined in the 2003 IBP and what was defined was not optimal to meet the changed demand structure in the Polish market, which required adaptation of the product range.

(62) The Polish authorities argue that the amendments in the 2005 IBP have no negative impact on Protocol No 8. The new plan is necessary to achieve 'lasting viability'. The current viability at the end of the restructuring period was only due to the positive market and price/revenue/cost situation. In this sense it is claimed that the blooming technology would not guarantee the company being competitive in the long term, and needed to be replaced by a state-of-the-art continuous casting process.

(63) The Polish authorities suggest that even if the aid obtained was considered to be additional operating aid, it should be deemed to be balanced by the compensatory measures, i.e. the company's additional capacity reduction after the strategy was modified. The Polish authorities also confirm that HLW did not carry out all its investments because its asset restructuring was delayed.

(64) Poland also informed the Commission of the interest rate charged for the loan as indicated above in point (41) and the other costs charged in relation to the loan and guaranty as indicated in point (42).

## V. COMMENTS FROM INTERESTED PARTIES

(65) The beneficiary submitted comments on the initiation of the procedure and has subsequently been kept informed about the information exchange between the Commission and the Polish authorities.

(66) AHW argues that a large part of the aid was used to buy back some leased assets in order to reduce financial costs. Moreover, as the investments concerned the leased property, its buy-back could be seen as part of the restructuring.

([14]) The Polish authorities confirm that the capital expenditure required for the adaptation relating to continuous casting and extending the product range is higher, but argue that it is compensated for by two factors: firstly, switching investment to the construction of a replacement mill should result in considerable cost savings of up to EUR 85 million and, secondly, there should be energy and operating cost savings later.

(67) The beneficiary also argues that the guarantee was granted before Poland's accession to the European Union (the resolution of the Council of Ministers was adopted in December 2003), and it was therefore up to the Polish government to determine the purpose of the aid. Moreover, the company indicates that it has used the aid in exact accordance with the decision granting the guarantee.

(68) AHW reiterates that the new plan is to serve the objective of the old plan and the change of strategy is necessary for the long-term viability of the company.

## VI. ASSESSMENT

### 1. Applicable law

(69) Point 1 of Protocol No 8 provides that 'notwithstanding Articles 87 and 88 of the EC Treaty, State aid granted by Poland for restructuring purposes to specified parts of the Polish steel industry shall be deemed to be compatible with the common market' if, inter alia, the conditions set out in the Protocol are met.

(70) The grace period for granting restructuring aid to the Polish steel industry under the Europe Agreement was extended by the Council until the accession of Poland to the European Union. This arrangement was recognised in Protocol No 8 as part of Poland's accession to the European Union. In order to achieve this objective, the Protocol covers a time frame extending before and after accession. More precisely, it authorises a limited amount of restructuring aid for the years from 1997 to 2003 and forbids any further State aid to the Polish steel industry for restructuring purposes between 1997 and 2006. In this respect it clearly differs from other provisions of the Accession Treaty such as the interim mechanism set out in Annex IV (the existing aid procedure), which only concerns State aid granted before accession insofar as it is 'still applicable after' the date of accession. Protocol No 8 can therefore be regarded as *lex specialis* which, for the matters that it covers, supersedes any other provision of the Act of Accession ([15]).

(71) Consequently, while Articles 87 and 88 ECT would normally not apply to aid granted before accession and not applicable after accession, the provisions of Protocol No 8 extend State aid monitoring under the EC Treaty to any aid granted for the restructuring of the Polish steel industry between 1997 and 2006.

([15]) See Decision of 5.7.2005 in Case C 20/04 Huta Czestochowa (OJ L 366, 21.12.2006, p. 1).

(72) The decision may be taken under Article 88(2) EC after Poland's accession because, in the absence of specific provisions in Protocol No 8, the normal rules and principles should apply. Consequently Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 (hereinafter the Procedural Regulation) ([16]) will also apply.

2. **Misuse of aid**

(73) Point 18(a) of Protocol No 8 gives the Commission the power to take 'appropriate steps requiring any company concerned to reimburse any aid granted in breach of the conditions laid down in this Protocol […] if monitoring of the restructuring shows that the commitments for the transitional arrangements contained in this Protocol have not been fulfilled'.

(74) Following the formal investigation, the Commission has concluded that Poland has not been able to allay its doubts concerning misuse of the restructuring aid. The Commission concludes that the company has not properly implemented its restructuring plan as explicitly stipulated in points 9(a) and (h) of Protocol No 8. The Commission observes that, of the financial resources made available (around EUR 34 million), only an insignificant part was used for financing investments in line with 2003 IBP, while the rest, i.e. EUR 31,2 million, was used for purposes not indicated in the plan.

(75) To arrive at its conclusion, the Commission first assessed what kind of measures were planned in the original IBP, then whether the measures which were pursued by the company were in any way incompatible with the common market, and then the effect of the incompatibility of the misused aid in view of the overall plan, before considering the aid amount. The question of whether the new plan may change this conclusion is discussed in the following chapter (3).

(a) *Scope of restructuring established in the original investment plan*

(76) The Commission first clarifies the scope of the 2003 IBP and whether the pay-off of the productive assets sale and leaseback agreement, for which the restructuring aid was mainly used, was covered by the 2003 IBP.

(77) As stated above in point (34), the main task of the restructuring plan was to guarantee the execution of certain measures necessary for HLW to restore viability in a timely fashion. This mainly concerned investments and financial restructuring. The emphasis of the plan was on enabling the company to restructure in 2002 and 2003.

(78) Firstly, under the 2003 IBP HLW was to invest PLN [150-220] million. However, both the beneficiary and the Polish authorities seem to infer that acquisition of the productive assets could be seen as part of the investment programme. Poland argues that the investments were described as a very general measure, without specifying any of the investments in detail. Moreover the beneficiary argues that the purchase was necessary to the restructuring process 'since the plant could not have been operated during the restructuring without these facilities'.

(79) The Commission cannot accept these arguments. It is evident that the 2003 IBP earmarked the investments under point 4.4 in terms of costs (Table 21 of 2003 IBP, shown as Table 1 in point (18) above), object (Table 22 of 2003 IBP) and time (Table 23 of 2003 IBP). There was no room for any paying off of the productive assets sale and lease agreement. In fact, this attempt rather illustrates that neither the Polish authorities nor the beneficiary saw any plausible justification for paying off the sale and lease agreement. Otherwise this would have been included in the plan.

(80) Secondly, the 2003 IBP envisages limited financial restructuring. In their later submissions the Polish authorities claimed that the amount of the repurchase of the productive assets should be included in the financial restructuring ([17]). They argue that the financial restructuring also covered existing losses of PLN 150 million and debt rescheduling of PLN 513 million and thus arrive at total restructuring costs of around PLN 858 million.

(81) However, the Commission cannot accept that the existing losses of PLN 150 million and the debt rescheduling of PLN 513 million are restructuring costs. As indicated in point (22), the Commission does not dispute that point 4.7 of the 2003 IBP mentions that 'the company intends to restructure the liability of PLN 513 million'. However, it is not indicated that this is necessarily part of the restructuring tasks. Indeed, point 3.2 singled out only the 'repayment of short-term loans and the sale of unnecessary assets not connected with production' as a restructuring task.

([16]) OJ L 83, 27.3.1999, p. 1.

([17]) Letter 4 June 2007, point 24.

(82) Moreover, it is also not usual to consider all kind of losses simply as restructuring costs as Poland claims. Balance sheet liabilities are not necessarily equivalent to restructuring costs, as liabilities as such form part of normal business operations. It is true that excessive liabilities may give raise to difficulties but then restructuring must identify specific measures such as capital injections or loans or rescheduling agreements to deal with the liabilities. The plan does not include any of these measures for the financial restructuring (point 4.7, fifth paragraph).

(83) Indeed, the 2003 IBP indicates in point 4.7 that only PLN 363 million was required to finance the restructuring. This is less then the total existing debt of PLN 513 million. Moreover, the PLN 60 million mentioned in point 4.7 seems to relate to future working capital. Thus, PLN 300 million at most was to go towards the restructuring (see above point (30)).

(84) However, the use of the PLN 300 million is clarified in point 4.12.1 of the 2003 IBP concerning the costs and sources of the programme. This point explains that total financial coverage of PLN 219 million was required for 2002-03. Given that this was also to cover investments, as indicated above in point (26), the funds left for financial restructuring were only PLN […] million.

(85) The PLN 81,5 million would not even cover the amount to pay off the sale and leaseback agreement. Point 3.2 indicated clearly that financial restructuring would only concern the short-term debt. Therefore, the financial restructuring included in the plan was limited to PLN 81,5 million, which did not, however, concern the paying off of the sale and lease agreement, which, as it was to have been repaid over the years up to 2010, was clearly a long-term liability. Hence paying off the sale and leaseback agreement can also not be viewed as part of the financial restructuring to be supplemented by aid.

(86) Finally, the Polish authorities seem to accept that paying off the sale and leaseback transaction was not part of the asset restructuring, as they do not argue that this is the case. However, they indirectly refer to the asset restructuring when citing a passage from the part on asset restructuring, 'the above sale will enable Huta L.W. to repay part of its loans and maintain financial liquidity' (point 64 of letter of 4 June).

(87) However, the Polish authorities fail to accept that it is nowhere stated that the entire debt from the sale and leaseback is to be rescheduled, while the plan indicates at several points that the rescheduling concerns only the non-productive assets. This is reiterated twice in the same chapter from which the above quote of the Polish authorities was taken. In fact, it is clearly set out there that certain debts under the sale and leaseback agreement, namely those concerning non-productive assets (see point 4.12.1 of the 2003 IBP), are to be subject to asset restructuring. These concern the 100-hectare and 88-hectare projects. The purpose of this asset restructuring was to free up cash in order to make the investments. This would simultaneously reduce the financial cost of the debt. However, no indication is given that the entire sale and leaseback agreement should be paid off ahead of schedule in order to reduce financial costs. Rather the asset restructuring aims only to 'reduce' financial costs, not eliminate them.

(88) Finally, given HLW's financial constraints, the Commission does not see any reason why HLW had to aim to purchase its productive assets when the repayment was only due at a later stage. Indeed, it was in no way indicated that the lease contract would be an obstacle to the restructuring. In particular, point 4.12 of the 2003 IBP does not support this, since it only indicates that by selling off some assets, which were previously identified as the unproductive ones, HLW would be able to reduce the costs of serving the leasing contract. This is only logical, given that assets were to be sold in order to (partly) repay the loan and thus relieve HLW from paying interest on the loan. However, it in no way relates to the re-purchase of the productive assets, which could not generate any cash as these assets would be kept by the firm.

(89) Buying back the productive assets was not therefore provided for in the 2003 IBP. Hence, HLW used the aid for a purpose which was not covered by the restructuring plan which was the basis for authorisation of the aid. This means that the aid was used in contravention of the NRP and the authorisation decision, i.e. Protocol 8. Under Article 1(g) of the Procedural Regulation, this may be considered misuse, since this is defined as using the aid in contravention of the State aid approval decision ([18]).

(b) *Incompatibility of the misused aid*

(90) After it has been established that the State aid obtained was not used in accordance with the plan, it needs to be demonstrated that this misused aid is also incompatible with the common market.

([18]) Misuse does not, however, call into question whether a beneficiary was originally entitled to receive aid, but only concludes that the aid has been used in contravention of the decision granting it.

(91) In formal terms, this can already be concluded from the fact that, firstly, the company did not use the aid in accordance with the plan, which, under Protocol No 8, it is obliged to implement properly and, secondly, that any other State aid outside the IBP, NRP and Protocol No 8 is incompatible with the common market under point 18 of Protocol No 8.

(92) In addition, the Commission notes that it would not have been able to find the actual use compatible with the common market, despite the fact that AHW restored its viability. In this context the Commission would like to clarify that, although the beneficiary doubts that the beneficiary's current viability is sufficient, it must be considered that its understanding of viability departs from the way viability was predefined in Annex 3 of Protocol No 8. This understanding was agreed under Protocol No 8, was monitored by both contracting parties and cannot be altered retroactively by a beneficiary.

(93) However, the Commission reiterates firstly that compatibility does not simply follow from the fact that HLW did restore viability in 2006. In fact, the restoration of viability is not alone sufficient to render a restructuring project compatible with the common market. Moreover, it must be ensured that the restoration of viability is achieved with the minimum amount of State aid necessary for the restructuring and that compensatory measures are implemented. The Commission recalls that these conditions are stated in Article 8(4) of the Europe Agreement, to which reference is made in point 1 of Protocol No 8. In particular the concept of State aid being the minimum necessary implies that the aid should not be used to finance an investment or measure that is not essential for the restructuring ([19]).

(94) Secondly, the Commission recalls that the plan, i.e. the restructuring tasks and the measures to finance them, must, from an *ex ante* point of view, ensure that viability will be achieved. In fact, the 2003 IBP put special emphasis on investments and on bringing forward investments in its use of State aid. The plan indicated that investments were to be brought forward to 2003 thanks to the bridging loan. Moreover, it is indicated that the asset restructuring was expected to take place in 2004 and 2005, which was obviously too late for implementation of the investment programme. Therefore the loan was provided to bridge the financing gap. Indeed, the introduction to the plan reiterates that 'implementation of the restructuring programme in accordance with the adopted schedule and continuation of the enterprise will require the necessary bridging loan'. In conclusion, the bridging loan was considered necessary in order to bring investments forward according to a specific schedule.

(95) The fact that HLW did opt to pay off the productive assets sale and lease agreement and not to make the investments in time therefore indicates that, from an *ex ante* point of view, HLW's action endangered its chances of restoring viability. In fact, the Polish authorities have not communicated any reason why in August 2003, when HLW applied for the guarantee, the situation should have changed, given that it was only five months after the last update of the plan in March 2003. Such use of the aid was therefore not an implementation of the plan but rather, given the fact that the investments were tied to a time schedule, obstruction of proper implementation of the plan. Thus, from the *ex ante* point of view, the company clearly endangered viability, despite the fact that it later restored it.

(96) It is true that financial resources are fungible, and the fact that the State aid was not used in accordance with the plan might imply that the restructuring plan could be financed by other means, which it was originally planned to use for other purposes, for which the aid is now being used. However, such argumentation is not acceptable in the case of a restructuring project, where the financial means of the company should be used for the firm's reorientation and, owing to the company's difficulties, no spare funds should be available for projects outside the plan. Therefore, the use of the funds from the State-guaranteed loan to pay off the loan for the productive assets is a causal factor in the reduction of restructuring activities elsewhere, in particular timely implementation of the above investments.

(97) Furthermore, the Commission does not see the relevance of the argument put forward by the Polish authorities and the beneficiary to the effect that in 2003 the company was in such financial distress that it was unable to undertake any investments. This is because the Commission fails to see why a company in such a situation would have opted for repayment of a long-term debt rather than for other measures which were identified as being necessary to restore viability.

([19]) This common principle has already been reiterated. It is laid down in point 45 of the rescue and restructuring guidelines and confirmed in Commission Decision in Case C 31/2001 Schmitz-Gotha, OJ L 77, 24.3.2003, p. 41, where the Commission rejected the acquisition of a subcontractor, which was seen as useful, but not as strictly necessary for the restructuring. This was upheld in Case T-17/03 Schmitz-Gotha [2006] ECR II-1139.

(98) Finally, it is also not relevant that the company is now offering to catch up with the investments forgone in 2004, because the implementation was bound to a particular time schedule, which was considered the only way to restore viability by the end of 2006. This infringement is definite and can also not be altered by a change in the IBP. This is so even despite the fact that the 2005 IBP provides for additional investments, as these cannot put right the misuse.

(99) Thirdly, even if HLW assumed in August 2003 that the investments were no longer necessary to restore viability, this would imply that HLW had indicated excessively high restructuring costs in the 2003 IBP and that the aid received was not necessary for the restructuring. However, the Commission finds it unlikely that the company changed its mind just five months after the 2003 IBP had been concluded (in March 2003) when, in August 2003, it applied for the guarantee and indicated that the main part was wanted to pay off the loan on the productive assets. In order to substantiate such a finding, the company should then in any event have indicated this fact to the Commission in due time, which it did not.

(100) Nevertheless, even if the investments had not been necessary, the redirecting of the funds to pay off the sale and leaseback of the productive assets would not seem to be justifiable as restructuring costs. In fact, the financing to pay off the productive assets sale and leaseback agreement was arranged, and could have been paid off after the end of the restructuring period. It may be true that it resulted in financial burdens, but these were apparently taken into account in the financial projections of the 2003 IBP. As the assets could not be sold off, the only effect of the repayment would thus be relief from the financial costs, which would have given HLW additional liquidity. This means that HLW obtained additional cash, which can be considered operating aid, which could have even resulted in measures involving excessive distortion of the market. Thus the Commission does not see how such measures could have been authorised if notified to the Commission. Thus also, if the investments were really not necessary, the actual use of the aid would also be considered incompatible with the common market.

(101) Finally, the Commission does not dispute the beneficiary's argument that the guarantee was used in accordance with the government decision and that the government was competent to determine the purpose of the aid. However, the Commission notes that this is without effect on the compatibility of the guarantee, which has to be determined in accordance with Protocol No 8 and the 2003 IBP, which do not include aid for the purpose approved by the government in the granting decision.

(102) In view of the foregoing, the Commission must conclude that the aid has been used in a manner incompatible with points 9 and 18 of Protocol No 8. It is therefore incompatible with the common market.

(c) *Effect of the incompatibility of the misused aid on the entire restructuring plan*

(103) Finally, the effect of the incompatibility of the misuse must be determined.

(104) To this end, the Commission would first like to point out that the present investigation did not find that some restructuring costs had become obsolete, but that parts of the State funds had been misused. It might be true that some investments could have been cancelled — ideally after obtaining Commission approval. This would mean that the actual restructuring costs were lower and the relevant proportion of the aid would have to be recovered; an approach which the Commission has accepted in previous steel restructuring cases ([20]). However, in the present case it is not only that some restructuring costs have become redundant but, as discussed above, the problem is that the entire financing of a part of the restructuring (i.e. the EUR 31,2 million) has lost its object, given that from the *ex ante* point of view the bridging loan was used almost entirely in a way that was not in line with the IBP and endangered the restoration of viability or, from the point of view of the time when the change occurred, it equipped the company with surplus cash, which must be returned. Moreover, such misuse can not be rectified retroactively, by the company implementing investment later, because the funds were given in order to enable financing of investments and financial restructuring at a certain point in time. This incentive for the aid was already outdated in 2005. In fact, if the restructuring had been arranged at a later stage, no aid, in particular not the bridging loan guaranteed by the State, would have been necessary. Hence the misuse concerns all the funds provided under the bridging loan which were used for the sale and lease-back of the productive assets.

(105) The Commission is further aware that an excess of resources at the end of the restructuring period is not unusual and that a company should not be punished for achieving better results than expected *ex ante*. However, this should lead to better business results, allowing the company some more margins for bringing forward the debt repayment, for example. This does not mean that the company may redirect almost all the aid to purposes not indicated in the business plan.

([20]) Commission Decision of 13.9.2006 in Case N 350a/2006 MSO, OJ C 280, 18.11.2006, p. 4, point 48.

(106) Secondly, it must be recalled that the company also received several other State aid measures, such as the debt write-off and a part of the guaranteed loan used to finance investments. These measures were implemented according to the plan and helped to achieve viability for the company.

(107) Nevertheless, it could be assumed that the entire restructuring must be deemed to have failed, because the plan was only partly implemented and, from an *ex ante* point of view, only full implementation of the restructuring plan would ensure that viability was restored. However, in this context it might be of relevance that the company did restore viability ([21]). This is the case at least so long as the company did not obtain any excess aid which was not necessary to restore viability. In other words if this advantage were recovered it would restore the *ex ante* situation, i.e. make good the receipt of excessive aid. In this case the remaining measures, which were implemented in accordance with the plan, may indeed have contributed to restoring viability. They could therefore, provided that the excess aid received was recovered, be considered compatible.

(108) Therefore, as the remaining measures did ensure that viability was restored with the minimum aid necessary, the Commission can conclude that only the redirected amount of the guaranteed loan, and not the entire amount of the restructuring aid, was misused, and that the other measures under the 2003 IBP remained compatible.

(d) *Aid element of the misused part of the guaranteed loan*

(109) Finally, the aid element of the State-guaranteed loan of EUR 31 245 684 must be determined. In principle the aid intensity of a guarantee can be up to 100 % ([22]).

(110) The Commission acknowledges however that the guarantee as a form of aid had in this case a limited distortive effect given that the loan for which HLW obtained a guarantee was repaid after one year by Arcelor. Therefore, the Commission considers that in order to recover all the advantage received by the company it is necessary to recover only the interest subsidy given by the guarantee for the period when the borrowed money was at the company's disposal. Moreover, the Commission notes that the company still had some chances of getting finance and was able to provide decent security. This is confirmed in the guarantee contract, which required security.

(111) According to constant Commission practice, the interest subsidy would be equivalent to the difference between the interest that would have had to be paid on market terms and the interest actually paid by the company. The market interest in this case would be calculated on the basis of the reference rate at the time when the money was made available (August 2004) plus 400 basis points, given that HLW was not viable in 2004 (see above point (46)), but was a company in difficulty ([23]). Established Commission practice does not allow going below 400 basis points ([24]). However no further increase is necessary as the company provided security and the steel sector was performing well in 2004.

(112) As the loan was provided not in PLN but in euro, the Commission is applying the reference rate for the Eurozone, i.e. 4,43 %. In this context it should be recalled that the benefit actually achieved must be assessed by comparing the conditions obtained by the company and the conditions that would have been achieved under market conditions (without the State guarantee). It is normal market practice to determine credit interest on the basis of the reference rate (usually the relevant interbank reference rate) for the currency of the principal, because the fluctuation of the value of money is related to the economy in which a particular currency is used. Therefore, in the case of a loan denominated in euro the reference rate applied by a market economy creditor should also be the one used for credit denominated in euro, even though the loan was granted in Poland.

([21]) See Commission Decision of 23 October 2007 in Case C 23/06 Technologie Buczek, not yet published, where this was not the case.

([22]) Commission Notice on the method for setting the reference and discount rates (OJ C 273, 9.9.1997, p. 3). See also Commission Decision of 12.9.2007 to open proceedings in case NN 45/2007 (C 38/2007), *Arbel Fauvet Rail*, OJ C 249, 24.10.2007, p. 17, point 15.

([23]) The Commission determines that a firm is in difficulty in accordance with the Community Guidelines on State aid for rescuing and restructuring firms in difficulty, OJ C 244, 1.10.2004, p. 2. Furthermore a firm is also regarded as being in difficulty when it is in its restructuring period and is following a restructuring plan, which is the case here. For the 400 basis points cf. Commission Decision of 2.3.2005 in Case C 43/2001, Chemische Werke Piesteritz, OJ L 296, 12.11.2005, p. 19, points 107-108; and Commission Decision of 24.1.2007 in Case C 38/2005, Biria, OJ L 183, 13.7.2007, p. 27, points 83 et seq.

([24]) Commission Notice on the method for setting the reference and discount rates, OJ C 273, 9.9.1997, p. 3.

(113) Thus, the interest should have been at 8,43 % p.a., i.e. it should have amounted to EUR 2 807 206. This needs to be compared with the expenses the company actually incurred. These consist of the interest of EUR 1 061 050 plus some premiums for the guarantee (as indicated in points (42)(a) and (b)), which, according to Commission practice, have to be considered when calculating the aid amount of a guarantee ([25]).

(114) The cost of the guarantee should be spread over the total amount of the guarantee and related to the misused aid plus the interest covered by the guarantee. This is because the limited use of the guaranteed part of the loan for investments was a business decision that had not yet been taken when the guaranteed loan was arranged as a loan of EUR 46 million plus interest for five years. Otherwise the guaranteed loan would have been arranged differently. Hence a pro rata division should be made by calculating the proportion of the fee relating to the actual amount guaranteed and misused. Moreover, for the same reasons the fee should be calculated pro rata of the time actually used in relation to the guarantee for the total period of five years, as the guarantee was theoretically amortised in that period. If it is terminated earlier, this is a revision of a business decision which is independent of the former arrangement.

(115) This means that the Commission accepts deduction of the costs for the State Treasury fee and the preparation fee as indicated above in point (42), but on the basis of a pro rata calculation, based on (a) the ratio of the amount actually guaranteed (32,3 (=31,24 + 1,06 (principal plus interest actually paid)) to the total amount of the guarantee (EUR 58 330 000)) and (b) the ratio of actual use to the intended use for five years (i.e. 388 days out of a potential 1 826 days).

(116) However, as regards fees for the loan indicated above in point (42)(c), the Commission does not consider these as costs deductible from the advantage, given that any loan on market terms must also involve similar costs, which could possibly even have been higher.

(117) This leads to the following calculation, taking into account compound interest on the benefit from 24 August 2004 until repayment, at a recovery rate of 7,62 % p.a.:

*(EUR)*

| | |
|---|---|
| Total amount financed | 31 245 684,00 |
| Appropriate interest required from 24.8.2004 to 16.9.2005 | 2 807 206 |
| Interest actually paid by HLW on guaranteed loan | 1 061 050 |
| Preparation fee for guarantee, pro rata over total guarantee and loan duration | 31 792 |
| State Treasury Fee, pro rata over total guarantee and loan duration | 68 683 |
| Total costs for guaranteed loan actually incurred | 1 161 525 |
| Interest differential (= benefit) | 1 645 682 |
| Plus compound interest at recovery rate from 24.8.2004 to 20.11.2007 | 444 086 |
| Payable on 20.11.2007 | 2 089 768 |

(e) *Conclusion*

(118) To summarise: the Commission concludes that the paying off of the sale and leaseback agreement for the productive assets was not envisaged in the 2003 IBP and put the restoration of viability at risk, at least at the time when the aid was required. However, as the company nevertheless restored viability, the misuse of the aid does not affect the compatibility of the remaining aid. Moreover as the guarantee has been terminated and the loan has already been repaid, only the interest subsidy from which HLW benefited in the period when the money was available (i.e. from the transfer of money to the repayment) need now be recovered. This interest subsidy amounts to EUR 1 645 682.

### 3. **Change of plan**

(119) Poland has asked the Commission to accept an updated IBP under point 10 of Protocol No 8.

(120) The Commission has dealt with similar cases in the past and has clarified that, '*An agreement by the Commission to a change of an IBP must be based on the consideration that there is no problem of compatibility of the change with the objectives of Protocol No 8. This is the case where the main figures*

([25]) Cf. Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees, OJ C 71, 11.3.2000, p. 14, point 3.2.

*indicated in the Protocol concerning State aid, capacity and timing remain unchanged and the proportionality of the State aids as stipulated in the Protocol remains in place without questioning the objective of viability* ([26]).'

(121) The Commission clarified in the opening decision that in this case the changes concerned neither an increase of the total amount of State aid nor an increase of production capacity ([27]) within the restructuring period, but that the revised IBP mainly implied a significant change in the company's investment strategy, that the State aid provided seemed to have been abused as operating aid and no more State aid was necessary to complete the investments (see points (54) and (56)). Essentially, the investigation confirmed that these doubts were not allayed, as the aid was indeed misused, as concluded above, and is incompatible with the common market.

(122) The 2005 IBP does not rectify this defect, i.e. the excess of State aid, and can thus not be approved in that form. In particular, the fact that AHW has in the meantime revived the investment programme does not suffice to rectify the defect. As discussed above, this would have been so even if the company had carried out only the investments indicated in the restructuring plan. It is clear that the new investment programme will be implemented at a much later stage than originally envisaged in the plan. It is further clear that the original aid was provided to ensure adherence to the schedule of the restructuring programme. Thus the aid was related to the purpose of inciting HLW to make these investments in a scheduled, timely fashion in 2003 and 2004. In fact, if the restructuring schedule had been delayed *ex ante* to 2004 and 2005, no bridging loan and thus no aid would have been necessary.

(123) Notwithstanding the misuse, the Commission notes that if the misused aid is recovered, it can accept the residual new plan. In the decision initiating the procedure the Commission noted its readiness to accept the new business strategy from an industrial point of view, accepting that the new investment would be beneficial for the company's future economic performance and could have other positive effects as regards environmental protection and cost reduction.

([26]) Commission Decision in Case N 186/05, Change of IBP of MSP, point 41 and Commission Decision No N 600/04 Change of IBP of VPFM.

([27]) The Commission noted that the new investment would result in a reduction of capacity from 930 kt to 700 kt.

(124) In any event the Commission notes that the amendment of the plan does not require any additional aid but is entirely financed from the investor's funds. Therefore, the Commission sees no reason to object to the updated programme, even if there is a change in strategy ([28]).

## VII. **CONCLUSION**

(125) In short, the Commission concludes that, pursuant to points (9) and (18) of Protocol No 8, the guarantee for loan of EUR 31,2 million was misused and was used in an incompatible manner by HLW. Taking into account that the State guarantee has been terminated and the loan has been repaid, meaning that there was an advantage for HLW equivalent to an interest subsidy of EUR 1 645 682, this advantage should be reimbursed. Given that on 20 November 2007 AHW voluntarily repaid into the blocked account EUR 2 089 768, corresponding to the amount to be recovered plus compound interest, to be received by the Polish authorities as of the day of issuance of this decision, no further recovery is necessary.

(126) Moreover, provided that this aid is reimbursed, the Commission can, under point (10) of Protocol No 8, approve the change of plan as indicated in the 2005 IBP, as it does not involve additional aid and reinforces the viability of the firm,

HAS ADOPTED THIS DECISION:

*Article 1*

State aid of EUR 1 645 682 granted to HLW/AHW by Poland in breach of point (18) of Protocol No 8 has been misused by HLW/AHW and is incompatible with the common market.

*Article 2*

In view of the repayment of the misused aid referred to in Article 1, the Commission has no objections to AHW's amendment of its business plan.

([28]) In the interests of completeness, the Commission would also like to note that it maintains its view that the replacement was not already included in the 2003 IBP. The IBP states clearly that HLW wanted 'to focus on the gradual improvement of its product mix' by 'the development of production with a focus on speciality and engineering steels'. The 2005 IBP clearly indicates that 'in order to meet market demand, it has become necessary to refine the strategy and to enrich the portfolio of the steel works by a new range of new products'. This implies that AHW wanted to meet the demand for construction steel by erecting a new mill capable of producing construction steel and using the existing liquid steel more efficiently for this purpose. However, it is evident that the company did not have the funds make do these investments before 2003, but could only do so with the help of Arcelor.

*Article 3*

This Decision is addressed to Poland.

Done at Brussels, 11 December 2007.

*For the Commission*
Neelie KROES
*Member of the Commission*