IV

(Acts adopted before 1 December 2009 under the EC Treaty, the EU Treaty and the Euratom Treaty)

COMMISSION DECISION

of 6 November 2008

on State aid C 17/05 (ex N 194/05 and PL 34/04) granted by Poland to Stocznia Gdynia

(notified under document C(2008) 6771)

(Only the Polish text is authentic)

(Text with EEA relevance)

(2010/47/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

Having called on interested parties to submit their comments [1] pursuant to the provisions cited above and having regard to their comments,

Whereas:

I. PROCEDURE

(1) Pursuant to the provisions of point 3 of Annex IV to the Accession Treaty governing the interim mechanism procedure, on 29 April 2004 Poland notified restructuring measures in favour of Stocznia Gdynia S.A. (hereinafter Gdynia Shipyard). The case was registered as PL 34/2004.

(2) By letter of 19 May 2004 the Commission asked Poland to submit certain missing documents. These were provided on 16 June 2004. The Commission requested further information by letters of 30 July 2004, 8 October 2004, 23 November 2004 and 4 March 2005, to which Poland replied, respectively, by letters of 3 September 2004, registered on 7 September 2004, 10 November 2004, registered on 15 November 2004, 17 February 2005, registered on 21 February 2005, 30 March 2005, registered on 1 April 2005 and 18 April 2005, registered on 20 April 2005. By letter of 22 April 2005 registered on the same day, Poland accepted that the Commission would treat PL 34/2004 dated 29 April 2004 as a notification under Article 88(2) of the EC Treaty with regard to any measures which were found to constitute new aid. The case was attributed a new number: N 194/2005.

(3) On 1 June 2005 the Commission adopted a decision to open a formal investigation, which was published in the Official Journal [2], and invited Poland and interested parties to submit comments.

(4) Having been granted an extension of the deadline for submitting comments (letter of 9 August 2005), Poland submitted its comments by letter of 2 September 2005, registered on 5 September 2005. In its reply Poland submitted to the Commission the restructuring plan for Gdynia Shipyard Update, dated 4 March 2004 (hereinafter 'the 2004 restructuring plan').

(5) Poland submitted additional comments by letter of 3 November 2005, registered on 7 November 2005.

(6) Gdynia Shipyard submitted comments by letter of 10 October 2005, registered on 14 October 2005. Comments were also submitted by Ray Car Carriers (by letter of 7 October 2005, registered on 10 October 2005), by the Office of the Permanent Representative of Denmark to the European Union (by letter of 7 October 2005, registered on 11 October 2005), by the Danish shipbuilding association Danish Maritime (by letter of 7 October 2005, registered on the same day), by the Solidarity trade union (by letter of 7 October 2005, registered on 10 October 2005) and by the Polish shipbuilding association (by letter of 10 October 2005, registered on 11 October 2005).

(7) The Commission forwarded these comments to Poland by letters of 26 October 2005 and 12 December 2005 [3]. Poland responded to the comments provided by Gdynia Shipyard by letter of 16 January 2006, registered on 18 January 2006. Poland did not provide any comments on the submissions of other third parties.

[1] OJ C 220, 8.9.2005, p. 7.

[2] OJ C 220, 8.9.2005, p. 7.

[3] By letter of 17 November 2005, registered on 18 November 2005, the Polish authorities asked for selected excerpts in English from the third parties' submissions to the Commission to be translated into Polish. The Commission forwarded these translations by letter of 12 December 2005.

(8) The Commission sought the assistance of an external consultant for the evaluation of the 2004 restructuring plan. The consultant transmitted his report to the Commission in December 2005.

(9) By letter of 13 January 2006, the Commission asked Poland to provide an update on the latest developments in its restructuring strategy for Gdynia Shipyard. Poland replied by letter dated 20 February 2006, registered on 21 February 2006, and a meeting between representatives of the Commission, the Polish authorities and Gdynia Shipyard took place on 22 February 2006. Poland announced that the 2004 restructuring plan was outdated and that it had adopted a new strategy for the restructuring of Gdynia Shipyard Group involving the spin-off from the Group of Gdańsk Shipyard and the (partial) privatisation of Gdynia Shipyard. Poland also announced that an amended restructuring plan was to be submitted to the Commission by 30 June 2006 and that the privatisation of Gdynia Shipyard would commence shortly.

(10) As follow-up to this meeting, the Commission sent a letter to Poland on 8 March 2006, to which Poland replied by letter of 13 March 2006, registered on the same day, announcing a privatisation timetable. Poland provided additional information on the privatisation process by letter dated 29 March 2006, registered on 30 March 2006. The Commission asked for further information by letter of 30 March 2006, to which Poland replied by letter of 19 April 2006, registered on 20 April 2006.

(11) By letter of 6 April 2006, registered on 10 April 2006, Poland submitted a first draft of the document 'A strategy for the shipbuilding sector (maritime construction shipyards) in Poland 2006-2010.' The Commission provided comments by letter of 12 April 2006. The document was finally approved by the Polish Cabinet on 31 August 2006 and sent to the Commission by letter of 1 September 2006, registered on the same day.

(12) By e-mail of 15 May 2006, Gdynia Shipyard submitted to the Commission the 'information memorandum on Gdynia Shipyard' dated May 2006, which was made available to potential investors as of 10 May 2006.

(13) By letter of 26 May 2006, registered on 30 May 2006, Poland submitted further information on the ongoing privatisation process, including the list of companies to which Poland, via its privatisation consultant, had sent the offer to participate in the new capital increase approved by the General Assembly of Gdynia Shipyard on 19 April 2006. By letter of 13 July 2006, registered on 17 July 2006, Poland submitted further information on the ongoing privatisation process, informing the Commission that two companies had submitted preliminary offers to participate in the capital increase and providing a comparative analysis by the privatisation consultant of these offers.

(14) Gdynia Shipyard submitted initial draft amendments to the restructuring plan to the Commission on 9 June 2006. Commission representatives visited the yard on 13 June 2006 and made initial comments on the amended restructuring plan. The Commission's external consultant provided his comments in a report dated July 2006. Lastly, the Commission commented on the shortcomings of the draft amendments to the restructuring plan by letter of 17 July 2006.

(15) Several meetings were held on the privatisation process and the preparation of the amended restructuring plan attended by representatives of the Commission and the Polish authorities: in Brussels on 31 January, 22 February and 10 May 2006 and on the premises of Gdynia Shipyard on 13 June 2006.

(16) Poland replied to the Commission's letter of 17 July 2006 by letter dated 31 August 2006, registered on 1 September 2006.

(17) Poland gave notice of amendments to the 'Restructuring Plan of Gdynia Shipyard S.A.' dated 3 September 2006 (hereinafter the '2006 restructuring plan') and of new State aid granted to Gdynia Shipyard following the Commission's decision to open a formal investigation.

(18) Poland provided further information on the restructuring process of Gdynia Shipyard Group by letter of 12 September 2006, registered on 13 September 2006, stating in particular that the capital of Gdańsk Shipyard and Gdynia Shipyard Group had been separated.

(19) Further information on the privatisation process of Gdynia Shipyard was submitted by letter dated 26 September 2006, registered on 27 September 2006.

(20) Poland gave notice of additional new aid for Gdynia Shipyard by letter dated 21 November 2006, registered on 27 November 2006.

(21) A meeting took place on 7 December 2006 between Commissioner Kroes and Piotr Woźniak, the Polish Minister for the Economy. The Minister stated that Poland was committed to relaunching the privatisation process of Gdynia Shipyard by way of an open and transparent procedure to be completed by June 2007. Poland confirmed this statement by letter of 27 December 2006, registered on 4 January 2007, referring to the Cabinet decision of 19 December 2006 to endorse a document entitled 'The state of the ship-building industry'. Poland asked the Commission for talks on countervailing measures.

(22) Commission representatives visited the yard on 19 December 2006 with the external consultant with a view to collecting the facts and data necessary to evaluate the countervailing measures. The Commission's external consultant submitted a report on the capacity of the yard on 16 January 2007.

(23) The Commission replied to the letter of 27 December 2006 by letter of 29 January 2007 in which it called on Poland to submit a proposal for countervailing measures for Gdynia Shipyard by end-February 2007.

(24) By letter dated 28 February 2007, registered on the same day, Poland submitted explanations concerning the privatisation of Gdynia Shipyard and a proposal for countervailing measures.

(25) On that basis, a technical meeting was held on 15 March 2007 between the Commission, the Polish authorities and representatives of the yard, focusing mainly on countervailing measures but also on the ongoing privatisation process. The Commission and the Polish authorities agreed that the Commission would enter into technical discussions direct with Gdynia Shipyard with a view to collating all the data necessary for its assessment of the countervailing measures proposed by Poland. Gdynia Shipyard transmitted some initial information on the yard's capacity by email dated 12 March 2007, registered on 27 April 2007.

(26) The Commission requested further information on the countervailing measures by letters of 29 March 2007, 27 April 2007 and 25 May 2007, to which Gdynia Shipyard replied by letters of 20 April 2007, registered on 23 April 2007, 9 May 2007, registered on 10 May 2007 and 30 May 2007, registered on 31 May 2007 respectively. Gdynia Shipyard submitted further information at a meeting with representatives of the Commission on 6 June 2007 and subsequently by letter dated 18 June 2007, registered on 21 June 2007. The Commission asked additional questions by email of 20 June 2007 to which Gdynia Shipyard replied by letter of 25 June 2007, registered on the same day.

(27) By letter of 31 July 2007 the Commission informed Poland that its preliminary analysis of the countervailing measures proposed by Poland for Gdynia Shipyard suggested that the measures were acceptable, subject to certain conditions being met. Poland replied by letter of 24 August 2007, registered on 27 August 2007, in which it commented on the conditions governing implementation of the countervailing measure for Gdynia Shipyard. The Commission closed the issue of countervailing measures by letter dated 3 October 2007.

(28) In a telephone conversation on 24 May 2007, the Polish authorities informed the Commission that Poland intended to restart the privatisation process of Gdynia Shipyard by way of a public tender. The Commission requested comprehensive information on the latest developments in the privatisation process by letter dated 29 May 2007, reiterating its request by letter of 6 June 2007. Poland replied by letter of 22 June 2007, registered on 25 June 2007 and, following a further request for information dated 28 June 2007, completed its submission by letter of 11 July 2007, registered on the same day. By this letter Poland also submitted to the Commission the information memorandum on Gdynia Shipyard dated 4 July 2007 (hereinafter 'the information memorandum'). By letter of 31 July 2007 the Commission indicated that the privatisation process could not be delayed any longer.

(29) The Commission transmitted its comments on the information memorandum by letter of 30 July 2007. Poland responded by letter dated 21 August 2007, registered on 27 August 2007. By letter of 29 August 2007, registered on the same day, Poland submitted a draft document entitled 'Supplementary clarifications on the Gdynia Shipyard information memorandum' dated 29 August 2007, to be annexed to the information memorandum of 4 July 2007 (hereinafter 'the Annex to the information memorandum'). The Commission presented its comments on the Annex to the information memorandum by letter of 4 September 2007, to which Poland replied by letter of 7 September 2007 in which it submitted an amended version of the Annex to the information memorandum. The Commission presented its final comments by letter dated 14 September 2007.

(30) Poland submitted information on the latest developments in the privatisation process by letters of 7 September 2007, registered on the same day, 23 October 2007, registered on 24 October 2007, and 25 October 2007, registered on the same day.

(31) In reply to a letter from the Commission dated 30 November 2007, Poland provided further information on the privatisation process by letters dated 13, 19 and 21 December 2007, registered on 14, 20 and 21 December 2007 respectively. In the last letter, Poland informed the Commission that it had received three binding offers for the purchase of Gdynia Shipyard. These offers were submitted to the Commission by letter of 8 February 2008, registered on 11 February 2008.

(32) A meeting between representatives of the Commission and the Polish authorities took place in Brussels on 10 January 2008, the conclusions of which were reiterated by the Commission in letters dated 17 and 30 January 2008.

(33) By letter of 30 January 2008, Poland informed the Commission that two bidders had been invited to hold negotiations with the Treasury. By letter of 14 February 2008, registered on 19 February 2008, Poland announced that the privatisation process of Gdynia Shipyard would be completed by summer 2008. The Commission replied by letter dated 28 February 2008.

(34) By letter dated 29 February 2008, registered on 3 March 2008, Poland submitted the first draft of a new restructuring plan prepared by one of the bidders, Amber Sp. z o.o. The company was granted temporary negotiating exclusivity on 20 March 2008 and provided an update to the draft restructuring plan by email of 9 April 2008, registered on 24 April 2008. Further information was provided by this bidder in 'Key restructuring directions', a document submitted to a meeting on 10 April 2008 and registered on 18 April 2008. The information prepared by the second bidder was submitted later, by letter of 7 April 2008, registered on 18 April 2008, following a reminder dated 18 March 2008.

(35) Poland submitted information on developments in the negotiations with Amber Sp. z o.o., as the exclusive bidder, by letters of 28 March 2008, registered on the same day, 7 April 2008, registered on 18 April 2008, 23 April 2008, registered on the same day, and 25 April 2008, registered on the same day. A meeting between representatives of the Commission, Gdynia Shipyard, the Amber Sp. z o.o. and the Polish authorities took place in Warsaw on 10 April 2008. Poland submitted its record of the meeting to the Commission by letter dated 7 May 2008, registered on 13 May 2008.

(36) The Commission provided comments on the progression of the privatisation process by letters of 21 and 30 April 2008.

(37) By letter dated 12 May 2008, registered on the same day, Poland informed the Commission that Amber Sp. z o.o. had withdrawn from the privatisation process. Lastly, by letter of 26 May 2008, registered on 27 May 2008, the Polish authorities informed the Commission that, on 15 May 2008, the Minister for the Treasury had decided to terminate the privatisation process within the framework of the public invitation to engage in negotiations with bidders whose offers had been admitted to the procedure launched in 2007.

(38) The Polish authorities also informed the Commission that they were taking action to relaunch the privatisation process with a view to signing privatisation agreements in November 2008. As of 3 June 2008, Poland has submitted daily reports to the Commission on actions taken by various interested parties in the relaunched privatisation process. By letter of 6 June 2008, registered on the same day, Poland submitted the 'information memorandum on Gdynia Shipyard' of 2 June 2008 (hereinafter 'the 2008 information memorandum') to the Commission.

(39) At the request of the Polish authorities, on 10 June 2008 a meeting was held between representatives of the Commission, the Polish authorities and ISD Polska, which was introduced to the Commission as a potential buyer of Gdynia Shipyard. Another meeting between the Commission and the Polish authorities took place on 13 June 2008.

(40) By letter of 26 June 2008, registered on the same day, Poland submitted a draft restructuring plan for Gdynia Shipyard and Gdańsk Shipyard prepared by ISD Polska (the owner of Gdańsk Shipyard) and a draft restructuring plan for Gdynia Shipyard prepared by the Polish Shipbuilding Company (hereinafter the PSC).

(41) By letter dated 4 July 2008, the Commission requested clarifications on certain issues relating to the draft restructuring plan prepared by ISD Polska. Poland replied by letters of 7 and 8 July 2008, registered on the same days. A meeting between representatives of the Polish authorities, ISD Polska and the Commission took place on 8 July 2008.

(42) By letter dated 14 July 2008 Poland undertook to provide the Commission with a complete restructuring plan by 12 September of that year.

(43) On 16 July 2008 the Commission endorsed, on a preliminary basis, the assessment and conclusions presented in a draft decision to conclude the formal investigation which stated that the aid granted to Gdynia Shipyard was incompatible with the common market and had to be recovered. However, in the light of the letter from the Polish authorities dated 14 July 2008, the Commission decided to postpone adopting the decision in order to assess whether the new restructuring plan to be submitted by the Polish authorities by 12 September 2008 would significantly improve the situation and would allow the aid to be deemed compatible with the common market.

(44) Since then, Poland has been providing the Commission with weekly updates on the privatisation process (letters dated 28 July, 4 August, 12 August, 21 August, 25 August, 1 September, 8 September, 16 September and 23 September, registered on the same days).

(45) By letter of 18 July, registered on 21 July, Poland asked for three rounds of consultations with the Commission on the draft restructuring plan with a view to preparing a final version incorporating the Commission's comments. The Commission agreed to the schedule by letter of 31 July.

(46) However, the first unofficial meeting between the Polish authorities and the Commission did not take place until 21 August 2008. Another meeting with the Polish authorities, in the presence of ISD Polska, took place on 2 September 2008. Poland informally submitted ISD Polska's draft restructuring plan on 28 August 2008 and an amended version of this draft on 8 September 2008.

(47) By letter of 12 September 2008, registered on the same day, Poland submitted ISD Polska's final restructuring plan for Gdynia Shipyard and Gdańsk Shipyard.

(48) By letter of 16 September 2008, registered on 17 September 2008, Poland submitted a draft of the privatisation agreement between ISD Polska and the Polish Treasury.

(49) On 30 September 2008 a meeting was organised between the Polish authorities and the Commission. Representatives of ISD Polska participated in the meeting.

(50) By letter dated 27 October 2008, the Commission informed the Polish authorities of the framework conditions for implementation of this decision. By letter of 3 November 2008, registered on 4 November 2008, Poland undertook to comply in full with these conditions. The Commission accepted this undertaking by letter dated 6 November 2008.

(51) By letter of 14 June 2007 the Commission requested the Polish authorities to submit an overview of all State aid granted to the yard since Poland's accession to the EU on 1 May 2004. Poland responded by letter of 11 July 2007 registered on the same day. The Commission requested further clarifications by letter dated 13 November 2007, to which Poland replied by letter of 9 January 2008, registered on the same day. Poland informed the Commission of additional aid granted to Gdynia Shipyard by letter of 6 December 2007, registered on the same day, by letter of 12 February 2008, registered on 13 February 2008 and by letter of 6 June 2008, registered on the same day.

II. **DETAILED DESCRIPTION OF THE AID**

1. *RELEVANT UNDERTAKING*

(52) The aid recipient is Gdynia Shipyard. The firm is based in the Gdańsk-Gdynia-Sopot region in the north of Poland.

(53) The Commission notes that, under the State aid rules, companies in the region are eligible for aid from the Structural Funds under the Convergence objective [4] and from the Cohesion Fund [5]. In particular, companies located in the region are potentially eligible for support from the Regional Operational Programme under priority axes designed to support small and medium-sized enterprises, innovation and technology transfer measures (oriented towards job creation in the long-term) and to develop social and educational infrastructure for the purposes of vocational and lifelong training. Companies in the region are also eligible for the Innovative Economy and Human Resources operational programmes, the latter being specifically designed to help companies and the labour market adapt to changes in the economy, including restructuring processes.

[4] Article 5(1) and (3) of Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999 (OJ L 210, 31.7.2006, p. 25). Annex to Commission Decision 2006/595/EC of 4 August 2006 drawing up the list of regions eligible for funding from the Structural Funds under the Convergence objective for the period 2007-2013 (OJ L 243, 6.9.2006, p. 44).

[5] Article 5(2) of Council Regulation (EC) No 1083/2006. Commission Decision 2006/596/EC of 4 August 2006 drawing up the list of Member States eligible for funding from the Cohesion Fund for the period 2007-2013 (OJ L 243, 6.9.2006, p. 47).

(54) Gdynia Shipyard is active in shipbuilding, production of hulls, construction of steel bridges, shipbuilding and non-shipbuilding services.

(55) Gdynia Shipyard's biggest shareholders ([6]) include the Treasury, which owns 32 % of shares, corresponding to 35 % of voting rights, Ray Car Carriers Ltd (16 % and 22 %), Korporacja Polskie Stocznie S.A. (10 % and 6 %), the Industrial Development Agency (Agencja Rozwoju Przemysli S.A.) (9 % and 13 %) and Stoczniowy Fundusz Inwestycyjny S.A. (7 % and 5 %). None of the remaining shareholders has a stake in excess of 4 %.

(56) Gdynia Shipyard is the parent company of the Gdynia Shipyard Group, which comprises 12 subsidiaries. Until recently, Stocznia Gdańsk S.A. was one of the subsidiaries but, by agreement of October 2007, Gdynia Shipyard sold its remaining shares in the Gdańsk shipyard to the new majority owner of Stocznia Gdańsk S.A. Nevertheless, from 1998 until autumn 2006, Gdynia Shipyard held the majority of shares in Stocznia Gdańsk S.A. (previously called Stocznia Gdańsk — Grupa Stoczni Gdynia) and therefore restructuring of the two yards was conducted in parallel.

(57) Gdynia Shipyard's main shipbuilding products are container vessels from 1 100 to 5 000 TEU and Ro/Ro car carriers with load capacity ranging from 2 100 to 6 000 cars. Other products include multipurpose vessels, product and chemical carriers, bulk carriers and liquefied petroleum gas carriers.

(58) In the segment of container ships up to 3 000 TEU, the main competitors are European shipyards Aker Ostsee and Volkswerft Stralsund in Germany and the Korean and Chinese shipyards. The yard manufactures the largest car carriers in the world (in terms of DWT) and its share of the world order book for these products is 11 % ([7]). No other yard in the EU produces car carriers of this size, and the only European competitor is Uljanik shipyard in Croatia. Gdynia's other competitors are the Korean and Japanese shipyards.

(59) Between 2002 and 2006 Gdynia Shipyard produced 48 vessels. In 2004 Gdynia ranked as the 13th biggest shipyard worldwide in terms of its order book (measured in CGT). In 2005 it ranked 21st but was still the biggest shipyard in Europe.

([6]) Situation as at 31 March 2007. *Source:* information memorandum of 4 July 2007.

([7]) *Source:* information memorandum of 4 July 2007.

(60) At present (as at April 2008) ([8]), its order book comprises 16 contracts (12 car carriers and 4 container vessels) with total volume of 581 000 CGT for delivery in 2008 and 2009.

(61) Gdynia Shipyard's main production facilities include two dry docks, SD I and SD II.

(62) As at August 2007, Gdynia Shipyard had a workforce of 4 611, 68 % of whom were directly linked to the production process ([9]). This represents a reduction of 26 % on December 2004, when the yard employed 6 249 persons ([10]).

(63) Gdynia Shipyard Group first experienced difficulties in 2002. The 2004 restructuring plan explains that the factors which contributed to the difficult financial situation were external, such as Asian competition, the upturn in the zloty against the dollar, rising steel prices and problems with accessing funding following the bankruptcy of Stocznia Szczecin Porta Holding S.A. and the collapse of a gantry crane at the Gdynia yard during a violent storm in 1999. As part of its efforts to fill its order book, especially after the acquisition of Gdańsk Shipyard in 1998 boosted its production potential, Gdynia Shipyard took a number of management decisions which proved to be problematic. The yard took on design, technological, financial and commercial risks (new products, prototypes and loss-making construction of vessels which were new to the yard, such as small bulk carriers, chemical carriers, Ro/Ro vessels, gas tankers, bulk-container carriers and general cargo vessels). The rate at which Gdynia Shipyard reduced its production costs was also unsatisfactory.

(64) These difficulties have continued throughout the restructuring process. According to the 2006 restructuring plan, the reasons for these persistent difficulties were the zloty's appreciation against the dollar and an unprecedented increase in steel prices, which were not reflected in the contracts concluded by the yard. Another reason was the lack of financial resources for extensive restructuring operations.

(65) The Group's financial difficulties led to arrears in public and commercial debts and wages, shortages of materials, slowdowns in production, rising costs (labour consumption, fines) and significant delays in fulfilling contracts.

(66) The financial situation of Gdynia Shipyard has gradually worsened.

([8]) *Source:* The assumptions underpinning the financial projections for Stocznia Gdynia S.A. prepared by Amber in the context of the due diligence examination of Gdynia Shipyard, submitted to the Commission on 9 April 2008, registered on the same day.

([9]) *Source:* Business plan of Stocznia Gdynia for 2008-2012 prepared by Amber in December 2007 and submitted to the Commission on 29 February 2008, registered on 3 March 2008.

([10]) Ibidem.

Table 1

Operation of Gdynia Shipyard

(PLN million)

	2002	2003	2004	2005	2006	2007
Turnover	1 724	891	1 327	1 599	1 259	1 040
Result	– 477	– 190	– 77	– 114	– 292	– 311
Equity			– 288	– 285	– 576	– 928

Source: 2006 restructuring plan and information memorandum.

(67) The yard expects to incur further substantial losses in 2008 and 2009 on its current order book ([11]).

2. *DECISION TO INITIATE PROCEEDINGS UNDER ARTICLE 88(2) OF THE EC TREATY*

(68) In its decision to open a formal investigation, the Commission indicated that some of the measures of which it had been notified under Annex IV, point 3 of the Accession Treaty constituted new aid because they had been granted after Poland's accession to the EU on 1 May 2004 or had not yet been granted at the time of the decision. The Commission listed these measures in Annex I, part B of the decision.

(69) The Commission also decided that a number of measures indicated in Annex I, part A of the decision had been granted to Gdynia Shipyard prior to 1 May 2004 and were not applicable after accession within the meaning of Annex IV, point 3 of the Accession Treaty and, therefore, would not be examined under the procedure laid down in Article 88(2) of the EC Treaty. These measures are therefore not caught by this decision. Nonetheless, they had to be included in the assessment of compatibility with the common market of the measures granted after accession.

(70) In essence, the Commission argued that a legally binding decision had not been taken on the measures listed in Annex I, part B of the decision prior to accession, although it recognised that some preliminary steps had been taken towards such a legally binding decision.

([11]) The joint restructuring plan prepared by ISD Polska as described below estimates losses in 2008 at PLN 280 million.

(71) With regard to the restructuring of public debt under the Chapter 5a procedure based on the State aid (Enterprises of Special Significance for the Labour Market) Act of 30 October 2002, as amended ([12]), the Commission concluded that the restructuring decision issued by the Chairman of the Industrial Development Agency, the government agency responsible for administering the Chapter 5a procedure, was legally binding. In this case, however, no such restructuring decision had been issued prior to accession ([13]). This is because the decision issued by the Chairman of the Industrial Development Agency on 19 April 2004 approving the 2004 restructuring plan did not fulfil the procedural and substantive requirements to qualify as a restructuring decision.

(72) The Commission accepted Poland's explanation that the accrued interest on these public-law debts would automatically be written off together with the principal in view of its ancillary nature, without it being necessary to issue a separate decision.

(73) The Commission did not find any evidence of legally binding decisions for a series of measures, including production guarantees and a capital injection, bond issue and debt-for-equity swap, listed as measures 28-34 of Annex I, part B of the decision. The Commission responded in particular to Poland's main argument, namely that these measures had been included in the 2004 restructuring plan for Gdynia Shipyard, which had been approved by the shipyard's Supervisory Board, with Treasury representatives obliging the competent authorities to implement the measures by voting in favour of the plan.

([12]) The legal basis is described in detail in the decision to open a formal investigation, part 3.2.

([13]) The Commission learned from the comments of Gdynia Shipyard on the decision to open a formal investigation that the restructuring decision had in fact been issued on 4 January 2005.

(74) The Commission found in particular that, in so far as the shareholders had not taken the requisite steps to that end, the Supervisory Board had not been empowered to adopt decisions with financial repercussions for the shareholders. The Commission also found that, even assuming that the Supervisory Board was entitled to take such decisions on behalf and on the account of the shareholders, it remained unclear whether such a decision would create a positive obligation on the part of the Treasury to award State aid, since it is not normally possible to assimilate actions taken by the state as a market player with actions taken by the state in pursuance of various public goals.

(75) With regard to measure 32 of Annex I, part B of the decision (capital injection of PLN 40 million), the Commission had doubts as to whether the decision obliging the Treasury to effect a capital increase prior to Poland's accession was valid in law, given that the requirement to have any capital increase registered with the competent court within 6 months had not been complied with.

(76) Having found that a number of measures for Gdynia Shipyard constituted new aid, the Commission expressed doubts that any of the conditions for the aid to be approved as restructuring aid had been met.

3. *COMMENTS FROM INTERESTED PARTIES*

(a) ***Comments by Gdynia Shipyard***

(77) The recipient presented two types of argument: concerning the Commission's competence in respect of the measures listed in Annex I, part B of the decision and concerning the Commission's doubts on the compatibility of this aid, in so far as it was deemed to constitute new aid, with the common market.

(78) With regard to the restructuring of public debt under Chapter 5a, the recipient argued that the fact of awarding the aid constituted a restructuring decision on the part of the Chairman of the Industrial Development Agency. The recipient maintained, however, as did Poland in the initial phase of the Commission's investigation, that the relevant decision was adopted by the Chairman of the Industrial Development Agency prior to accession, on 19 April 2004.

(79) The recipient argued that it was the agreement of all the individual public creditors with the restructuring under Chapter 5a which constituted the award of the aid, prior to accession ([14]).

([14]) For details see point 67 of Commission decision to open a formal investigation.

(80) Contrary to what Poland stated in the first phase of the Commission's investigation, the recipient argued that no default interest had accrued after 30 June 2003 on the public-law debts restructured under Chapter 5a.

(81) The recipient argued that the State's precise exposure in respect of measure 32 (capital injection) had been known prior to accession and that therefore the aid should be regarded as having been granted before accession.

(82) The recipient also commented on other aspects of the decision. In particular, it stated that the production guarantees provided to the yard by the Export Credit Insurance Corporation did not constitute State aid. The recipient argued that the Export Credit Insurance Corporation guarantee scheme is a self-financing system in which, over the long term, premiums collected exceed risks covered and amounts actually paid out. The recipient described the conditions in which the Export Credit Insurance Corporation issues these guarantees (premiums and type of collateral required).

(83) With regard to the requirement that aid be limited to the minimum necessary, the recipient argued that the amount of the aid had been limited to the strict minimum, and that it would be justified to award more aid, if available. The recipient also suggested that even if the Commission defined the restructuring costs narrowly (i.e. as not including the running costs of the yard), the financing component of these costs free of State aid would still be of the order of 30 %, thus satisfying the 1999 Restructuring Guidelines ([15]).

(84) The recipient also argued that the State aid to Gdynia Shipyard does not distort competition in Europe, claiming that the real competitive threat to European shipyards comes from the Far East. The recipient acknowledged that container vessels were also built in other European shipyards, particularly in Germany, but claimed that the container vessels built in Germany differed in terms of design and technical specifications. The recipient asserted that no other EU shipyard built car carriers and that therefore Gdynia Shipyard was not competing in this segment with any other EU shipyard.

([15]) The recipient asserts that the 1999 Community Guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 288, 9.10.1999, p. 2) apply.

(85) Lastly, the recipient stated that its restructuring would definitely be completed by end-2007.

(b) ***Comments by other interested parties***

(86) Denmark and Danish Maritime supported the Commission's efforts to ensure that State aid was granted in line with the applicable rules. They pointed out that, as a result of the competitive situation in the world shipbuilding market, a number of Danish shipyards had closed or faced bankruptcy without any State aid being provided. They also confirmed that the product range of the Danish yards was similar to that of the Polish yards, with the result that the Danish yards could be affected by any unfair competition. Denmark also urged the Commission to require Gdynia Shipyard to reduce its capacity so that State aid was not used to increase overcapacity worldwide.

(87) Ray Car Carriers, as the largest customer of Gdynia Shipyard and a minority shareholder in the company, stressed the importance of Gdynia Shipyard to its own operations in view of its ongoing contracts with the yard. Ray Car Carriers was convinced that, with its highly skilled workforce and management, the yard would become one of the best in Europe, if it were restructured and received State aid for that purpose.

(88) The trade union Solidarność highlighted the declining situation at the yard, arguing that speedy restructuring was needed. The trade union described some of the restructuring measures already undertaken at the yard and expressed the belief that, with the technology and workforce available to it, it would join the ranks of the profitable European shipyards. State aid was therefore necessary to implement the restructuring plan.

(89) The Polish shipbuilding association Forum Okrętowe explained the reasons for the yard's difficulties and expressed its support for the restructuring process and for the use of State aid to that end.

(c) ***Comments by Poland***

(90) Like the recipient, Poland commented on aspects of both competence and compatibility.

(91) With regard to the restructuring of public debt under Chapter 5a, Poland did not put forward any additional arguments. However, in its response to the recipient's comments, Poland expressed disagreement with the latter's interpretation of Polish law.

(92) With regard to measures 28-34 of Annex I, part B of the decision, Poland did not rebut the conclusions of the Commission indicated in the decision to open a formal investigation. However, Poland put forward a new argument to the effect that statements by representatives of various state authorities within the Shipbuilding Industry Team concerning plans to extend these measures should be considered as official undertakings. These statements were made prior to accession.

(93) With regard to measure 32 (capital injection), Poland argued that, in so far as the Treasury had acted at the shareholders' meetings as the owner of Gdynia Shipyard, this action could not be dissociated from its actions as a public aid awarding authority.

(94) At the same time Poland recognises that, while actions relating to capital injections belong to the ownership sphere (*dominium*) and are subject to civil law, when increasing the share capital of companies the Minister (for the Treasury) is obliged to observe additional public-law rules which do not apply to ordinary market players (*imperium*).

(95) Poland then explained that the 6-month rule (the deadline for registering share subscriptions with the court) was merely a formal requirement which did not have any effect on the point in time at which the shareholder's obligation to subscribe to the shares came into effect. Poland maintained that this obligation came into effect in 2004, prior to accession, and that its fulfilment only required passing a new resolution on an increase of the shipyard's share capital, which took place on 4 March 2005. The subscription by the Treasury took place subsequently, on 23 June 2005.

(96) As regards the compatibility of the new aid with the common market, Poland stated that the 2004 restructuring plan constituted a sound economic basis for the yard's restructuring process. Poland acknowledged that the restructuring process was carried out with limited financial resources. The Polish authorities then provided a brief description of the restructuring measures enshrined in the 2004 restructuring plan in order to demonstrate that restructuring was not purely financial in scope. They defended the countervailing measures proposed in the 2004 restructuring plan and implemented within the Gdynia Shipyard Group. With

regard to the requirement that aid be limited to the minimum necessary, Poland stated that the aid was not used for purposes other than restructuring and claimed that the aid intensity amounted to 31 %, i.e. aid as a percentage of the total restructuring costs, including operating costs. Poland argued that the re-negotiation of contract prices, together with the cumulated profits and positive cash flow generated by the yard in future, should be regarded as constituting the 'own contribution'.

(97) The Polish authorities described in detail how the Export Credit Insurance Corporation's guarantee system operated and argued that these guarantees did not constitute State aid.

4. *CHRONOLOGICAL DESCRIPTION OF DECISIVE EVENTS FOLLOWING THE COMMISSION'S DECISION TO OPEN THE FORMAL INVESTIGATION*

(98) The Commission investigation and the events which occurred in the course of it are summarised below.

(99) In reply to the Commission's decision to open the formal investigation, the Polish authorities submitted explanations of two types in autumn 2005: first, questioning the competence of the Commission to act on the measures identified as new aid in its decision, and, second, arguing that even if these measures constituted new aid, they were compatible with the common market as restructuring aid. The reaction of Gdynia Shipyard to the Commission's decision was of a similar nature. Both are described above.

(100) In support of its argument on the compatibility of the aid, Poland submitted to the Commission Gdynia Shipyard's 2004 restructuring plan, which was identical to the restructuring plan for which the Commission opened the formal investigation because of doubts as to its credibility and robustness. Nevertheless, the Commission carefully studied the 2004 restructuring plan and sought assistance from an external consultant. The Commission concluded that the 2004 restructuring plan did not fulfil any of the conditions for the approval of restructuring aid prescribed by the relevant guidelines. At the meeting of 22 February 2006, the Commission explained its main doubts to the Polish authorities. The Commission highlighted the main weaknesses of the 2004 restructuring plan: low investments, low planned productivity, high production costs, in particular overheads and insufficient strengthening of the yard's own capital base. The aid provided to the yard had to be regarded as operating aid in support of debt restructuring and the yard's continued operation.

(101) In December 2005, the Commission learned from public sources ([16]) that Korporacja Polskie Stocznia (hereinafter referred to as KPS), a capital group under public ownership, had been created with the aim of integrating the three major Polish shipyards in Gdynia, Gdańsk and Szczecin under one umbrella (hereinafter referred to as the 'consolidation plan'). The main role of KPS was to finance the shipyards production. Poland did not inform the Commission about the consolidation plan at any stage of the procedure, either prior to or after the decision to open the formal investigation procedure.

(102) At the same time, the Commission learned from the press about ongoing talks on the sale of the shipyards in Gdynia and Gdańsk to strategic investors and on the separation of the two companies, which until that date had operated as part of the same group. The Commission asked the Polish Government by letter of 13 January 2006 to spell out what its strategy for Gdynia Shipyard actually was.

(103) Poland explained by letter of 20 February 2006 that a consolidation plan had indeed been envisaged previously but that it had been discarded and a new restructuring strategy for the Polish shipbuilding sector would be adopted shortly.

(104) At the meeting of 22 February 2006 and by letter of 13 March 2006 the Polish authorities informed the Commission that the 2004 restructuring plan was outdated and had to be amended. The Polish authorities undertook to submit the amended restructuring plan by June 2006. The Polish authorities also presented the main features of the new restructuring strategy for the Polish shipbuilding sector. First, Gdańsk Shipyard was to be separated from the Gdynia Shipyard Group as soon as possible. Second, the Government was to allow an injection of private capital into the Gdańsk and Gdynia shipyards with the long-term objective of fully privatising the yards.

(105) The General Assembly of Gdynia Shipyard of 19 April 2006 decided on a capital increase of up to PLN 300 million. The management board was mandated to search for investors interested in participating. Accordingly, the information memorandum of May 2006 was made available as of 10 May 2006 to potential investors, and some 80 such investors were directly approached by Gdynia Shipyard's privatisation consultant. Gdynia Shipyard received two preliminary offers to participate in the capital increase, from the Ukrainian steelmaker Donbas and the yard's major

([16]) Cabinet Minutes of 25 January 2005 and 5 October 2005, published on the website.

customer Ray Car Carriers. These two companies eventually submitted binding offers on 28 August 2006 which were, however, conditional on debt coverage and cancellation by the seller — the State. According to the timetable announced by Poland (letter of 26 September 2006), the negotiations with the two bidders were to be completed by end-October 2006 and the subscription of new shares was to be finalised by 15 December 2006.

(106) The Commission received the first draft of the 2006 restructuring plan on 9 June 2006. Having visited the yard and received the opinion of an external consultant, the Commission expressed serious concerns about this draft during the on-site visit on 13 June 2006 and in writing on 17 July, pointing out that the restructuring plan did not appear to be sufficiently far-reaching to restore the yard to long-term viability, that no provision had been made to finance restructuring, that there was no real prospect of financing restructuring from resources free of State aid and, lastly, that no countervailing measures had been proposed. Referring to continuous reliance on ship financing guarantees provided by the Export Credit Insurance Corporation, a Government agency, the Commission warned the yard and the Polish authorities that these guarantees constituted State aid.

(107) Despite these warnings, the 2006 restructuring plan eventually submitted by Poland in September 2006, with a 2-month delay, did not differ substantially from the first draft. The Commission's main criticisms of the 2006 restructuring plan are described below.

(108) At a meeting on 7 December 2006 and by letter of 29 January 2007, the Commission indicated to the Polish authorities that a preliminary examination had concluded that the 2006 restructuring plan did not comply with any of the conditions for the approval of restructuring aid under the current guidelines.

(109) The Polish authorities announced at that meeting that they intended to re-launch the privatisation of Gdynia Shipyard by way of an open and transparent procedure with a view to attracting a private investor who would take full control over the yard. Poland indicated that the privatisation process was to be finalised by June 2007. Pending preparation of the privatisation documents, Poland asked the Commission to issue a statement on the necessary countervailing measures for Gdynia Shipyard so that potential investors could be provided with the correct information.

(110) In the following months, Gdynia Shipyard continued talks with the two investors, Donbas and Ray Car Carriers, who presented their bids in August 2006. At the same time, the Government prepared various privatisation documents with a view to relaunching the privatisation process in the event of the ongoing negotiations failing. In May 2007 the Polish Government announced that the negotiations had failed and that the privatisation process would be relaunched. By letter dated 22 June 2007 Poland submitted a new timetable for the privatisation process, indicating December 2007 as the tentative deadline for its completion, i.e. half a year after the initial deadline which Poland had signed up to in January 2007. By letter of 31 July 2007 the Commission indicated that the privatisation process could not be delayed any longer. The Commission also warned Poland that, at that point, the conditions that the yard's long-term viability had to be restored and restructuring had to be financed at least in part from resources free of State aid did not appear to have been met.

(111) At the same time, following an agreement reached between Commissioner Kroes and Minister Woźniak in December 2006, the Commission was engaged in intensive discussions with the Polish authorities and Gdynia Shipyard with a view to determining the necessary countervailing measures. By letter of 28 February 2007 Poland undertook to close the SD I dock in Gdynia Shipyard after outstanding orders had been processed and the necessary investments in the SD II dry dock had been completed, i.e. as of January 2010.

(112) In order to check whether this proposal constituted a genuine countervailing measure, the Commission asked Gdynia Shipyard to provide it with information on a number of matters. Eventually the Commission informed Poland by letter of 31 July 2007 that it was prepared, on a preliminary basis, to consider the closure of dry dock SD I as a sufficient countervailing measure on condition that the closure entailed scrapping the facility in such a way as to irreversibly disable ship assembly and launching activities and that closure was implemented as of 1 September 2009, or earlier if vessel 8185/04, the last one on the yard's order book as at 8 March 2007, were launched prior to that date. In addition, in 2009, dock SD I could only be used to assemble the two vessels currently scheduled for assembly on that dock in 2009 and which could not be transferred to dock SD II (LPG carriers 8185/03 and 8185/04). The basis for the Commission's conclusion is described below.

(113) The new privatisation procedure based on the Privatisation Act of 30 August 1996 commenced in July 2007. On 5 July 2007 the General Assembly of Gdynia Shipyard adopted a resolution on a capital increase of PLN 515 million, with the shares to be subscribed by the Treasury if the privatisation was completed successfully. An information memorandum was prepared, dated 4 July 2007. It was made available to potential investors as of 10 July 2007, i.e. on the date of publication in the international and Polish press of the invitation to tender. As described in the procedure above, the Commission transmitted comments on the information memorandum of which Poland took due account.

(114) Noting further delays in the privatisation process, the Commission urged Poland by letter of 3 October 2007 to complete privatisation without delay. By letter of 23 October 2007 Poland informed the Commission that privatisation would not be completed as planned, i.e. by end-2007. Instead Poland undertook to commence negotiations with selected investors as of January 2008. The Commission reiterated its concerns with regard to the delays by letter dated 30 November 2008 and indicated that it expected the new owner of Gdynia Shipyard to submit the first draft of a new restructuring plan by end-February 2008. This request was subsequently repeated by the Commission on numerous occasions. The Commission frequently insisted on strict adherence to the privatisation schedule, stating that there did not appear to be any justification for Poland to restart the privatisation process.

(115) Poland informed the Commission that 11 companies had asked for Gdynia Shipyard's information memorandum and that four companies had submitted initial offers by the deadline of 1 October 2007. The four companies were accepted for a due diligence examination. Eventually, three binding offers were submitted by the deadline of 20 December 2007. At end-January 2008, Poland decided to enter into negotiations with two of these investors. In mid-February 2008, Poland announced that the privatisation process of Gdynia Shipyard would be completed by summer 2008, i.e. 1 year later than initially promised by Poland in January 2007.

(116) As of 20 March 2008, one of these investors, Amber Sp. z o.o. (hereinafter Amber), a subsidiary of Złomrex, a Polish steel trading company, was granted exclusive negotiating rights, which were subsequently extended several times, finally ending on 12 May 2008.

(117) Poland forwarded a draft restructuring plan for Gdynia Shipyard prepared by Amber to the Commission on 29 February 2008 [17]. Amber submitted updated financial projections by email dated 9 April 2008. The Commission provided verbal comments on this draft at a meeting with representatives of the Polish authorities, Amber and Gdynia Shipyard held in Warsaw on 10 April 2008, and written comments by letter of 21 April 2008.

(118) At a meeting with the Polish authorities on 12 May 2008, Amber announced that it had withdrawn from the privatisation process of Gdynia Shipyard. Poland informed the Commission of this development on the same day. In the justification for its decision sent to the Treasury, Amber cited as the main reason for its withdrawal the fact that, after an in-depth due diligence examination of the shipyard's situation, it had concluded that the yard would not become profitable even after restructuring measures, including significant investments, had been implemented.

(119) On 15 May 2008 the Polish authorities decided to close the privatisation process in the form of a public invitation to negotiations with bidders whose offers had been admitted to the procedure started in 2007.

(120) On 26 May 2008, Poland informed the Commission that the privatisation process had been relaunched. In subsequent daily reports, the Polish authorities informed the Commission of the actions they had taken to find a buyer for Gdynia Shipyard. Poland forwarded several letters to the Commission in which potential investors expressed an interest in being kept informed of the ongoing privatisation process and in receiving the information memorandum when available.

(121) At the meeting of 10 June 2008 it emerged that the Polish authorities were conducting intensive talks with ISD Polska, the current owner of Gdańsk Shipyard, on the possible purchase of Gdynia Shipyard and a merger of the two yards. Poland proposed new countervailing measures and indicated that the new investor had requested additional State aid as a condition for taking part in the privatisation. Poland also informed the Commission that ISD Polska was preparing a joint

[17] *Source:* Business plan of Gdynia Shipyard for 2008-2012 prepared by Amber in December 2007 and submitted to the Commission on 29 February 2008, registered on 3 March 2008.

restructuring plan for both yards to be submitted to the Commission by 26 June 2008, in line with the information injunction adopted by the Commission with regard to State aid case C 18/05 ([18]).

(122) At the request of the Polish authorities, the Commission informed Poland and ISD Polska at the meeting of 10 June 2008 and again at the meeting of 13 June 2008 that certain framework conditions would have to be met if ISD Polska was to purchase Gdynia Shipyard with the intention of operating it jointly with the one in Gdańsk. These framework conditions were that ISD Polska would have to present a joint restructuring plan for both yards by 26 June 2008, contribute significantly to the restructuring costs and adopt meaningful countervailing measures in accordance with the relevant guidelines. The Commission stated that ISD Polska's proposed contribution to restructuring costs was insufficient, bearing in mind the amount of State aid that the yard had received in the past and the additional aid that ISD Polska had applied for in connection with privatisation.

(123) By letter of 6 June 2008, Poland informed the Commission that the Government had adopted a decision on 3 June 2008 to contribute capital of PLN 515 million to Gdynia Shipyard, partly to cover anticipated losses on existing shipbuilding contracts.

(124) On 26 June 2008 the Commission received a draft restructuring plan dated June 2008 and prepared by ISD Polska entitled 'Restructuring Plan of the New Gdańsk-Gdynia Shipyard', presenting a joint restructuring strategy for the shipyards in Gdańsk and Gdynia (hereinafter the 'joint restructuring plan (of ISD)'). The Commission also received a draft restructuring plan dated June 2008 and prepared by the Polish Shipbuilding Company entitled 'Restructuring Plan of Gdynia Shipyard for 2008-2012' (hereinafter 'the Restructuring Plan of PSC'). A brief description of the two plans is set out below.

(125) By letter of 14 July 2008 Poland informed the Commission that the privatisation of Gdynia Shipyard was continuing and requested additional time for potential investors to finalise the restructuring plan. Poland undertook to submit a definitive restructuring plan for Gdynia Shipyard by 12 September 2008 at the latest.

(126) The Commission agreed to wait until a decision had been taken to submit a definitive restructuring plan.

([18]) Commission decision of 23 May 2008 (C(2008) 2277).

(127) On 12 September 2008, Poland submitted the final restructuring plan prepared by ISD Polska entitled 'Restructuring Plan of the New Gdańsk-Gdynia Shipyard' (hereinafter 'the joint restructuring plan of 12 September'), which is essentially an updated version of the joint restructuring plan of 26 June 2008

5. *2006 RESTRUCTURING PLAN*

(128) According to the 2006 restructuring plan, the amendments to the 2004 restructuring plan were necessary because of a change in the macroeconomic climate, i.e. the appreciation in the zloty against the US dollar from PLN 4,1 to PLN 3,0 per USD and the rise in the steel price from USD 300/t to USD 700/t, which had adversely affected the shipyard's economic situation, coupled with insufficient State aid, as a result of which the 2004 restructuring plan could not be implemented in full.

(129) The 2006 restructuring plan drawn up by the yard with the support of Ernst & Young covers the period from 2006 to 2012. However, most of the measures are to be implemented by end-2009. The 2004 restructuring plan covered the period from 2003 to 2008.

(130) The objectives of the 2006 restructuring plan are to effectively limit operating costs, improve efficiency in the shipyard and ensure that shipbuilding is profitable. To that end, the shipyard first intended to renegotiate existing contracts, thereby eliminating anticipated losses on ships scheduled for completion in 2006 and 2007. In addition, a cost reduction programme would aim to lower production costs.

(a) ***Sales strategy***

(131) The planned sales strategy was to concentrate on standard vessels, which comprised container vessels and car carriers. The shipyard also planned to maintain capacity for niche markets if profitable offers arose.

(b) ***Industrial and operational restructuring***

(132) The main measures are:

— An increase in efficiency through investments of EUR 61 million over the period 2007-2009. The investments are designed to eliminate bottlenecks in the production process (particularly in the pre-fabrication of steel) and increase efficiency. IT investments worth EUR 6,6 million are also planned;

— Employment restructuring, i.e. elimination of increasingly commonplace fixed-term employment contracts and measures designed to achieve target employment levels. Introduction of an incentive scheme. The shipyard also plans to increase the wages of workers directly involved in production by 10 % in 2006 and by 4 % p.a. from 2008 to 2010. High absenteeism and a lack of qualified workers are currently the main problems facing the yard;

— The plan underlined the importance of protecting the yard against the currency risk. To that end; 70 % of the yard's revenue is to be hedged against the currency risk from 2007 to 2012 by way of foreign exchange transactions;

— There will be further spin-offs of subsidiaries (such as Zakładowa Służba Ratownicza, Wydział Technicznej Obsługi Urządzeń Dźwignicowych etc.) and asset sales;

— Improvements to the design process (standardisation of design solutions). This also includes an option to spin-off the Design Office which was to be decided in 2007;

— Other measures such as contract renegotiation, application of indexation clauses in contracts to hedge against currency risks, employee incentive scheme, process optimisation and financial asset sales.

(c) ***Financial restructuring measures***

(133) The shipyard should carry out financial restructuring. At end-2005 equity amounted to – PLN 285,4 million. It was planned to improve the yard's equity situation in 2006-2007 by way of a capital injection of PLN 1 015 million in total: a capital increase of PLN 500 million in 2006 was to be financed by private investors and a capital increase of PLN 515 million in 2007 by a private or public investor.

(d) ***Target figures at the end of restructuring — restoration of long-term viability***

(134) At the end of the restructuring period in 2009 the shipyard's production is expected to be 298 610 CGT, against 279 258 CGT in 2006. The number of ships built will be reduced from 13 in 2006 (8 container ships and 5 car carriers) to 11 (5 container ships and 6 car carriers). Production is expected to increase further to 324 110 CGT in 2012 (12 vessels).

(135) Average employment is to be reduced from 5 208 in May 2006 to a target level of 4 530 at end-2007.

(136) Productivity (work consumption ratio) is expected to improve from 44,8 man-hours/CGT in 2007 to 37,0 man-hours/CGT in 2012. According to the Commission's consultant, the productivity of the most efficient comparable yards in Europe is below 20 man-hours/CGT.

(137) Turnover is expected to increase from PLN 1,599 million in 2005 to PLN 1,869 in 2012. Operating profit is expected to improve from PLN 7,35 million in 2005 and PLN 233,5 million in 2006 to PLN 67,68 million in 2012, the first profitable year being 2009.

(e) ***Sensitivity analysis***

(138) The plan includes a sensitivity analysis on the following issues:

— Appreciation in the PLN against the USD by PLN 0,05 and 0,1 annually as opposed to a constant exchange rate of PLN/USD 3,00 as in the baseline scenario;

— Maintaining ship production at the level of 10 ships in 2009-2010, whereas in the baseline scenario 11 ships are to be produced in 2009-2010 and 12 in 2011-2012;

— Faster growth in various settlement rates (remuneration for work and rates for variable and invariable cooperation) in 2008-2012 than in the baseline scenario;

— Fall in prices for ships of 5 % and 10 % in 2009-2012;

— Increase in prices for materials combined with an increase in prices for ships from 2007 onwards.

(f) ***Countervailing measures***

(139) The 2006 restructuring plan proposed limiting output to 340 000 CGT per annum as a compensatory measure, assuming that the technical capacity of the yard was 540 000 CGT. As explained in detail below, in February 2007 Poland proposed the irreversible closure of dry dock SD I. The yard provided data demonstrating that current technical capacity is well below 540 000 CGT. Eventually the Commission gave its preliminary agreement to the proposed capacity reduction, which replaced the compensatory measures indicated in the 2006 restructuring plan.

6. *JOINT RESTRUCTURING PLAN PREPARED BY ISD*

(140) ISD Polska, as the majority owner of Gdańsk Shipyard, entered the privatisation process after the withdrawal of Amber from the privatisation round launched in 2007. As indicated above, ISD Polska reviewed the restructuring plan it submitted to the Commission on 26 June 2008, submitting an updated version on 12 September 2008. The following description, where applicable, explains the amendments made in the September joint restructuring plan.

(141) The rationale for the joint business strategy prepared by ISD Polska is that synergies between the two yards should be utilised and the best production assets in both facilities should be joined ([19]). The main storage facilities for materials will be situated in Gdynia Shipyard, where the pre-fabrication of plates and profiles will also take place. Plates and profiles will then be transported by water to Gdańsk Shipyard, where sections and blocks will be produced. Assembly will be carried out on the docks at Gdynia Shipyard and final outfitting will take place at quays in both yards.

(142) The joint restructuring plan refers to the failure of the 2006 restructuring plan to restore the yard's viability and identifies the causes for the current financial difficulties of both shipyards. These include in particular the failure to privatise the yard and the related failure to raise the yard's capital to levels permitting restructuring, and the fact that the yard did not receive sufficient amounts of State aid. The joint restructuring plan also identifies macroeconomic factors such as the appreciation of the Polish zloty against the US dollar, rising steel prices and internal factors such as the outflow of qualified workers from the yard, low productivity and the conclusion of contracts without the necessary hedging against changes in the exchange rate and cost of materials, resulting in losses to the shipyard.

(143) The purpose of the joint restructuring plan is to return the two restructured companies, Gdynia and Gdańsk Shipyards, to viability: Although the present decision concerns Gdynia Shipyard alone, the following description and assessment of the joint restructuring plan must naturally also take into account the existence of Gdańsk Shipyard, its past restructuring efforts and the State aid it has received and will receive in future.

([19]) State aid to Gdańsk Shipyard is also subject to a formal investigation procedure, initiated by Commission decision of 1 June 2005 in State aid cases C 17/05 and C 18/05 Restructuring aid to Gdynia Shipyard; Restructuring aid to Gdańsk Shipyard (OJ C 220, 8.9.2005, p. 7).

(a) ***Sales strategy***

(144) According to the joint restructuring plan, the merged shipyards should engage in two activities: shipbuilding and non-shipbuilding.

(145) As regards the shipbuilding business, in the short term ISD Polska will target market segments such as container ships (small to medium-sized, 500–3 000 TEU), general cargo vessels ('classic' vessels for the transportation of dry cargo, multipurpose vessels and heavy lift) and car carriers (large pure car carriers, size C6600) and will also develop activities in the off-shore vessels segment (e.g. anchor-handling towing supply vessels, platform supply vessels, crew boats), which should become dominant in the medium-term.

(146) The market analysis is based on a comparison with the production of other European shipyards and the experience of the merged shipyards. The plan recognised that the requisite know-how for the production of off-shore vessels would have to be developed and that production would be carried out with sub-contractors in the first few years. The joint restructuring plan of September describes Gdańsk Shipyard's previous experience in constructing hulls of off-shore vessels and explains that the yard has vessels of this type on its order book. The plan also showed that Gdańsk Shipyard had recently signed a letter of intent for 5-year cooperation with a renowned builder of off-shore vessels which would subcontract hulls with an increasing level of complexity to Gdańsk Shipyard. The plan envisaged a gradual move from this subcontractor work to building fully equipped off-shore vessels and recognised the need to gradually acquire the capacity to build fully equipped ships and create a network of suppliers.

(147) The planned production portfolio assumes that production of container ships is initially maintained but gradually marginalised until 2011 and then discontinued. The plan then envisages a portfolio comprising off-shore vessels and large C6600 car carriers. Under the joint restructuring plan, after June the merged yards were to conclude contracts for 13 vessels in 2008 (3 container vessels, 5 off-shore vessels and 5 car carriers), 16 vessels in 2009 (2 container vessels, 8 off-shore vessels and 6 car carriers), 15 vessels in 2010 and 2011 (1 container vessel, 7 off-shore vessels and 7 car carriers), 17 vessels in 2012 (10 off-shore vessels and 7 car carriers) and 18

vessels in 2013 and 2014 (14 off-shore vessels and 4 car carriers). The production plan was amended in the Joint Plan of September: between 2009 and 2011 12-13 vessels should be built per annum (5-7 car carriers and 6 off-shore vessels; there are no container vessels on the order book after 2008).

(148) As for the non-shipbuilding business, ISD Polska intends to start production of windmills and steel structures in the merged shipyards. The plan envisages that windmill production will start in 2011 (75 items), rising to 350 as of 2014 (planned length 80 metres).

(149) The July plan envisaged the production of various steel structures (e.g. jibs, storage structures, steel structures for the building industry, and parts of vessels), rising from 2 174 tons in 2008 to 13 500 tons as of 2011 ([20]).

(150) The September restructuring plan provides details of the know-how of ISD Polska (or other Donbas Group companies) in the area of steel structures. It is planned to move some production from Huta Częstochowa to the merged yards. The plan summarises the results of a market study by an independent consultant (Roland Berger) undertaken in preparation for the development of the steel structures segment at Gdańsk Shipyard after ISD Polska acquired its holding at the beginning of 2007. According to the plan, this study forecasts growth in the steel structures segment in Europe and Poland in particular (e.g. development of infrastructure with the help of the Structural Funds). This study has not been submitted to the Commission.

(151) The September plan contains different forecasts for the volume of production of steel structures, as shown in the following Table 1a.

Table 1a

Planned production of steel structures in tons (joint restructuring plan of September 2008)

Products	2008	2009	2010	2011	2012	2013	2014
Jibs	274	2 000	2 000	2 000	2 000	2 000	2 000
Lifts	0	1 100	1 500	1 500	1 500	1 500	1 500
Storage structures	1 500	6 000	16 000	22 400	36 000	36 000	36 000
Steel structures for building	0	1 100	3 000	4 000	4 000	4 000	4 000
Parts of vessels	0	1 000	1 450	5 000	13 000	13 000	13 000
Total	1 774	11 200	23 950	34 900	56 500	56 500	56 500

(b) ***Industrial and operational restructuring***

(152) The joint restructuring plan indicates that the production assets of both yards have deteriorated significantly and are on the same level as those of European shipyards at the beginning of the 1990s. The planned investments amount to EUR 111 million for shipbuilding and PLN 193 million for non-shipbuilding (PLN 175 million for windmills and PLN 18 million for steel structures).

(153) Investments in shipbuilding will be implemented in two overlapping stages between 2009 and 2011. The most important investments ([21]) are in plate cutting, flat panel production, a new pipe shop and a new volume section hall. These investments, together with organisational changes, should result in a productivity improvement from the current 45 man hours/CGT to the target of 20 man hours/CGT ([22]).

([20]) Production of the following items was expected to increase: jibs, from 474 tons in 2008 to 1 700 tons in 2009; storage structures, from 1 700 tons in 2008 to 6 000 tonnes in 2009; steel structures for buildings, from 0 to 3 900 tonnes in 2011; vessel parts for other producers, from 0 to 1 900 tons in 2011.

([21]) See Table 42, p. 138 and graph 37, p. 140 of ISD's joint restructuring plan for a detailed list of investments.

([22]) Graph number 38, p. 141 of ISD's joint restructuring plan.

(154) The main organisational needs concern: sales (contracts), purchases of materials and services, design capabilities, production, human resources and information technologies.

(155) The Joint Restructuring Programme provides for the creation of a Planning Centre which would be responsible for planning production efficiently on all organisational levels of the merged yards. The purpose of setting up this Centre is to iron out any shortcomings in planning, scheduling, budgeting and checking the production process.

(156) As regards contracting, ISD Polska intends to introduce indexation clauses to protect the yard from increases in the prices of materials and wages by transferring the risk to the shipowner. The yard should also introduce a new model contract. Extracts from some existing shipbuilding contracts were attached to the September joint restructuring plan to demonstrate that the yard was able to negotiate indexation clauses to hedge against steel price fluctuations.

(157) To protect itself from the risk of currency fluctuations, the yard intends to introduce the necessary infrastructure after identifying the costs and revenues generating the currency-related risk and defining permissible levels of exposure to that risk. The risk management system provided for in the joint restructuring plan is based on four main elements: taking this risk into account when determining the yard's strategy (definition of risk tolerance and risk control), adjusting the organisational structure, using information technologies and adopting various methods to minimise risk (natural hedging, indexation clauses in contracts and purchases of financial products such as currency options and forwards). The September joint restructuring plan describes the proposed currency hedging policy in greater detail. It identifies three hedging instruments the yard should use; it quantifies the order book's exposure to currency risks up to 2012 and it estimates the costs of these hedging instruments on that basis. In accordance with the plan, ISD Polska contacted a number of banks which, for the purpose of preparing hedging offers, asked it to submit an adequate hedging strategy. According to the plan, this strategy should be drawn up in the first 6 months of restructuring.

(158) In the production area, the objective is to address the problem of inefficient logistics at Gdańsk Shipyard and bottlenecks at Gdynia Shipyard. The plan proposes a division of labour between the two facilities and a new material flow diagram.

(159) As regards purchases and management of materials, the main objective is to cut costs. The restructuring measures include, for example, purchasing materials on the basis of at least three bids, cooperation on purchases with Huta Częstochowa, stock management, etc.

(160) The yard plans to employ and train qualified workers and to extend the use of and modernise existing information technologies.

(161) In the employment field, the objective is to cope with high rotation and absenteeism. ISD Polska plans to cooperate with a local recruitment agency. Internally, the plan envisages expanding carrier development systems, introducing incentive-related pay (overtime management, employee evaluation, checks on absenteeism and pay based on work performed, timeliness and quality of implementation) and developing corporate identity. The plan invokes the need to reduce employment from the current workforce of 8 137 employees (2 651 at Gdańsk Shipyard, 4 238 at Gdynia Shipyard and 1 248 in Gdynia subsidiaries) to between 5 000 and 5 395 employees. According to the September joint restructuring plan, redundancies will take place gradually from 2009 to 2012. The updated plan includes a calculation of the costs and effects of employment restructuring.

(162) Finally, as regards design activities, the plan provides for the work of the Design Office to be rationalised and more closely linked to the production process.

(163) The plan contains a brief, general description of the desired effects of these organisational restructuring measures, which it quantifies with the assertion that the resultant improvement in productivity will be about 12 man hours/CGT ([23]).

(c) ***Financial restructuring***

(164) As regards financial restructuring, the plan envisages that the State aid of which the Commission was notified in the course of its formal investigation (see part 9 below) will be implemented It also envisages a capital injection by the State of PLN 385 million to cover public-law liabilities and anticipates that some public-law liabilities (in particular monies owed to ZUS relating to social security) will be made payable in instalments and

([23]) Graph number 38, p. 141 of ISD's joint restructuring plan.

repaid by 2018 (public-law liabilities with a nominal value of PLN 418,8 million), ([24]) that the State will inject capital of PLN 250 million to cover expected losses for 2008 and, via the Industrial Development Agency, a further PLN 200 million to finance working capital and, lastly, that it will take over a potential liability of PLN 308 million related to ongoing litigation concerning Gdańsk Shipyard's tax arrears.

(165) The plan provides for some PLN 712 million of restructuring costs to be financed from the company's future cash flows.

(d) ***Costs of restructuring and own contribution***

(166) The joint restructuring plan quantifies the restructuring costs incurred by Gdynia Shipyard to date at PLN 936 702 419, including investment costs of PLN 98 million and debt restructuring of PLN 365 million ([25]). According to the joint restructuring plan, restructuring at Gdańsk has cost PLN 311 533 500, including e.g. investment costs of PLN 23 million and debt restructuring of PLN 48 million ([26]). The September joint restructuring plan does not amend costs incurred in the past, but it does amend the restructuring cost forecast for the merged yards. The following costs can be identified: investment costs of PLN 552 million, repayment of public-law arrears of PLN 892 million, ([27]) repayment of commercial arrears of PLN 889 million, coverage of expected losses for 2008 of PLN 250 million, ([28]) repayment of potential liabilities of PLN 308 million in connection with ongoing litigation concerning the outstanding tax arrears of Gdańsk Shipyard, costs of demolishing redundant production assets (slipways) of PLN 42,8 million and costs of employment restructuring of PLN 69 million. In total, the expected costs are PLN 3 billion.

(167) At the meeting on 30 September the Polish authorities proposed disregarding *de facto* operating aid granted to the yards in the past when assessing the own contribution to cover restructuring costs. The Polish authorities proposed that in its assessment the Commission should consider the restructuring costs incurred as of the time when the investor took control over the yard. ISD Polska became the majority shareholder in Gdańsk Shipyard on 28 November 2008 and the Polish authorities claim that the restructuring costs incurred at the yard since then amount to PLN 62,5 million. Given that ISD Polska does not yet have a shareholding in Gdynia Shipyard, any restructuring costs incurred for that yard in the past should be disregarded. As a result, the restructuring costs as proposed by Poland at the meeting on 30 September would amount to PLN 3,065 billion.

(168) ISD Polska maintains that the own contribution of the yard and its shareholders to restructuring costs is as described in the following Table 1b, reflecting the proposals put forward in the September joint restructuring plan.

Table 1b

Own contribution to restructuring costs according to the joint restructuring plan

(PLN)

	Alleged previous own contribution	
1.	Sale of assets by Gdynia Shipyard	3 783 515
2.	Debt-for-equity swap undertaken by employees and private creditors	70 740 000
3.	Sale of financial assets by Gdynia Shipyard between 1 May 2004 and 24 June 2008	72 797 423
4.	Lease of production assets — Gdynia	8 335 000

([24]) Table 109 attached to the September joint restructuring plan.
([25]) Table 13, p. 243 of the joint restructuring plan.
([26]) Table 12, p. 242 of the joint restructuring plan.
([27]) Including public-law liabilities to be deferred and repaid in instalments.
([28]) Net asset value is forecast to increase by PLN 250 million in the September restructuring plan; this will be covered by a capital injection by the State.

5.	Investment expenditure 2004-2007 — Gdynia	98 044 000
6.	Purchase of shares by ISD	35 875 059
7.	Investment expenditure 2004-2007 — Gdańsk	22 238 900
8.	Lease of production assets — Gdańsk	14 700 000
9.	Restructuring loan from Bank Nord/LB	20 000 000
10.	Loan from ISD	2 000 000
	Alleged future own contribution	
11.	Capital increase by ISD	305 000 000
12.	Capital increase by ISD	100 000 000
13.	Sale of assets	240 000 000
14.	Working capital loan	280 000 000
15.	Investment loan for non-shipbuilding production	185 000 000
16.	Working capital loan for non-shipbuilding production	45 000 000
17.	Purchase of shares from the Industrial Development Agency [1]	69 560 400

[1] Under an agreement between the Industrial Development Agency and ISD Polska dated 31 October 2007, amended on 8 July 2008, the Industrial Development Agency has a put option entitling it to sell its remaining shares in Gdańsk Shipyard after 31 October 2011.

(169) According to the explanations on the joint restructuring plan provided by Poland on 7 July 2008 and the September joint restructuring plan, the external financing sources listed under items 14-16 are not known at present.

(170) ISD Polska envisages obtaining a working capital loan of PLN 280 million in 2012 and deems this assumption realistic in view of the allegedly favourable debt/EBIDTA ratio anticipated in 2012.

(171) With regard to loans for non-shipbuilding production (production of windmills, items 15-16), ISD Polska intends to create a special-purpose subsidiary of the merged shipyards to conduct windmill production, and it expects this business to attract external capital. The September joint restructuring plan provided additional information on the investment loan for the windmill project (item 15). It includes a summary of the windmill project that was to be submitted to various banks for consideration. Two letters of interest referring to this project, from Kredyt Bank (KBC) and Fortis Bank dated 4 August and 4 September 2008 respectively, were attached to the restructuring plan. Fortis Bank claims that it is widely known to be interested in renewable energy projects. It states that ISD's windmill project seems to be very interesting and that it would welcome further talks on specific issues. Kredyt Bank confirms that it is interested in financing renewable energy projects. The bank lists the analyses which will have to be carried out before it considers a loan application: an evaluation of the business plan and the financial model based on real assumptions which reflect market laws, an evaluation of the project's profitability and its sensitivity to factors such as prices of materials and the exchange rate, an evaluation of existing supply contracts and the outcome of the ongoing administrative proceedings concerning the legal status of the land on which the project is to be carried out.

(172) By letter of 8 July 2008 Poland provided a list of financial and production assets that ISD Polska intended to sell off in order to raise revenue of PLN 189 million. The September joint restructuring plan corrects the figure to PLN 240 million, the main difference lying in the evaluation of the main component of these divestitures — the sale of the land occupied at present by three slipways at Gdańsk

Shipyard. Whereas the June restructuring plan indicated the estimated net revenue from the sale (sales price minus cost of preparing the land for sale), the September plan indicates the nominal value of revenue from the sale and includes land preparation costs in its estimate of restructuring costs. An independent valuation of the land was attached to the September plan. This valuation does not indicate the current market price of the land, but estimates its value to an investor purchasing it for development purposes (apartments, office buildings).

(173) Poland explained that the slipways at Gdańsk Shipyard and the land adjoining them is currently owned by a company called Synergia 99. Gdynia Shipyard is one of Synergia's shareholders and, under a shareholder agreement, is entitled to acquire the slipways and the land adjoining them if Synergia is wound up. According to the information provided by Poland, the division of Synergia's assets between its shareholders depends on progress with ongoing administrative proceedings to establish the boundaries of the port of Gdańsk.

(174) The September joint restructuring plan explains that the ongoing administrative proceedings do not concern the plot adjoining the slipways and includes confirmation by Synergia 99 dated 28 August 2008 that it will lodge an application with the competent authorities to exclude the land on which the slipways are located from the port area.

(175) The September plan also clarified the arrangements for winding up Synergia 99 as agreed by its shareholders. This will take place in two stages: first, Synergia 99 will be divided in two companies, which will each take over earmarked assets from Synergia 99, and second, Gdynia Shipyard will become the sole owner of the company which had acquired the land on which the slipways are located. According to the plan, the first phase of the winding-up process should take place at a meeting of Synergia shareholders on 15 October 2008. The planned division is, however, conditional on changes being made to the port's boundaries. The shareholder agreement on the arrangements for winding up Synergia 99 is limited in time.

(176) According to Gdynia Shipyard's balance sheet, the yard's holding in Synergia 99 amounts to PLN 40 million. According to the September joint restructuring plan ([29]), in August 2007 the Board of Synergia 99 confirmed, with a view to concluding a shareholder agreement on the division of Synergia's assets in the event of its being wound up, that the nominal value of Synergia 99's assets was PLN […] (*) million, which, according to the Board, reflected their market value. An independent expertise forwarded by the Board to the shareholders at the time confirmed that the market value of the land on which the slipways are located was PLN […] million.

(e) ***Financial projections***

(177) The September joint restructuring plan contains amended financial projections. These are based on certain assumptions as to inflation (WIBOR 3m), the USD/PLN exchange rate and the cost of materials, which in turn are based on estimates by external experts. The PLN/USD exchange rate adopted in June was 2,254 for 2008 and 2,32 for 2009, while the September plan, on the basis of an external report ([30]), adopted a PLN/USD exchange rate of 2,32 for the whole restructuring period. The steel price adopted in June for 2008 was USD 1 381/t, declining to USD 1 211/t for 2011 and rising again to USD 1 359/t for 2014. The September plan is based on higher steel prices (USD 1 539/t in 2009, USD 1 350/t in 2011 and USD 1 516/t in 2014). The June joint restructuring plan anticipated the following growth trends in wages: 7,6 % in 2009, 7 % in 2010, 6 % in 2011 and around 5 % after 2012. The September plan forecasts a lower rate of increase: 5,8 % in 2009, 5 % in 2010, 4 % in 2011 and 2012 and 3 % p.a. after 2012 ([31]). The June restructuring plan forecast inflation of around 2,2 %. The September plan forecasts higher inflation, starting at 3,4 % in 2009 ([32]) and gradually decreasing (to 2,5-2,6 % after 2012) ([33]).

(178) The main change in financial projections in the September plan compared with the June plan concerns revenue from sales of vessels and from non-shipbuilding activities. In particular the September plan forecasts substantially higher prices for car carriers, one of the two main products, a changed assumption which heavily influences the profit and loss account forecasts.

([29]) Annex 56 to the September joint restructuring plan.
(*) 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.
([30]) Based on Goldman Sachs' global FX monthly analysis of June 2008.
([31]) Global Insight.
([32]) European Commission, economic forecast, spring 2008.
([33]) Global Insight.

(179) The forecast for the consolidated profit and loss account for shipbuilding and non-shipbuilding activities in the September plan shows positive profit margins as of 2009: (4,1 % in 2009, 3,1 % in 2010, 7,4 % in 2011 and 6,4 % at the end of the restructuring period in 2012). Profit margins will decrease to 4,3 % in 2014 (downturn on the market) and then gradually increase to 7,7 % in 2017.

(180) The June joint restructuring plan included a short version of a sensitivity analysis which examined the effects of certain changes in the main underlying assumptions on the 10-year EBIDTA and 10-year accumulated profits. In particular, it analyses the effects of a further appreciation of 5 groszy in the PLN and a further 5 % increase in steel prices and wages. The September joint restructuring plan includes a new and more detailed sensitivity analysis, showing, in particular, the impact of a 5 % appreciation in the PLN against the USD. The September joint restructuring plan assumes that Poland will adopt the euro in 2013 and that thereafter the yard's operations will not be affected by fluctuations in the PLN/USD exchange rate. The new sensitivity analysis shows the impact of a 5 % depreciation in the USD against the euro in 2013-2017 (i.e. after Poland presumably adopts the euro).

(181) According to the financial projections in the June plan, non-discounted payback (disregarding the changing value of money over time) will not be achieved until the 11th year of operations, i.e. in 2019. This calculation took into account only the investor's financial exposure (PLN 440 million), which means that accumulated cash flows for the period under review are compared only with capital injections by the investor and disregard the fact that the state is expected to make a substantial capital injection first. The plan assumes that restructuring costs of PLN 712 million approx. will be financed from the company's future cash flows.

(182) The September joint restructuring plan contains a discounted calculation of the payback period, which amounts to 10 years. The plan also assumes that a large part of the restructuring costs (PLN 712 million) ([34]) will be covered by future cash flows.

([34]) For example, PLN 400 million of public-law liabilities accumulated until 2008 will be repaid by additional cash flows generated in 2012-2018.

7. *RESTRUCTURING PLAN OF PSC*

(183) PSC was set up in Poland in 2007 for the purpose of acquiring Gdynia Shipyard. It belongs to two companies, Marine Co and Maritim Shipyard, controlled by Polish businessman Mr Janusz Baran. The two companies have operated since the 1990s in Gdynia, Gdańsk and Szczecin, producing ships and boats and working as a subcontractor for larger shipyards, mainly in Germany, Norway, the Netherlands and France, building blocks and sections and providing services. The group as a whole employs 1 500 people.

(a) ***Sales strategy***

(184) As regards market strategy, the plan assumes that the company will concentrate on container vessels, car carriers and gas tankers and that up to 10 platform supply vessels will be produced per annum. It is also assumed that in future the yard will produce 12 vessels per annum, this being the yard's capacity after the closure of the small dock. The section on future production assumes that an increasing number of vessels will be produced (rising from 6 in 2008 to 12 in 2009, 17 in 2010 and 21 in 2012). The financial model as submitted, on the basis of which the financial projections were apparently prepared, also assumes that output will increase to 21 vessels in 2012.

(185) In addition, the plan envisages diversifying activities and setting up a container terminal within the current area of the yard. According to the plan, following the capacity reduction the yard would have a redundant coastal strip on which a container terminal with capacity of 150 000 TEU p.a. could be built.

(b) ***Industrial and operational restructuring***

(186) The main restructuring measures proposed are industrial restructuring by implementing an investment programme designed to increase productivity, cut costs and shorten the production cycle. The estimated cost of the shipbuilding investment programme is EUR 80 625 000. Provision has also been made for investments of PLN 50 million (about EUR 15 million) for the development of a container terminal. This would mean total investment costs of EUR 95,6 million. However, another part of the restructuring plan estimates total investments at EUR 131 million (PLN 443 million). The difference between the two figures is not explained in the plan. According to the plan, implementation of these measures should cut costs per vessel by 25 % over the 5-year period.

(187) The plan also envisages the implementation of an integrated IT system managing all the areas of the yard's activity, i.e. design, supplies, stocks, steel processing, planning, production supervision and accounting.

(188) The plan envisages either maintaining the current workforce or reducing it by 650. It is not clear which factors would influence the choice of either of the two options. The plan envisages implementing an incentive-based pay system.

(189) As regards one of the yard's main problems, i.e. exposure to exchange-rate fluctuations and rising steel prices, the plan proposes incorporating indexation clauses into contracts and natural hedging (incurring costs in the currency of revenue).

(190) The plan also assumes that ship financing will be ensured by way of advance payments guaranteed by the Export Credit Insurance Corporation at an advantageous premium compared with its normal practice for healthy companies, and bridging loans guaranteed by the Treasury.

(c) ***Financial restructuring***

(191) As regards financial restructuring, the plan assumes that existing contracts will be renegotiated to reduce anticipated losses. According to the plan, restructuring should increase prices by 30 % (to the level prevailing on the market) and generate additional revenue of USD 100 million.

(192) Implementation of the plan is contingent on the State awarding additional aid in the form of a capital injection of PLN 515 million, cancelling and rescheduling public-law debt to a total amount of PLN 497 million and covering any other accumulated and potential liabilities of the yard (such as future losses on existing contracts or litigation). Lastly, the investor calls on the State to ensure that the Export Credit Insurance Corporation guarantees production during the restructuring period at an advantageous premium compared with its normal practice for healthy companies and that the Treasury provides guarantees for working capital to an amount of PLN 297 million.

(d) ***Own contribution***

(193) As regards own contribution, the plan provides for a capital injection by the investor of PLN 500 million to finance the investments and cover expected losses on existing contracts. The plan also suggests that the own contribution to the restructuring process also include revenue of PLN 50 million from the planned sale of assets and revenue from the sale of assets which took place after accession (PLN 124,5 million). It could be argued that this increases the own contribution to PLN 675 million. However, in the restructuring plan the investor declares an own contribution of only PLN 475 million.

(e) ***Financial projections***

(194) The financial projections are based on a stable currency exchange rate of PLN 3,46 per euro and PLN 2,2 per USD. The forecasts are based on an assumption that the number of vessels built will increase to 21 in 2012 and that the investor actually plans to expand shipbuilding at the yard: sales are expected to amount to PLN 1,2 billion in 2008 and it is assumed that they will increase constantly, reaching PLN 2,6 billion by 2012 (up 116 % on 2008).

8. *COUNTERVAILING MEASURES*

(195) In cooperation with its external consultant and the yard, the Commission adopted the following methodology for evaluating the capacity reduction proposed as a countervailing measure by Poland.

(196) For the countervailing measures to be effective, the capacity reduction must be sufficient to ensure that the yard's future capacity after restructuring is lower than at present.

(197) The Commission first assessed the yard's current technical capacity and stated that the assembly of vessels at the docks was one of the bottlenecks in the yard's production process which could not be easily resolved by outsourcing. Under the methodology used by the Commission, which is undisputed by the Polish authorities or the yard, capacity is calculated with reference to the duration of assembly time at the dock and a typical portfolio of vessels (since assembly of vessels with varying CGT values may take the same amount of time).

(198) Current capacity takes into account the time actually needed for the assembly of a (certain type of) vessel at the docks. This time should reflect all the current shortcomings in the production process, i.e. low productivity, bottlenecks, obsolete assets, inefficient production flows, and problems with the workforce. The financial constraints affecting the yard as a result of its difficult

financial situation are the only factor by which assembly time may be adjusted. Irregular or lack of access to working capital can seriously disrupt the production process. Since this is an external factor inherent to all companies in financial difficulty and not linked to inefficiency on the part of the company itself, the Commission took the view that the yard's actual performance could be adjusted by assuming easy access to working capital.

(199) Estimated future capacity takes into account the time probably needed for the assembly of a (certain type of) vessel at the dock, on the assumption that the yard's productivity is comparable to a benchmark set by other competitive European shipyards. In other words, the effects of the necessary modernisation of the facilities and the introduction of optimal working conditions (organisation, supplies, workforce) should be taken into account.

(200) Modernisation is unavoidable if the yard wishes to restore long-term viability. The related productivity increase will mean the yard reduces input and speeds up production. As various aspects of production improve, capacity, understood as the ability to build a certain number of vessels, will increase. It should therefore be noted that the closure of some facilities, such as the proposed closure of the SD I dry dock at Gdynia Shipyard, can be entirely offset by the increase in the capacity of the remaining dock. For the countervailing measures to serve their purpose, the capacity reduction must be such that the yard's capacity at the end of restructuring, i.e. after investments and the increase in productivity, is lower than at present. Only in this way can the twin goals of long-term viability, which requires an increase in productivity, and limiting any distortion of competition to the minimum be reconciled.

(201) To ensure that the calculation method for current and future capacity is consistent, the same product mix, i.e. the same types of vessels, should be used. Alternatively, an 'average vessel' (i.e. with average CGT on the basis of the yard's order book) could be used.

(202) At the outset, Gdynia Shipyard indicated that its technical capacity amounted to 540 000 CGT. After the above methodology had been clarified and agreed upon by the Commission and Gdynia Shipyard, the yard indicated that the technical assumptions for calculating its current capacity, in so far as it was free from financial constraints, were a docking cycle of 3 months with the parallel assembly of up to three vessels in various stages of completion (partial use of the semi-tandem method on the SD II large dock), resulting in the construction of up to 14 vessels per annum. The hypothetical portfolio was typical for the yard, which was confirmed by the existing order book and by the sales strategy presented in the 2006 restructuring plan. With an average CGT of 27 000 per vessel, current capacity without financial constraints was estimated at 378 000 CGT.

(203) In order to examine the impact of existing financial constraints on the production process (i.e. by how many weeks/months the production cycle is extended as a result of delays in supplies purely because of a lack of working capital) and to assess whether the seriousness of such constraints is over- or underestimated, the Commission compared this figure with the best result in recent years (12 vessels with a total CGT of 272 000 in 2002). First, the Commission noted that the discrepancy between the best result in 2002 and current technical capacity was partly due to differences in the order books. The yard currently produced vessels with a higher CGT value. Had the yard produced vessels with an average CGT of 27 000 in 2002, its total output would have been 324 000 CGT. The remaining difference can be attributed to the impact of financial constraints on the production process and corresponds to about two vessels with an average CGT, i.e. 14 %, which the Commission regarded as a reasonable assumption.

(204) As to its future capacity, assuming that both docks were utilised, the yard explained that the large SD II dock could be used for parallel building and for the semi-tandem building method, so that up to four hulls in various stages of completion could be built in parallel. In this way, the yard would be able to build 18 vessels, assuming a docking cycle of 3 months ([35]). Assuming an average CGT per vessel of 27 000, the yard's future capacity with both docks would be 486 000 CGT. The yard's future capacity after the closure of the small SD I dock would be 12 vessels or 324 000 CGT, assuming an average CGT per vessel of 27 000 CGT.

([35]) The yard confirmed that the duration of the docking cycle would not change substantially, as investments would probably cut costs rather than reduce the production cycle.

(205) On the basis of these figures, the Commission found that capacity reduction after the closure of the small SD I dock would correspond to about 14 %. Taking into account that the yard would be left with only one launching facility, the SD II dry dock, and that it had demonstrated by means of a detailed, credible break-even analysis that any reduction in the capacity of the SD II dry dock, in addition to the closure of the SD I dock, would endanger the yard's long-term viability, the Commission concluded on a preliminary basis that the closure of the SD I dock proposed by Poland would be a sufficient countervailing measure.

(206) ISD Polska's joint restructuring plan proposed an alternative set of countervailing measures in view of the business strategy adopted. The plan envisages the following countervailing measures in the context of the State aid investigation of Gdańsk Shipyard and Gdynia Shipyard: the closure of three slipways at Gdańsk Shipyard by 31 December 2008 in so far as it is possible to transfer existing production at Gdańsk Shipyard to the small dock at Gdynia in the light of the technical, organisational and legal obstacles. At the meeting on 8 July 2008 ISD Polska stated that it assumed that the work to fit out the small dry dock at Gdynia would not allow the slipways to be closed before the second half of 2009. The September joint restructuring plan proposes deferring the closure of two slipways until June 2009 and a third slipway until October 2009 ([36]). In addition, the yard's capacity will be limited to 400 000 CGT per annum for 10 years as of Poland's accession to the European Union, i.e. until 2014.

(207) At the meeting on 30 September ISD Polska informed the Commission that, as an additional countervailing measure, it could further cut its production to 360 000 CGT per annum for a 10-year period as of the point at which the slipways closed. ISD Polska also indicated that it could close the slipways earlier than envisaged in the restructuring plan of 12 September, i.e. it could close slipways B3 and B5 by end-April 2009 and slipway B1 by end-August 2009.

(208) PSC's restructuring plan envisages the sale of the smaller dock at the beginning of 2009. The anticipated revenue of PLN 170 million should increase the yard's working capital.

([36]) Annex 32 to the September joint restructuring plan.

9. *STATE AID GRANTED TO GDYNIA SHIPYARD (SITUATION IN JUNE 2008)*

(209) According to the Polish authorities, Gdynia Shipyard has received the State aid listed in Tables 1-4 since 1 May 2004.

(210) Table 1 sets out the aid granted between 1 May 2004, the date of Poland's accession to the EU, and 30 June 2007. Poland notified these measures by letter of 13 July 2007. The list includes some of the measures described in Annex I, part B of the decision to open a formal investigation.

(211) Poland provided additional explanations with regard to the restructuring of liabilities under Chapter 5a. The Polish authorities explained that the yard transferred to the Operator ([37]) assets to the value of at least 45 % of the value of the transferred liabilities ([38]). According to Poland, the aid element is therefore equivalent to 55 % of the nominal value of the liabilities transferred to the Operator. This nominal value is set out in Table 1 below.

(212) The loans benefiting from the Treasury guarantees listed in Table 1 were granted at an interest rate equal to LIBOR 1M + 100 basis points, whereas the risk of default when the guarantees were issued was estimated by the Polish authorities at 60-70 %. The Treasury guarantees were granted against collateral in the form of a blank promissory note issued by the yard and a notarial deed in which the yard agreed to the enforcement of its assets up to 120 % of the value of the guarantee. The Treasury charged a premium equivalent to 0,4 % of the guaranteed amount.

(213) Table 1 also includes loans granted by Korporacja Polskie Stocznie (KPS) used to finance the yard's working capital requirements. Poland claims in its submissions of 11 July 2007 and 9 January 2008 that these loans did not constitute State aid because the interest charged corresponded to the risk assessment of the particular project for which the loans were sought.

(214) For the loans granted in 2005-2007, KPS charged interest ranging from 9,6 % to 13,46 %, with an average fixed interest rate of 10,64 %. It also charged a one-off fee ranging from 0,1 % to 0,4 %. According to the Polish authorities, KPS required collateral in the form of acceptance of enforcement, an agreement on cession of receivables, an unconditional payment order, a blank promissory note or asset pledges ([39]).

([37]) State-owned company implementing restructuring of public-law liabilities in accordance with Chapter 5a.

([38]) For details on the restructuring procedure under Chapter 5a, see part 3.2 of the decision to open a formal investigation.

([39]) Letter of 9 February 2008, p. 15.

(215) KPS was created in 2004 as a wholly-owned subsidiary of the Industrial Development Agency to operate as a risk capital fund for the Agency. Its initial role was to serve as a vehicle for the consolidation of the three largest shipyards in Poland, a project abandoned in 2006. According to the information provided by Poland in 2006 ([40]), KPS was to be financed by a capital injection from the Industrial Development Agency, by a contribution in kind (shares in third companies) provided by the Agency and by a revolving bank loan guaranteed by the Agency, which was specifically earmarked as financial aid for the shipyards. According to the Polish Government's website, KPS was also to support shipbuilding operations in Poland by issuing bonds fully guaranteed by the Industrial Development Agency. Indeed, the document entitled 'A strategy for the shipbuilding sector (maritime construction shipyards) in Poland 2006-2010' ([41]) confirms that KPS should generate funds by issuing debt instruments to an amount of around USD 100 million, secured on the assets earmarked for restructuring the shipbuilding industry in the form of funds transferred by the Treasury to the Industrial Development Agency.

(216) Table 2 indicates the measures which the Commission was informed of after 13 July 2007 by letters of 6 December 2007 and 12 February 2008: two loans from the Industrial Development Agency to finance working capital (wages and commercial liabilities). Table 2 also indicates a loan granted by KPS further to its decision No 02/11/2007, which the Commission was informed of by letter dated 9 January 2008 ([42]); however, the Commission does not have any detailed information on the amount and life of this loan. KPS charged interest of 10,5 % and a one-off fee of 0,1 %.

(217) Considering the yard's precarious financial situation, the Commission cannot exclude that further State aid of a similar nature has been granted to Gdynia Shipyard.

(218) Table 3 lists Gdynia Shipyard's outstanding public-law liabilities as per 30 September 2007. This information was provided by Poland on 9 January 2008. Poland confirmed in that letter that Gdynia Shipyard had not been settling its public-law liabilities regularly. The yard had been repaying its debts to the social security office (ZUS) in as far as possible in view of its financial situation when these liabilities fell due.

(219) According to Annex 1 to the letter from Poland of 9 January 2008, the outstanding liabilities to the relevant public bodies as at 1 May 2004 amounted to PLN 254 million approx. Between 1 May 2005 and 30 September 2007, new liabilities of some PLN 362 million accrued. During that time Gdynia Shipyard actually repaid about PLN 194 million ([43]). As at 30 September 2007 the outstanding liabilities amounted to about PLN 423 million.

(220) Gdynia Shipyard was planning to repay at least part of the outstanding liabilities from the proceeds of the capital injection by the Treasury of PLN 515 million, which was itself conditional on a capital injection from a private investor selected by way of the privatisation process described above.

(221) Lastly, after Poland's accession to the EU, Gdynia Shipyard received some aid that Poland deems to 'have been granted for purposes other than restructuring' (Table 4 below). This was State aid for R&D and training totalling PLN 412 000.

(222) Gdynia Shipyard has also received aid in addition to the aid listed in Tables 1-4 below.

(223) First, in its letter of 11 July 2007 ([44]), Poland notified a set of measures designated as 'measures to be granted […] between 1 July 2007 and the end of the restructuring process'.

(224) The Commission notes above all that these measures include a possible write-off of the interest accrued between 1 July 2003 and 15 March 2005 on public-law liabilities restructured under Chapter 5a of a total amount of PLN 6 905 304. According to Poland, whether this interest should be written off is the object of a dispute between Gdynia Shipyard and the competent Polish authorities in the national courts. Since this interest is ancillary to the main liabilities restructured

([40]) Letter of 17 February 2006, registered on 22 February 2006.
([41]) A strategy for the shipbuilding sector (maritime construction shipyards) in Poland 2006-2010, adopted in August 2006, page 30.
([42]) Table 3, page 14 of the letter.
([43]) It is not clear from Poland's submission whether all payments actually effected involved delays. However, the Commission notes the general situation at the yard, Poland's confirmation that the yard had failed to fulfil its public-law obligations and the fact that, in most cases where payments actually occurred, liabilities were not repaid in full.
([44]) Annex 1, Table 3.

under Chapter 5a and listed in Table 1 below, the Commission considers that cancellation of the interest also constitutes State aid up to the full amount ([45]) and is caught by this decision.

(225) The Commission also notes that this table contains several measures consisting of a deferral of payment or write-off of public-law liabilities. It is not clear to what extent these measures overlap with the public-law liabilities listed in Annex 1 to the letter from Poland of 9 January 2008 (and summarised in Table 3 below).

(226) Most importantly, Gdynia Shipyard benefited from production guarantees from the Export Credit Insurance Corporation (hereinafter referred to as 'advance payment guarantees' or as 'Export Credit Insurance Corporation guarantees'). Virtually all shipbuilding from 1 May 2004 was financed thanks to these guarantees. In total, between 1 May 2004 and 12 June 2008 Gdynia Shipyard received 108 guarantees for a total value of PLN 3 095 529 638 for vessels built at Gdynia (not at Gdańsk Shipyard, which was previously a subsidiary of Gdynia Shipyard) ([46]). In its submission of 11 July 2007 Poland informed the Commission that the Export Credit Insurance Corporation would continue to issue guarantees to Gdynia Shipyard until end-2008.

(227) A common feature of the industry is that shipyards typically are not able to raise sufficient working capital for the construction of vessels internally and rely on external financing, whether through borrowing (so-called production loans) or advance payments from shipowners to pre-finance production. Shipowners typically pay 80 % of the price upfront in instalments, coinciding with certain decisive stages of the vessel's completion, the remaining 20 % being paid on delivery. Shipowners' involvement in financing shipbuilding is therefore crucial. Export Credit Insurance Corporation guarantees were provided to Gdynia Shipyard to secure advance payments from shipowners against the risk of the shipyard defaulting on its obligation to deliver the vessel.

(228) Various submissions by Poland on the operation of the Export Credit Insurance Corporation guarantee system ([47]) indicate that these guarantees were granted to Gdynia Shipyard in the following way. First, a contract was signed with the shipowner, which was typically conditional on the yard proving within a certain period of time that financing of production would be guaranteed by the Export Credit Insurance Corporation. The Export Credit Insurance Corporation issued a resolution undertaking to ensure financing of the ship as a whole by guaranteeing the advance payments. In subsequent individual agreements, the Export Credit Insurance Corporation activated the guarantee for each individual advance payment (typically four). Typically the Export Credit Insurance Corporation's overall exposure to the risk of the shipyard defaulting on its obligation to deliver the vessel was 80 % of the purchase price, i.e. the total amount of the advance payments made by the shipowner prior to delivery. This overall exposure was known when the Export Credit Insurance Corporation issued the resolution securing the financing of the ship by the shipowner. The guarantee expired on delivery of the vessel.

(229) The Export Credit Insurance Corporation's operations are varied ([48]) and are essentially divided between commercial activities and activities effected on behalf of, and guaranteed by, the Treasury. A separate bank account in the name of 'Interes Narodowy' is kept for the purpose of the latter activities. The guarantees granted to Gdynia Shipyard are part of the business re-guaranteed by the Treasury.

(230) According to the information provided by Poland, the Export Credit Insurance Corporation granted advance payment guarantees to Gdynia Shipyard against a fee depending on the amount of the guarantee. The fee amounts to 2 % per annum for guarantees not exceeding PLN 35 million and 1 % per annum for guarantees exceeding PLN 35 million. The Export Credit Insurance Corporation requires as collateral the transfer of ownership of the ship, the ship under construction and the construction materials. The same conditions should apply to Export Credit Insurance Corporation guarantees granted before the end of the restructuring period, i.e. before 2012.

(231) Lastly, the Commission notes that on 3 June 2008 Poland adopted a decision to award Gdynia Shipyard an additional capital injection of PLN 515 million.

(232) Tables 1-4 and the above information show that Gdynia Shipyard has benefited from aid with a total nominal value of PLN 5 018 862 443 (about EUR 1 434 million) since 1 May 2004.

([45]) Liabilities restructured under Chapter 5a were written off after the creditors' claims had been at least partially satisfied from the sale of the yard's assets. If the outstanding interest is included in the restructuring package under Chapter 5a, it will probably be written off only in part.

([46]) Poland provided a list of these guarantees by letter of 26.6.2008.

([47]) Reply of Poland of 2 September 2005 to the decision to launch a formal investigation.

([48]) See also Commission decision of 18 July 2007 in case N 105/07, Guarantee scheme for export contracts, summary notice in OJ C 214, 13.9.2007. By this decision the Commission approved as free of State aid the guarantee scheme run by the Export Credit Insurance Corporation for companies not in financial difficulty.

Table 1

State aid granted to Gdynia Shipyard between 1 May 2004 and 30 June 2007, according to the information provided by the Polish authorities

Item No	Awarding authority	Aid instrument	Legal basis	Number of decision or agreement	Date on which aid was granted	Entry into force	Period for which aid was granted	Nominal value of aid (PLN)
1	2	3	4	5	6	7	8	9
1.	Treasury	Guarantee — vessel No 8276/1	Warranties and guarantees issued by the Treasury and some Legal Persons Act of 8 May 1997 (Journal of Laws 2003/174, item 1689, as amended)	Cabinet Decree No 198/2004 of 24.8.2004	24.8.2004	3.9.2004	Until 30.3.2006	75 000 000,00
2.	Treasury	Guarantee — vessel No 8276/2		Cabinet Decree No 198/2004 of 24.8.2004	24.8.2004	3.9.2004	Until 11.12.2006	75 000 000,00
3.	Treasury	Guarantee — vessels Nos 8245/1-4		Cabinet Decree No 213/2004 of 7.9.2004	7.9.2004	17.9.2004	Until 27.2.2007	82 531 200,00
4.	Treasury	Guarantee — vessels Nos 8148/11 and 8184/14-17		Cabinet Decree No 222/2004 of 21.9.2004	21.9.2004	1.10.2004	Until 15.1.2008	147 662 619,46
5.	Marshal of Pomerania Province	Write-off	Act of 30.10.2002	Decision No UPP/11/3/2005 of the Chairman of the Industrial Development Agency of 15.3.2005	4.1.2005	15.3.2005	Single write-off	600 568,04 (*)
6.	State Fund for Rehabilitation of Disabled Persons	Write-off		Decision No UPP/11/3/2005 of the Chairman of the Industrial Development Agency of 15.3.2005	4.1.2005	15.3.2005	Single write-off	5 331 071,54 (*)
7.	Pomerania Province	Write-off		Decision No UPP/11/3/2005 of the Chairman of the Industrial Development Agency of 15.3.2005	4.1.2005	15.3.2005	Single write-off	2 414 962,11 (*)
8.	ZUS	Write-off		Decision No UPP/11/3/2005 of the Chairman of the Industrial Development Agency of 15.3.2005	4.1.2005	15.3.2005	Single write-off	23 048 186,93 (*)

1	2	3	4	5	6	7	8	9
9.	Industrial Development Agency	Capital injection	Article 56, Privatisation Act (Journal of Laws 2002/171, item 1397, as amended)	Agreement (Notarial deed Rep. A No 3255/2005)	23.6.2005	27.6.2005	Single capital injection	40 000 000,00
10.	Association of municipalities	Arrangement of repayment in instalments	Act of 30.10.2002	No 200364/1/ZR —Restructuring agreement of 22.11.2004	22.11.2004	Monthly instalments paid from 31.12.2004 to 28.2.2006	Single transaction	419 543,25
11.	Treasury	Construction guarantee for vessels: 8184/21-25	Warranties and guarantees issued by the Treasury and some Legal Persons Act of 8 May 1997 (Journal of Laws 2003/174, item 1689, as amended)	Cabinet Decree No 93/2005	12.4.2005	12.9.2007	Until 31.12.2007	97 098 200,00
12.	KPS	loan	Activity of KPS according to the articles of association	Loan agreement No 1/2/2005	10.2.2005	10.2.2005	8.3.2005	7 500 000,00
13.	KPS	loan	Activity of KPS according to the articles of association	Loan agreement No 2/4/2005	12.4.2005	20.4.2005	5.5.2005	7 500 000,00
14.	KPS	loan	Activity of KPS according to the articles of association	Loan agreement No 4/9/2005	21.9.2005	31.10.2005	4.1.2006	14 500 000,00
15.	KPS	loan	Activity of KPS according to the articles of association	Loan agreement No 2/7/2006	24.7.2006	3.8.2006	29.11.2006	10 000 000,00
16.	KPS	loan	Activity of KPS according to the articles of association	Loan agreement No 1/4/2006	21.4.2006	26.4.2006	30.7.2007	4 000 000,00
17.	KPS	loan	Activity of KPS according to the articles of association	Loan agreement No 1/12/2006	5.12.2006	5.12.2006 11.12.2006	7.2.2006	5 500 000,00 2 300 000,00

1	2	3	4	5	6	7	8	9
18.	KPS	loan	Activity of KPS according to the articles of association	Loan agreement No 1/3/2007	20.3.2007	20.3.2007	20.9.2007	6 200 000,00
						29.3.2007		2 000 000,00
						23.4.2007		5 800 000,00
19.	ZUS	Arrangement of repayment in instalments	Application by the debtor	Formally not yet granted but being implemented in practice		In instalments until end-2008	In instalments until end-2008	34 272 360,17
							Total	**648 678 711,50**

(*) Liabilities restructured under Chapter 5a. The table indicates the nominal value of the liabilities transferred to the Operator. According to the Polish authorities, assets of at least 45 % of the nominal value of the liabilities were also transferred to the Operator.

Table 2

Additional State aid granted to Gdynia Shipyard between 1 June 2007 and 15 July 2008, according to the information provided by the Polish authorities

No	Awarding authority	Aid instrument	Legal basis	Number of decision or agreement	Date on which aid was granted	Entry into force	Period for which aid was granted	Nominal value of aid (PLN)
20.	Industrial Development Agency	Loan	Article 56, Privatisation Act (Journal of Laws 2002/171, item 1397, as amended)	Loan agreement No OPP/11/07	4.12.2007	in two instalments: 5.12.2007 4.1.2008	No later than 31.5.2008	40 000 000
21.	Industrial Development Agency	Loan			5.2.2008			54 000 000
22.	KPS	Loan	Activity of KPS according to the articles of association	Loan agreement No 2.11.2007				?

Table 3

Public-law liabilities outstanding as at 30 September 2007 according to the information provided by the Polish authorities

No	Awarding authority	Liabilities concerned	Amount outstanding as at 30 September 2007 (PLN)
23.	ZUS	Deferral of premiums, payment in instalments May 2004 — September 2007	356 708 912
24.	State Fund for Rehabilitation of Disabled Persons	Deferral of premiums, payment in instalments May 2004 — September 2007	12 192 821
25.	City of Gdańsk	Deferral of real estate tax, payment in instalments May 2004 — September 2007	50 872 523
26.	City of Gdańsk	Deferral of land use fee, payment in instalments 2005-2007	2 859 684
27.	Marshal of Pomerania Province	Deferral of environmental fee, payment in instalments May 2004 - September 2007	361 781
		Total	**422 995 722**

Table 4

State aid to Gdynia Shipyard for purposes other than restructuring, according to the information provided by the Polish authorities

No	Awarding authority	Aid instrument	Purpose	Legal basis	Number of decision or agreement	Date on which aid was granted	Entry into force	Period for which aid was granted	Nominal value of aid (PLN)
1	2	3	4	5	6	7	8	9	10
28.	Industrial Development Agency	Grant	R&D	Project part of INTERREG IIIC — 2005 Budget Act of 22.12.2004, Journal of Laws No 278 of 29.12.2004, item 2755	Payment note No 05/ERR/2006	30.5.2006	30.5.2006	One-off subsidy	1 322,19

1	2	3	4	5	6	7	8	9	10
29.	Ministry of Education and Research	Grant		Decree of the Chairman of the State Committee for Scientific Research of 30.11.2001 (Journal of Laws No 146, item 1642, as amended)	EU project G3RD-CT-2002-00822-FASTPOD	26.6.2006	26.6.2006	One-off subsidy	49 571,98
30.	Ministry of Education and Research	Grant			Decision No 03797/C.ZR6-6/2005	12.12.2005	20.11.2006	Project to be implemented by 31.1.2009	279 825,51
31.	Minister for Science and Higher Education	Grant		Financing of Science Act of 8.10.2004 (Journal of Laws No 238, item 2390, as amended)	Decision No 03858/C.ZR8-6/2006	1.9.2006	20.11.2006	Project to be implemented by 31.3.2009	36 509,45
32.	Minister for Science and Higher Education	Grant	R&D	State Committee for Scientific Research Act of 12.1.1991 (Journal of Laws No 33 of 2001, item 389)	Decision No 960/E-594/SPB/5.PR UE/DZ 29/2003-2005	31.1.2003	30.6.2005	30.6.2005	37 906,00
33.	Polish Agency for Enterprise Development	Grant		Decree of the Minister for the Economy and Labour of 16.9.2004 on the award by Poland (Industrial Development Agency) of financial aid as part of the Human Resources 2004-2006 Sectoral Operational Programme (Journal of Laws 2007, item 2115)	Agreement No 30/2006/efs/gdy training financed by ESF of 20.1.2006	2.2.2006	25.5.2006	One-off subsidy	4 253,02
34.	Polish Agency for Enterprise Development	Grant		Decree of the Minister for the Economy and Labour of 16.9.2004 on the award by Poland (Industrial Development Agency) of financial aid as part of the Human Resources 2004-2006 Sectoral Operational Programme (Journal of Laws 2007, item 2115)	Agreement Nr WSAiB/039	1.2.2007	13.3.2007	One-off subsidy	2 209,94
								Total	**411 598,09**

III. EVALUATION

1. *COMPETENCES OF THE COMMISSION*

(233) Annex IV, point 3 of the Accession Treaty describes the interim mechanism procedure. It constitutes a legal framework for the assessment of aid schemes and individual aid measures which are put into effect in a new Member State before the date of its accession to the EU and are still applicable after accession.

(234) Measures that were put into effect before accession and are not applicable after accession cannot be examined by the Commission either under the interim mechanism procedure or under the procedure laid down in Article 88(2) of the EC Treaty.

(235) However, measures that were not put into effect before accession will be assessed by the Commission as notified aid or as unlawful aid pursuant to the procedure laid down in Article 88(2) of the EC Treaty.

(236) The criterion used to determine the point in time when a given measure was put into effect is the legally binding act by which the competent national authority undertakes to award aid ([49]). Whether an administrative act is legally binding is a matter of national law. The Commission, however, must be able to review, especially in border-line cases, these administrative acts and, judging on their form and content, to assess whether they could have given rise to legitimate expectations of the beneficiaries enforceable before a Polish court of law. This capacity to review national administrative acts is indispensable for the exercise of the Commission's exclusive competence to approve derogations from the general prohibition of State aid with regard to measures put into effect in Poland after 1 May 2004.

(237) A measure put into effect prior to accession is applicable after accession if it can still give rise to the award of additional aid or to an increase in the amount of aid already granted, i.e. if the precise economic exposure of the State is not known on the date on which the measure was put into effect and remains unknown on the date of accession.

(238) In its decision to open the formal investigation, the Commission concluded, on the basis of the information provided by Poland, that a series of measures of which it had been notified on 29 April 2004 actually constituted new aid, either unlawful or notified, because it was granted after 1 May 2004, the date of Poland's accession to the EU. The comments provided by Poland and third parties after the investigation was opened did not lead the Commission to alter its conclusion. In particular, the Commission maintains that it is competent to assess whether the measures indicated in Annex I, part B to the decision to open the formal investigation are compatible with the common market. The Commission nevertheless notes that some of these measures have been abandoned (measures 33 and 34 of Annex I, part B to the decision to open the formal investigation).

(239) Below the Commission indicates why it cannot accept the arguments put forward by Poland and the interested parties.

(a) ***Restructuring of public-law debt under Chapter 5a***

(240) The Commission agrees with the recipient that the event which gave rise to the partial write-off of public-law liabilities under Chapter 5a was the adoption of the restructuring decision by the Chairman of the Industrial Development Agency. The Commission, however, cannot accept the submission that this decision was adopted on 19 April 2004, i.e. prior to accession. The Commission explained the reasons for its stance in the decision to open the formal investigation, and neither Poland nor the recipient has submitted any further arguments. The Commission reiterates that the decision of 19 April merely approved the 2004 restructuring plan, and did not restructure public-law liabilities pursuant to Chapter 5a. The Chairman of the Industrial Development Agency could not issue the restructuring decision before accession because he did not have, as required by Chapter 5a, the agreement of all the public-law creditors involved in restructuring and of the Operator, the company managing the restructuring operation ([50]). The Commission notes that the Chairman of the Industrial Development Agency recognised this fact when he mentioned in his decision of 19 April 2004 that a further decision would be necessary to complete restructuring under Chapter 5a and when he eventually issued the restructuring decisions on 4 January 2005, i.e. after accession.

([49]) Judgment of the Court of First Instance of 14 January 2004 in Case T-109/01 *Fleuren Compost* v *Commission* [2004] ECR II-00127, point 74.

([50]) For a detailed description of the Chapter 5a procedure, see part 3.2 of the decision to open the formal investigation.

(241) The Commission cannot accept the recipient's argument that the agreement of all the public-law creditors involved to restructure their receivables from Gdynia Shipyard under Chapter 5a constituted the legally binding act required by the Fleuren Compost judgment. The recipient basically argued that Chapter 5a was not *lex specialis* in relation to other laws permitting restructuring of public-law liabilities and that the function of the Chairman of the Industrial Development Agency was to administer and facilitate the restructuring process, not to replace the authorities involved and competent for specific liabilities. The Commission notes that this interpretation of Polish law is at odds with all the submissions from Poland to date and with the text and logic of Chapter 5a itself. Admittedly, as the recipient argued, the Act of 30 October 2002 'does not prohibit the restructuring authorities from issuing any write-off decisions in so far as they are allowed to do so by general provisions'. Nevertheless, if they did so, those liabilities would no longer fall under Chapter 5a with all the advantages associated therewith and that the recipient itself has enumerated as follows: eligibility for a loan from the Industrial Development Agency, suspension of any ongoing enforcement proceedings, exemption from bankruptcy and non-accrual of interest on amounts due.

(242) The Commission cannot accept the recipient's argument that no interest accrued after 30 June 2006 on the liabilities restructured under Chapter 5a. This interpretation of Polish law was rejected by Poland. In addition, Poland notified as new aid the planned (partial) write-off of interest accrued after 30 June 2006, so it is obvious that this interest had actually accrued.

(b) ***Measures 28-34 of Annex I, part B to the decision to open the formal investigation***

(243) The Commission cannot accept Poland's argument that this aid was granted *de facto* by virtue of the fact that all the relevant awarding authorities made verbal statements at a meeting of the Government working group on the restructuring of shipyards in Poland (the shipbuilding industry team). Such statements, if any, were purely verbal and further implementing measures were clearly necessary to create legitimate expectations under Polish law.

(c) ***Capital injection from the Industrial Development Agency***

(244) The recipient's argument that the aid was granted before accession because the precise economic exposure was known before that date stems from a misunderstanding of Annex IV, point 3 to the Accession Treaty. To qualify as previous aid, a measure must fulfil two requirements: it must have been granted before accession (which is equivalent to a legally binding decision by the competent awarding authority) and it must 'not be applicable after accession'. These are two separate and cumulative conditions. The recipient's argument that the State's economic exposure was known before accession refers to the second of these requirements and not to the point in time at which the aid was granted.

(245) The Commission cannot accept Poland's argument that the requirement to register the subscription of new shares within 6 months was purely formal. The Commission notes that, in reality, two distinct new decisions were necessary after the 6-month period expired: a new resolution of the General Assembly on the capital increase and the subscription itself. It seems to be the case that, under Polish commercial law, the entitlement of a company to a capital injection becomes effective on the date when the resolution to increase the capital is adopted (i.e. the first resolution of 17 February 2004). Registration is of significance for the company's external contacts, not for relations with its shareholders. However, the lack of registration also has legal effects on the relationship between the company and its shareholders: if it is not effected within 6 months, the resolution to increase the company's capital expires and the capital injection cannot take place. In these circumstances, a new resolution by the shareholders is required in order to increase the company's capital. Such a resolution was indeed adopted by the General Assembly on 4 March 2005. However, the fact that the resolution was not adopted unanimously (three major shareholders objected) demonstrates that this resolution cannot be regarded as a mere formal requirement. The Commission also notes that the capital was eventually subscribed by the Industrial Development Agency, not the Treasury. The resolution of 17 February 2004 cannot therefore be regarded as a final binding decision to award aid in the form of a capital injection listed as measure 32 of Annex I, part B to the decision to open the formal investigation.

(246) Lastly, the Commission notes that neither Poland nor the recipient has contested its conclusion that measures 19-27 of Annex I, part B to the decision to open the formal investigation constituted new aid and thus fall under the remit of the Commission under Article 88 of the EC Treaty.

2. *STATE AID WITHIN THE MEANING OF ARTICLE 87(1) OF THE EC TREATY*

2.1. EXISTENCE OF STATE AID

(247) Article 87(1) of the EC Treaty states that any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods and affects trade between Member States is incompatible with the common market.

(248) The Commission finds that all the aid described in recitals 209-232 was granted by the State or through State resources and, being directed to one particular undertaking, was selective.

(249) Gdynia Shipyard is one of the largest European shipyards and actively competes on the container ship market with shipyards in particular in Germany and Denmark, as Poland and the recipient have acknowledged, and as was noted by Denmark and the Danish shipbuilding association in their comments on the Commission's decision to open the formal investigation. Container vessels accounted for 26 % of European shipyards' order books at the end of 2006 ([51]).

(250) It appears to be the case that Gdynia Shipyard is the only yard within the EU which produced a certain type of ro-ro vessel: big car carriers. This specialisation, however, does not mean that Gdynia Shipyard is not in competition, at least potentially, with other yards in the EU. The Commission notes that there exists a significant level of supply-side substitutability, at least in the cargo ships segment ([52]), even though, considering the demand structure for various categories of cargo ship, these vessels do not belong to a single market.

(251) This means that other shipyards in the EU may not encounter significant barriers to launching production of car carriers, at least not of a technological nature (production facilities, know-how etc.). However, the continuous subsidising of Gdynia Shipyard, which allowed it to conclude contracts without full recognition and remuneration of all the risks involved, could have constituted a significant barrier for other shipyards to entry on the car carriers market.

([51]) 2006-2007 Annual Report of CESA, the Community of European Shipyards' Associations.

([52]) For passenger ships, including cruise ships, there are significant barriers to entry on the supply side.

(252) The Commission notes that Gdynia Shipyard also operates in other cargo ship segments by offering products such as multi-purpose vessels, liquefied petroleum gas carriers, product and chemical tankers and bulk carriers. For example product and chemical tankers constituted about 8 % of the order book of European shipyards at the end of 2006 ([53]). Yards in Germany and Romania are particularly active in these segments.

(253) On the basis of the above, the Commission concludes that the State aid granted to Gdynia Shipyard affected trade between Member States.

(254) Lastly, the Commission needs to determine whether the measures granted to Gdynia Shipyard conferred an undue advantage on it and thereby distorted or threatened to distort competition. The Commission notes that the Polish authorities did not dispute the classification of the measures covered by the present decision as State aid, with the exception of the loans granted by KPS and the guarantees provided by the Export Credit Insurance Corporation which, in the view of the Polish authorities, comply with the market economy investor principle.

(255) Below the Commission first explains why it took the view that the continuous non-enforcement of public-law debt did not pass the market economy creditor test. The Commission then assesses the measures disputed by Poland. Finally, the Commission considers the circumstances in which the aid covered by this decision was granted and its impact on competition.

(a) ***Continuous non-enforcement of public-law debt***

(256) The principle that continuous non-enforcement of public-law debt can in itself constitute State aid is established in case-law ([54]). The information provided by the

([53]) 2006-2007 Annual Report of CESA, the Community of European Shipyards' Associations.

([54]) Opinion of Advocate General Jacobs, Case C-256/97 *DM Transport* [1999] ECR I-3915, Case C-480/98 *Spain* v *Commission* [2000] ECR I-8717.

Polish authorities ([55]) clearly indicates that Gdynia Shipyard has significant public-law arrears dating back as far as 2004. The yard has been repaying public-law liabilities only irregularly and its outstanding debt has been continuously deferred, in all probability without any formal decision on the part of the relevant public creditors, or was subject to payment schedules. Poland explained that the recipient intended to repay public liabilities outstanding as at 30 September 2007 (PLN 443 million in total) using the capital injection by the Treasury following the yard's privatisation. This being an uncertain event with an uncertain timing, the yard's intention suggests that in practice the public-law liabilities were deferred for an unlimited or unspecified period of time and were repaid only occasionally as permitted by the yard's cash flow. The Commission considers that no market economy creditor would accept such an unlimited deferral of its liabilities, which would be contingent on the uncertain event of privatisation and recapitalisation by the State (this constituting State aid of doubtful legality and compatibility with the single market). In addition, there is no indication whatsoever that the relevant public creditors have undertaken any action to enforce their public-law receivables from Gdynia Shipyard, in particular by way of forced recovery or bankruptcy law. The Commission therefore concludes that continuous non-enforcement of public-law liabilities represents an advantage that the recipient would have not obtained from a market economy creditor and therefore constitutes State aid similar to an (interest-free) loan.

(b) ***Measures which Poland regards as passing the private investor test***

KPS loans

(257) The Commission cannot accept Poland's argument that aid in the form of working capital loans was free of State aid. The Commission observes that the interest rate charged by KPS was about 400 basis points above the reference rate. The Commission also notes that Gdynia Shipyard has been in a very precarious financial situation for several years, with its liabilities considerably exceeding its assets. Gdynia Shipyard has not been able to obtain funding for its production from any other external source. Its working capital was financed by advance payments fully covered by guarantees from the Export Credit Insurance Corporation, by loans fully covered by Treasury guarantees and by KPS loans. The interest rate charged by KPS therefore does not appear to correctly reflect the risk incurred. Although KPS did require collateral, its value remains questionable; it should be remembered that the Export Credit Insurance Corporation and Treasury required similar collateral and, considering Gdynia Shipyard's assets/liabilities ratio, it seems likely that KPS was not able to obtain first-rank collateral on the yard's assets. In any event, Poland has not provided detailed information enabling the Commission to determine the real value of the required collateral.

(258) Furthermore, there is no difference between loans granted by KPS and loans granted by the Industrial Development Agency, which owns KPS. It is difficult to maintain simultaneously, as Poland does, that the loans granted by the Industrial Development Agency constitute State aid whereas the loans granted by its subsidiary, KPS, meet the requirements of the market economy investor principle.

(259) Lastly, the Commission notes that KPS was established as a government-controlled fund with public policy objectives, the funding of which was fully provided, or guaranteed, by the State via the Industrial Development Agency. According to the document 'A strategy for the shipbuilding sector (maritime construction shipyards) in Poland 2006-2010', KPS was 'founded to organise the financing of shipyard production until such time as private investors took control'. The strategy, which is designed to achieve not only economic but also social and macroeconomic aims ([56]), mandates KPS with various powers, along with the Industrial Development Agency, the Treasury and other competent public bodies. The financial links of KPS to the Industrial Development Agency and the Treasury are clear and KPS acts rather like a vehicle for the transfer of assets earmarked by the State budget for shipyards in Poland, including Gdynia.

(260) In the light of the above, the Commission concludes that KPS did not act as a market economy investor when it granted working capital loans to Gdynia Shipyard. These loans, listed in recital 158, Tables 1 and 2, therefore constitute State aid.

([55]) In particular Annex 3 to the letter of 9 January 2008.

([56]) A strategy for the shipbuilding sector (maritime construction shipyards) in Poland 2006-2010, adopted in August 2006, p. 7.

Export Credit Insurance Corporation guarantees

(261) In its comments following the adoption of the decision to open the formal investigation, Poland argued that the guarantees granted by the Export Credit Insurance Corporation to Gdynia Shipyard did not constitute State aid. The Commission cannot accept this assertion.

(262) First, the Commission would point out that Export Credit Insurance Corporation advance payment guarantees are guaranteed by the Treasury and that related transactions are entered to a separate bank account in the name of 'Interes Narodowy'. If insufficient funds are available on that account, the Export Credit Insurance Corporation can either draw down loans from the Treasury or benefit from Treasury loan guarantees.

(263) Second, the Commission recalls its decision of 18 July 2007 in Case N 105/07 ([57]) whereby it approved as free of State aid the scheme under which the Export Credit Insurance Corporation operated its programme of export insurance guaranteed by the Treasury. This scheme currently covers the type of production guarantees that Gdynia Shipyard has been receiving for the last few years. The Commission notes that the scheme explicitly excludes ([58]) companies in financial difficulty within the meaning of the Guidelines on State aid for rescuing and restructuring firms in difficulty. The main feature of the scheme is that guarantee premiums are determined on the basis of a risk assessment. For example the guarantee premium for a company belonging to the highest risk category corresponds to […] % p.a. for guarantees under 2 years and […] % p.a. for guarantees above 2 years. The base premium is equal to […] % p.a. By way of comparison, guarantees to Gdynia Shipyard were given by the Export Credit Insurance Corporation against a premium of 2 % p.a. if the guarantee did not exceed PLN 35 million and against a premium of 1 % p.a. if the guarantee exceeded that amount.

(264) It is therefore clear that Gdynia Shipyard is not eligible for guarantees covered by the scheme described above and approved by the Commission as free of aid. Accordingly, the guarantees granted to Gdynia Shipyard are not free of aid.

(265) Furthermore, it is obvious that the guarantee premium charged to Gdynia Shipyard is well below the base premium used for guarantees to healthy companies and several times lower than the premium charged to high-risk companies which are, however, still eligible under the scheme described above. The Commission concludes that the guarantee premium applied to Gdynia Shipyard does not correspond to a market premium and that therefore these guarantees constitute State aid.

(266) Third, pursuant to the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees ([59]), for an individual State guarantee not to constitute State aid, the borrower must not be in financial difficulty. This is clearly not the case here. Pursuant to the same Notice, when the borrower is in financial difficulty the aid element of the guarantee may be as high as the amount covered by that guarantee.

(267) Finally, the Commission notes that Gdynia Shipyard relied exclusively on guarantees provided by the Export Credit Insurance Corporation and the Treasury and did not manage to obtain any guarantees on the market.

(268) In the light of the above, the Commission concludes that the Export Credit Insurance Corporation did not act as a market economy investor when it gave guarantees to Gdynia Shipyard.

(c) ***Distortion of competition caused by the State aid to Gdynia Shipyard***

(269) The Commission takes the view that full reliance on State aid enabled Gdynia Shipyard to engage in anti-competitive practice such as pricing below production costs without suffering the consequences that such practices normally entail, namely elimination from the market.

(270) Furthermore, the Commission notes that one of Gdynia Shipyard's main long-term problems was the conclusion of contracts which proved to be loss-making as the zloty appreciated against the dollar, the dominant currency in the shipbuilding business, and the price of steel plates increased worldwide. These external factors were already identified as the main threats to the yard's continued operation in the 2002 restructuring plan, and then subsequently in the amended version of 2004, in the new 2006 restructuring plan and, lastly, in the course of privatisation in 2008.

([57]) Commission decision of 18 July 2007 in Case N 105/07, Guarantee scheme for export contracts, summary notice in OJ C 214, 13.9.2007.

([58]) Article 3(1)1) of Resolution 111/2006 of the Export Insurance Policy Committee of 20 December 2006.

([59]) OJ C 71, 11.3.2001, p. 14.

(271) Despite the fact that the yard's management was aware of these threats, the yard continued to conclude contracts without taking any measures to mitigate the risk. This business practice continued during the unprecedented boom in the shipbuilding market between 2004 and 2008, when shipbuilding prices rose to record levels. As a result of this practice, the yard managed to maintain activity and employment, but at the cost of large losses on regular shipbuilding production. According to the due diligence report produced by Amber in the first half of 2008, the current order book with deliveries scheduled for 2008 and 2009 is also burdened by a risk of significant losses due to loss-making contracts concluded without any risk-mitigating measures; this has been confirmed by Poland.

(272) On that basis, the Commission concludes that all the aid granted to Gdynia Shipyard described in Part II, point 7 was such as to distort or threaten to distort competition on the shipbuilding market.

Conclusion

(273) In conclusion, the Commission takes the view that all the measures granted to Gdynia Shipyard are State aid within the meaning of Article 87(1) of the EC Treaty.

2.2. **Possibility for Poland and third parties to submit comments**

(274) By its decision of 1 June 2005, the Commission opened a formal investigation into a series of measures, including debt-restructuring (write-offs, deferrals, changes to the payment schedule) based on various legal grounds and concerning a certain number of public creditors, capital injections, Treasury production guarantees and capital-raising measures (bond issues and debt-for-equity swap).

(275) The Commission also clearly stated that Poland's argument that advance payments from shipowners should be considered as an own contribution could not be accepted. In that connection, the Commission expressed doubts as to whether the advance payment guarantees provided by the Export Credit Insurance Corporation constituted State aid and announced that it would investigate the nature of those advance payments.

(276) Both Poland and the recipient submitted comments; however, whereas they disputed the competence of the Commission to assess the compatibility of some of the measures concerned, they did not contest the Commission's conclusion that, in so far as these measures had been granted after Poland's accession to the EU, they constituted new aid within the meaning of Article 87(1) of the EC Treaty. The sole exception was the nature of the guarantees provided by the Export Credit Insurance Corporation, which were alleged to be free of State aid. Poland subsequently also argued that the loans granted by KPS did not constitute State aid. The Commission has addressed the arguments put forward by Poland and the recipient above.

(277) In the course of the Commission's investigation, significant changes were made on several occasions to the Polish Government's strategy as the majority owner of Gdynia Shipyard, as the above description of events shows. The strategy of consolidating the shipbuilding sector changed into a strategy of separating Gdynia and Gdańsk shipyards and into a decision to partially privatise Gdynia Shipyard, which later changed into a strategy of full privatisation. This outlook for this strategy is also questionable given the manifest lack of interest on the part of market operators in purchasing the yard.

(278) As indicated above, the Commission maintained regular contacts with the Polish authorities as the owner of Gdynia Shipyard and with Gdynia Shipyard itself. The Commission regularly indicated to both Poland and the yard that all measures granted to the yard from State resources probably constituted State aid within the meaning of Article 87(1) of the EC Treaty, considering the yard's precarious financial situation and the absence of any external financing free of State aid. The Commission also warned that this State aid had been granted in breach of Article 88(3) of the EC Treaty and was incompatible with the common market. The Commission also pointed out on several occasions that the guarantees provided to Gdynia Shipyard by the Export Credit Insurance Corporation constituted State aid.

(279) In the course of its investigation, the Commission also collated details on the operations of KPS and the nature of the working capital loans which it granted to the yard. The Commission indicated to Poland that in all probability these loans constituted State aid within the meaning of Article 87(1) of the EC Treaty.

(280) Lastly, the Commission noted in the course of its investigation that Gdynia Shipyard was still accumulating public-law liabilities. The Commission collated information on that subject and informed Poland (in its capacity as the yard's owner and creditor) that non-enforcement of public-law debt or its restructuring could constitute State aid within the meaning of Article 87(1) of the EC Treaty.

3. *COMPATIBILITY OF AID WITH THE SINGLE MARKET — DEROGATION UNDER ARTICLE 87(3) OF THE EC TREATY*

(281) The primary objective of the measures is to assist a company in financial difficulty and to keep it afloat. In such cases, the exemption provided for in Article 87(3)(c) of the EC Treaty, which authorises State aid granted to facilitate the development of certain economic activities where such aid does not adversely affect trading conditions to an extent contrary to the public interest, can be applied if the relevant conditions are complied with.

(282) Rescue and restructuring aid to ailing companies is currently regulated by the Community Guidelines on State aid for rescuing and restructuring firms in difficulty ([60]) (hereinafter referred to as the Guidelines), which replaced the previous text adopted in 1999 ([61]) (hereinafter referred to as the 1999 Guidelines).

(283) The transitional provisions of the Guidelines stipulate that notifications registered prior to 10 October 2004 are examined in the light of the criteria applicable at the time of notification (point 103). In the present case, the Commission was notified of some of the measures on 29 April 2004 under the interim mechanism pursuant to Annex IV, point 3 to the Accession Treaty, when the 1999 Guidelines were in force. However, the Guidelines also stipulate that they will apply for the assessment of any rescue or restructuring aid granted without the authorisation of the Commission (unlawful aid) if some of or all the aid is granted after 1 October 2004 (point 104, first subparagraph). Given that almost all the measures described in recitals 209-232 were granted unlawfully after that date, the Commission concludes that the 2004 Guidelines apply.

(284) The Guidelines apply to firms in all sectors, apart from the exceptions listed in point 18 of the Guidelines. The Framework on State aid to shipbuilding ([62]), which is the legal framework for the assessment of State aid to this sector, refers to point 12 of the Guidelines as the relevant legal basis for assessing rescue and restructuring aid.

A. RESCUE AID

(285) The Guidelines provide for rescue aid to be granted as temporary assistance for companies in financial difficulty pending such time as a restructuring plan or liquidation plan has been drawn up or with a view to addressing an acute liquidity crisis.

(286) The Commission notes that the State aid granted to Gdynia Shipyard does not meet either the temporality condition, as all the aid measures were granted for periods well beyond the prescribed 6 months, or the reversibility condition, as irreversible measures were authorised such as capital injections and debt write-offs comparable to grants.

(287) The Commission therefore concludes that the measures listed in recitals 209-232 are not compatible with the common market as rescue aid.

B. RESTRUCTURING AID

(288) The definition contained in point 17 of the Guidelines indicates that restructuring aid is based on a feasible, coherent and far-reaching plan to restore the firm's long-term viability within a reasonable time-frame. Restructuring usually involves the following elements: restructuring of all aspects of the company's activities, reorganisation and rationalisation of its business, including withdrawal from loss-making activities and financial restructuring. Restructuring operations, if benefiting from State aid, cannot however be limited to financial aid designed to make good past losses without tackling the reasons for those losses, i.e. without undertaking genuine restructuring. Furthermore, restructuring must be financed at least in part from the company's own resources or from external sources free of State aid, and State aid must be limited to the minimum necessary to restore viability. Lastly, countervailing measures must be adopted to mitigate the distortive effect of the aid.

(289) In view of the very distortive nature of restructuring aid, the Commission considers that aid to firms in difficulty can contribute to the development of economic activities without adversely affecting trade to an extent contrary to the Community interest only if all the conditions set out in the Guidelines are met.

(290) The Commission analyses below whether these conditions have been met.

([60]) OJ C 244, 1.10.2004, p. 2.
([61]) OJ C 288, 9.10.1999, p. 2.
([62]) OJ C 317, 30.12.2003, p. 11.

(a) ***Eligibility***

(291) To be eligible for rescue or restructuring aid, the firm must qualify as a firm in difficulty within the meaning of the Guidelines. The Commission believes that the financial situation of Gdynia Shipyard, at least since 2002, has been characterised by continuous illiquidity and insolvency, increasing losses and negative asset value. Gdynia Shipyard is therefore a firm in difficulty within the meaning of the Guidelines.

(b) ***Restoration of long-term viability***

(292) Pursuant to point 34 of the Guidelines, the granting of aid must be conditional on implementation of a restructuring plan, which must enable the company to restore viability within a reasonable time-frame. Restoration of viability means that the company, after completing restructuring, is able to cover all its costs and generate a sufficient return on capital to compete on its own merits. Restructuring must be carried out as quickly as possible.

(293) The Commission notes that, in the course of this investigation, it reviewed two restructuring plans (2004 and 2006) prepared by the yard's management and approved by its majority owner, the State. The Commission concluded that its serious concerns as to whether the two plans would restore the yard's viability had not been assuaged. Since the 2006 restructuring plan has replaced the 2004 restructuring plan, the Commission explains below the grounds for its serious doubts concerning the 2006 restructuring plan. The Commission, however, notes that this plan resembles in many aspects the 2004 restructuring plan and the doubts expressed by the Commission in its decision to open a formal investigation with regard to the 2004 restructuring plan also apply in full to the 2006 restructuring plan.

(294) The Commission recalls Poland's claim, after the decision to open the formal investigation had been taken, that the 2004 restructuring plan constituted a sound economic basis for the yard's restructuring. Reality showed that the 2004 plan was not sufficient to restore the yard's viability and needed to be amended as early as 2006.

(295) The Commission notes that the 2006 restructuring plan focused mainly on financial restructuring and that industrial aspects were not addressed in a convincing manner. No convincing far-reaching industrial strategy emerged from the plan.

(296) This is illustrated in particular by the proposed investment strategy, which could be characterised as a collection of small upgrading projects without the global vision which would appear necessary to modernise facilities many of which date from the 1970s. The plan does not analyse in detail the current state of production facilities or their shortcomings and does not identify the yard's bottlenecks. According to the Commission's external consultant, the amounts earmarked for investments (PLN 240 million; EUR 69 million) are too low to ensure genuine modernisation.

(297) To put the planned investments in perspective, it is also worthwhile considering the forecasts for annual depreciation of the yard's assets and trends in the value of fixed assets, as estimated by the 2006 restructuring plan. Depreciation over 2007-09, i.e. the investment period, is estimated at PLN 100 million. It follows that at least 40 % of the planned investments of PLN 240 million is needed simply to maintain the assets at their current technical level and the remaining 60 % would be the maximum available for real modernisation. The balance sheet forecast shows a steady increase in fixed assets from PLN 246 million in 2006 to PLN 361 million in 2010; however, that trend should be reversed in 2010, with the value of fixed assets decreasing again to a level of PLN 284 million in 2012 (the last year included in the forecast).

(298) In the light of the above, the Commission does not consider that the investment strategy is sufficiently far-reaching to ensure genuine modernisation and viability in the long term.

(299) The Commission also notes that the productivity target for 2012 of 37 man-hours/CGT, while an improvement compared with today's situation, is still modest in comparison with efficient European shipyards attaining productivity of about 20 man-hours/CGT.

(300) The plan states that one of the yard's main problems is high absenteeism and a shortage of qualified workers, who are leaving for better pay at other European yards. The Commission considers that the planned wage increase of 10 % in 2006 and 4 % annually from 2008 onwards will not be sufficient to address this problem.

(301) On the basis of the above the Commission does not consider that the planned industrial and organisational restructuring will be sufficient to restore the long-term viability of the yards.

(302) Furthermore, the Commission notes that the financial results forecast by the yard did not tally with its sensitivity analysis, based on a scenario involving depreciation of the US dollar, falling prices for vessels and rising prices for materials and wages. The sensitivity analysis shows that depreciation of the US dollar by PLN 0,10 p.a. would mean that viability would not be restored on the basis of the 2006 restructuring plan. The Commission therefore concludes that the 2006 restructuring plan is not sufficiently robust ([63]).

(303) Lastly, the Commission noted that the restructuring measures envisaged in the plan could not be implemented in the absence of an investor and that the new capital required in order to implement what appeared to be a rather modest restructuring was significant, mainly as a result of the need to undertake costly financial restructuring (PLN 1,015 billion) ([64]). The Commission doubted whether the plan was based on realistic assumptions as to the yard's capacity to attract new capital.

(304) These doubts were confirmed by actual developments in the privatisation process of Gdynia Shipyard. As indicated above, the State as the owner of Gdynia Shipyard has attempted twice to find a private investor ready to take over the yard. None of the privatisation attempts (whether the partial privatisation in 2006 or the sale of all publicly owned shares in 2007) succeeded. The Commission notes that the privatisation attempts took place at a time when the shipbuilding market was characterised by an unprecedented boom and therefore provided optimal conditions for the sale of the yard. The negative outcome of the privatisation process can only be interpreted as reflecting a lack of confidence of market players in the yard's ability to restore long-term viability. The withdrawal of Amber from the privatisation process after an in-depth due diligence examination only confirms this ([65]).

(305) The Commission took note of the renewed efforts of the Polish authorities to find a private investor for Gdynia Shipyard following the withdrawal of Amber. Until the decision was issued, however, no evidence convinced the Commission that the re-launched privatisation effort could be concluded positively in a short period of time and in line with the Guidelines. As explained below, the joint restructuring plan of ISD Polska and the restructuring plan of PSC are both based on the expectation that significant amounts of additional State aid will be granted to the yard and that it will be possible to return the yard to viability if it is freed from outstanding liabilities and anticipated losses on existing contracts.

Joint restructuring plan prepared by ISD

(306) The Commission concludes that the joint restructuring plan has not demonstrated that the viability of Gdynia Shipyard will be restored after the merger with Gdańsk Shipyard. In particular, the Commission is not convinced by the financial projections or the robustness of the plan. It takes the view that the restructuring measures envisaged in the plan are not sufficiently far-reaching. Although the revised joint restructuring plan has brought about some improvements, the Commission concludes that it will not restore the viability of the merged shipyards. Below the Commission assesses the September restructuring plan which replaced the June draft plan and highlights differences only where they are relevant to its assessment.

(307) The assumptions in the June plan that the return on equity would be achieved only in 2020 and the return on investment only in 2016 tend to lead the Commission to the conclusion that the project is not viable. What is more, these results are based on non-discounted amounts; if the amounts were discounted the return on equity and investment would be achieved even later. The September plan brings an improvement in that respect because it indicates discounted forecasts. Nevertheless, the plan assumed that the discounted return

([63]) The Commission notes that the base scenario involved an exchange rate of PLN 3,0/USD, but that the current exchange rate is PLN 2,2/USD.

([64]) The equity of the yard in 2006 was negative at PLN 576 million.

([65]) Amber indicated that its analysis showed that the yard would not become profitable after the restructuring Amber envisaged implementing.

on equity would be achieved in 2018, i.e. 10 years after the entry of the new investor in 2009, which is still too long and demonstrates the riskiness of the project. The Commission therefore maintains that the plan does not demonstrate that the project is viable. In addition, the Commission notes that the improvement in financial projections is not based on the adoption of more far-reaching restructuring measures (such as productivity improvements or cost reduction) but on amendments to the main underlying financial assumptions that have not been sufficiently justified, as will be explained below.

(308) The financial projections assume that a large part of restructuring costs can be covered from the company's future cash flows. The Commission regards this as unrealistic for a company which has generated enormous losses in the past and requires substantial restructuring. According to the September plan, cash flow will be affected by past liabilities, which have increased from PLN 592 million to PLN 712 million. Moreover, a large part of the public-law liabilities (more than PLN 400 million) is to be repaid between 2012 and 2018, i.e. long after the envisaged restructuring period ([66]). The Commission notes that the investor has admitted that the level of expected results is borderline profitable, but he also claims that there is an additional reason why ISD Polska is interested in this project. The investor claims that the yard will create significant demand for another group company, the steel mill Huta Częstochowa, and therefore investment in Gdynia Shipyard makes sense for the whole ISD Polska group.

(309) The Commission notes that the joint restructuring plan is based on an assumption that the State aid was awarded in the context of the privatisation to settle the yard's balance sheet and cover expected losses. The plan is also based on an assumption that the shipyard's activities will continue to be funded by guarantees from the Export Credit Insurance Corporation on advantageous terms compared with its normal practice for healthy companies. The financial projections take account of this expected State aid. The September joint restructuring plan did not reduce this exposure to additional State aid. On the contrary, the investor identified an additional potential liability of PLN 308 million linked to a tax dispute between Gdańsk Shipyard and the State. The investor expects the Treasury to guarantee payment of this liability if it materialises.

(310) The Commission notes that neither the June plan nor the September update contains a fully-fledged business plan for the production of steel structures. This is a serious deficiency, as this business should generate turnover of PLN 300 million at the end of the restructuring period, benefit from the new yard's considerable steel-processing capacity (increasing from 4 % in 2009 to 20 % in 2012) and should represent around 10 % of the new yard's sales.

(311) The September plan refers to an independent market study which seems to demonstrate that demand for steel structures in Poland and Europe as a whole will grow over the next few years. However, the study does not analyse how this growth could be exploited by the merged yard. The September plan, although more detailed on the steel structure business, does not analyse whether the production volume forecast for the new yard is realistic. On the contrary, it contains further indications that this these forecasts may be unrealistic.

(312) The current output of steel structures is 2 000 tons, while the target output is 56 000 tons. Compared with the June plan, the September plan envisages doubling output as early as 2010 (24 000 tons as against 12 000 tons in the June plan) and quadrupling output as of 2012 (56 000 tons as against 13 000 tons in the June plan). Huta Częstochowa, one of the largest steel producers in Poland, has an output of 100 000 tons of steel structures.

(313) ISD Polska lists Gdańsk Shipyard's existing contracts for steel structures, including one contract for oil-storage facilities for about 5 000 tons per annum in 2008 and 2009. Under the plan, output of this particular product would be 16 000 tons by 2010, rising to 36 000 tons in 2012.

([66]) For example, in 2014, the forecast net profit is PLN 93 million, of which PLN 55 million will have to be used to repay old public-law liabilities. The final year burdened with restructuring costs relating to past operations (accumulated public-law liabilities) is 2018, when PLN 45 million of extra cash flow will have to be generated for that purpose.

(314) No market analysis or forecast reports were submitted which would explain the profit forecasts for steel structures (9,5 % in 2010 and around 8 % afterwards). The Commission notes that, according to the Polish Statistical Office, profitability of the steel structures sector in Poland rose to 6 % in 2006 and remained at that level in 2007.

(315) On the basis of the information available, the Commission concludes that the steel construction business, which is to form an integral and significant part of the operation of the new yard, is not based on a credible analysis of the competitive position of the new yard. The market analysis does not demonstrate that the output forecast by the new yard is likely to be absorbed by demand on the market. The plan has not demonstrated that it is based on realistic assumptions for the steel structures segment.

(316) On the restructuring of contracting, the plan addresses two of the most significant external causes of the yard's current difficulties (increasing material costs and the appreciation in the zloty) by provided for the series of measures described above. The plan is based mainly on the assumption that it will be possible to incorporate indexation clauses into shipbuilding contracts, at least partially transferring the risks associated with currency fluctuations and the costs of materials to the shipowner. The plan has, however, not shown that such indexation clauses have been or would be accepted by shipowners. The September plan provided some additional information on that subject, in particular extracts from existing contracts of the two yards including indexation clauses of that type.

(317) The Commission has examined this evidence and notes that the contracts presented in the plan initially included indexation clauses whereby any increase in steel prices would be covered by the buyer, but these clauses were cancelled by a later addendum, and replaced by an arrangement whereby the shipyard and the buyer would jointly purchase materials and, on completion of this purchase, agree on an adjustment to the price. The arrangements for this price adjustment will be agreed in a later addendum. However, this addendum has not been submitted to the Commission.

(318) The Commission also notes that these contracts were concluded and renegotiated in a peak demand period (2005 and afterwards) in which flexibility on the part of the shipowners was a response to supply-side limitations. Whereas the Commission is aware that the practice of steel price indexation has recently developed in the shipbuilding industry, it should be noted that previously these clauses were not accepted, particularly in difficult times.

(319) On the basis of the available information, the Commission does not consider that the plan demonstrates that the yard will be able to conclude contracts with indexation clauses. The experience of Gdynia Shipyard in this respect, as described in the plan, is not conclusive in the Commission's view.

(320) The September plan, compared to the June draft, contains more detailed information on the intended hedging strategy to mitigate currency-related risks. However, the plan does not demonstrate that either of the two yards has used these instruments (including cost-free natural hedging), at least in recent years ([67]). Although the September plan quantifies the costs and effects of the proposed hedging policy, it does not show that the new yard would be able to obtain such hedging on the market. It is clear, on the other hand, that banks require investors to draw up a fully-fledged hedging strategy before deciding whether to offer hedging.

(321) Considering the relevance of this factor to the yard's activities, the plan does not address this issue convincingly. Indeed, the sensitivity analysis suggests that, despite the introduction of these risk-mitigating measures, allegedly factored in the financial projections, the latter remain sensitive to minor changes in the exchange rate, as will be described below. The Commission therefore has not been convinced that the intended hedging policy is sufficiently far-reaching to ensure the yard's long-term viability.

(322) On the employment restructuring front, the plan does not contain any analysis of rationalisation needs but simply states that the workforce will be reduced. The plan mentions, but again without further justification, that this reduction will entail costs of about PLN 69 million. The September plan quantifies the costs and effects of employment restructuring but does not explain or justify the basis on which these costs and effects were estimated. On that basis, the Commission cannot conclude that the plan identifies in detail the reasons for and the effects of redundancies and that the quantification of costs and effects is based on reliable assumptions.

(323) With regard to the financial projections, the Commission notes in particular the following weaknesses of the base scenario with which the financial model prepared by ISD Polska works, questioning the credibility of these projections.

([67]) The plan indicates that currency clauses were included in two contracts, but these have not been submitted.

(324) First, the September plan, compared to the June draft plan, assumes significantly higher sales prices for car carriers, one of the two main products of the new yard. The plan bases the projections for the first few years on existing contracts concluded by Gdynia Shipyard. However, it does not justify the projections for the following years and does not provide any external forecasts in that respect ([68]).

(325) Second, the assumption that wages will rise by some 4-6 % per annum during the restructuring period appears to be an underestimate in view of the serious lack of qualified staff, rotation and absenteeism and the wage competition that both yards have faced from yards abroad and in Poland. The September plan envisages even lower levels of wage growth than the June plan. The Commission notes that, from January 2007 to January 2008, the average gross salary in Poland increased by 11,5 % ([69]), and further increases are expected. Various sources, including those referred to in the September restructuring plan (such as the National Bank of Poland, the OECD, EC Economic Forecast Spring 2008, Goldman Sachs) forecast a significant surge in wages in Poland in the medium term and growing labour shortages. In any event, this is a factor that should have been taken into account in the sensitivity analysis.

(326) Third, the base scenario assumes costs of working capital guarantees of 1,5 %. This estimate is based on the assumption that full advance payment guarantees will be provided by the Export Credit Insurance Corporation and that these guarantees will be given at terms more favourable than Export Credit Insurance Corporation guarantees to other (healthy) companies. If the merged yards were to obtain similar guarantees on the market, as Poland claimed in its clarifications of 7 July 2008, the cost of capital would be considerably higher than assumed in the base scenario ([70]), with direct negative consequences for financial projections.

(327) Considering these assumptions, the plan does not provide sufficient assurances that the base scenario of the financial projections is realistic and achievable.

([68]) The plan makes reference to several external reports which are said to contain price forecasts for vessels of this type. The Commission notes that the reports submitted to it do not contain such forecasts.

([69]) Publication by the Polish Central Statistical Office of 15 February 2008.

([70]) The Export Credit Insurance Corporation charges 4,2 % of the guaranteed amount to companies with a higher risk of defaulting for the type of guarantees to be granted to the merged yard at a 1-2 % premium. The plan does not demonstrate that the yard would be able to obtain guarantees of similar magnitude and under similar conditions on the market.

(328) In addition, the sensitivity analysis does not show that the plan is sufficiently robust to withstand some of the principal risk factors associated with the yard's operation. The September revision of the plan does not show a convincing improvement.

(329) The sensitivity analysis shows that a 5 % depreciation in the US dollar against the zloty would cause a 35 % reduction in the 10-year accumulated net profit even if the base scenario took account of restructuring measures to mitigate the exchange-rate risk.

(330) A separate analysis attached to the September plan shows that a 5 % appreciation in the euro against the US dollar from 2013 to 2017 (i.e. after Poland is scheduled to adopt the euro) would cause a 44 % reduction in the 10-year accumulated net profit compared with the base scenario.

(331) The Commission notes that in the event of these two currencies appreciating (a one-off appreciation in the zloty in 2009 and a one-off appreciation in the euro in 2013) against the US dollar of 5 % compared with the base scenario, the 10-year accumulated profit would be reduced by 80 % as compared with the base scenario.

(332) The Commission concludes that the sensitivity analysis demonstrates that financial projections are sensitive to minor changes in the underlying assumptions, in particular concerning the exchange rate, which according to the plan itself is one of the major factors leading to the yard's current financial difficulties. The Commission cannot conclude on that basis that the joint restructuring plan is sufficiently robust to ensure the restoration of viability of the merged yards in the long-run.

Restructuring plan of PSC

(333) In many respects the plan contains serious deficiencies, leading the Commission to the conclusion that it does not demonstrate that viability will be restored within a reasonable time-frame. Serious inconsistencies in the restructuring plan raise significant doubts as to its viability and robustness. Contradictory assumptions are made as regards market strategy and the future production and capacity of the yard. What is more, there is no market analysis to justify the chosen strategy and show that the hypothetical portfolio would yield profits.

(334) As regards financial restructuring, the assumptions concerning the cost of capital, arrangements for financing production and the exchange rate show the following serious weaknesses. The plan assumes that exchange rates will be stable throughout the restructuring period at a more optimistic level than is currently the case (PLN 3,46/EUR and PLN 2,23/USD, against the current rates of PLN 3,32/EUR and PLN 2,12/USD). In addition, the assumption that the yard would manage to increase revenue by 30 %, obtaining an additional USD 100 million, by renegotiating existing contracts must be seen in the light of the fact that the yard has already made significant efforts to renegotiate existing contracts and that, as a result, many of these contracts have been cancelled. The plan does not substantiate the assumption that further renegotiation would be possible and therefore the Commission regards it as unrealistic.

(335) As for employment restructuring, the very fact that the investor proposes two options (either maintaining employment at the current level or reducing it by 650 employees) may suggest that it does not have a clear strategy for restoring viability to the yard. These alternative assumptions also call the financial projections into question, as it is not explained which level of employment served as a basis for the forecasts.

(336) The plan does not explain in detail how various restructuring measures, including investments and various cost-cutting measures, will influence the financial projections. In other words, it is not clear what the link is between the envisaged restructuring measures and the financial projections, in particular regarding production and overheads. For example, the plan does not show how the envisaged 25 % reduction in vessel production costs over a 5-year period could be achieved. The credibility of the projection is also undermined by contradictions concerning the planned level of investments. The Commission is therefore not convinced that the base scenario for the financial projections is credible and based on realistic assumptions.

(337) There is no analysis testing the sensitivity of these projections to risk factors such as market trends and changes in prices, costs of materials, exchange rates, wages etc. In the absence of a detailed description and justification of the assumptions underlying the financial projections, the financial model used for these projections and a sensitivity analysis, the Commission considers that the credibility of these projections and the robustness of the plan have not been demonstrated.

(338) Lastly, the Commission notes that the investor makes successful implementation of the restructuring plan contingent on the award of additional State aid.

(339) In the light of the above, the Commission takes the view that the ability of the June 2008 restructuring plan prepared by PSC to restore the yard's viability has not been demonstrated.

Conclusion

(340) In the absence of a realistic and far-reaching restructuring plan, the Commission concludes that the aid granted to Gdynia Shipyard described in recitals 209-232 is purely operating aid which is incompatible with the common market as restructuring aid.

(c) ***Aid limited to the strict minimum***

(341) Pursuant to point 43 of the Guidelines, aid must be limited to the strict minimum, i.e. the costs necessary to carry out restructuring. The recipient is expected to make a significant contribution to the financing of restructuring using its own resources or external financing at market rates. This contribution demonstrates the market's belief that the company's viability can be restored and it ensures that State aid is limited to the minimum necessary. In the case of large enterprises, such as Gdynia Shipyard, this contribution should amount to at least 50 % of the restructuring costs. The own contribution must be real, which excludes expected profits and cash flow (point 43 of the Guidelines).

(342) The Commission assessed whether the 2006 restructuring plan met this criterion and concluded that it did not, for two reasons. First, the plan was based on continuous state financing in the form of guarantees, capital injections and debt waivers and it did not demonstrate that this level of State aid was necessary to restore the yard to viability (in particular that alternative restructuring strategies requiring a lower level of State intervention could not be pursued). Second, the own contribution was very limited and the entry of an investor which could provide external financing at

market rates was merely a potential future event. The own contribution could have included measures such as participation in a share capital increase by the management, a debt-for-equity swap by private creditors and the sale of assets. Together these measures contributed some PLN 127 million to the restructuring of the company. Considering the substantial involvement of the State, however, even if these measures had been qualified as an own contribution within the meaning of the Guidelines, this contribution would not have been significant.

(343) The Commission also looked at the situation in the yard over the last few years in isolation from the 2006 restructuring plan, which, after all, had not been implemented.

(344) First, the above description of the situation at Gdynia Shipyard shows that the yard has not been able to attract virtually any external financing for its restructuring. There are few signs of external participation under market conditions in the yard's activities.

(345) The yard has managed to negotiate some restructuring of its commercial liabilities, in particular in the restructuring agreement concluded in July 2003 ([71]), which concerned liabilities of some PLN 424 million and the debt-for-equity swap by commercial creditors of some PLN 70 million. At the same time, however, Gdynia Shipyard faces numerous enforcement proceedings and litigations. The Commission also notes that the value of accumulated public-law liabilities as at 30 September 2007 was PLN 423 million. The Commission takes the view that the 2003 restructuring agreement could be considered as an own contribution only if the creditors involved accepted a longer than normal deadline for repayment; in that case additional resources could be made available to the company for restructuring and the extension of the deadline for repayment would constitute a sign that the market regarded it as feasible that the yard would be restored to viability. The same applies to the debt-for-equity swap. However, even if the restructuring agreement were considered as constituting an own contribution, the Commission observes that this contribution would clearly not be sufficient within the meaning of the Guidelines. The level of restructured commercial liabilities is equal to that of unenforced public-law liabilities. Clearly, the yard would have to bear restructuring costs other than the costs of debt restructuring.

([71]) Some 470 commercial creditors, probably including publicly-owned utilities, agreed to write off interest and other costs and reschedule their receivables over a period ranging from 2 to 4 years. The agreement concerned liabilities of about PLN 424 million.

(346) Poland and the recipient argued after the formal investigation was opened that advance payments from shipowners should be treated as own contributions. The Commission cannot accept this argument. The Guidelines state that the own contribution must not contain any aid, which is not the case, for instance, where a loan is backed by government guarantees containing elements of aid (footnote 1 to point 44 of the Guidelines). The advance payments were backed in full by guarantees from the Export Credit Insurance Corporation which, as explained above, the Commission regards as constituting State aid. Advance payments from shipowners therefore cannot be considered as external financing at market rates. It follows that Poland's initial claim that aid intensity equalled 31 %, based on the assumption that advance payments covered by guarantees from the Export Credit Insurance Corporation constituted an own contribution, cannot be accepted.

(347) The Commission also notes that Ray Car Carriers entered the shareholding structure of Gdynia Shipyard by way of a debt-for-equity swap and therefore did not contribute to the restructuring costs.

Joint restructuring plan prepared by ISD

(348) When considering the expected restructuring costs of PLN 3 billion and comparing them with the expected sources of financing, the Commission notes a financing gap in the plan as shown by Table 5 below. Naturally, the working capital loans of PLN 280 (item 14 of Table 1b) and PLN 45 million (item 16 of Table 1b), as well as working capital loans from the State of PLN 250-350 million are not included here because they are earmarked to finance working capital, which was not included in restructuring costs. The same applies to the Industrial Development Agency capital injection (PLN 200 million). The outstanding payment for the Industrial Development Agency shares in Gdańsk Shipyard (item 17 of Table 1b) cannot be considered as a financing source for restructuring the new yard as it is a payment to the Industrial Development Agency, not to the yard.

Table 5

Expected financing sources for anticipated restructuring costs

(PLN million)

Capital injection by ISD Polska	405
Investment loan	185
Sale of assets	240
Capital injection by the State	515
Capital injection by the State	385
Capital injection by the State	250
Write-off of tax liabilities	308
Total	2 288
Total expected restructuring costs	3 000
Financing gap	712

(349) In the light of this financing gap, the Commission concludes that the joint restructuring plan does not secure the financing of the restructuring. In other words, the plan does not show how the planned restructuring could effectively be implemented, even if substantial additional State aid were granted to the yard.

(350) The September joint restructuring plan identifies certain items of revenue in the past as own contributions of Gdynia Shipyard and Gdańsk Shipyard to their restructuring (Table 1b 'Alleged own contribution realised in the past'). Although some of this revenue (e.g. some of the assets sales) could have been qualified as own contributions within the meaning of the Guidelines (real, actual and free of State aid), the Commission considers, in view of the precarious financial situation of the two yards, that this additional revenue was used to reduce losses and could not have been used for genuine restructuring. Even if the yard were able to implement some restructuring measures (such as minor investments) thanks to, for example, divestiture of assets, the Commission considers that any such revenues would not qualify as free of State aid, because the restructuring and functioning of the yards was possible only by virtue of continuous accumulation of public-law debt, the possibility of continuing loss-making economic activities and ongoing State support.

(351) In any case, considering the financial situation of the yard it is clear that any past revenue from the yard's own resources or external sources have been used to fund the operations of the yard in the past.

(352) In addition, the Commission cannot accept the following items of the alleged planned own contribution.

(353) First, as mentioned above, the working capital loans of PLN 280 million (item 14 of Table 1b) were not earmarked to cover any of the expected restructuring costs described above but were specifically intended to finance working capital for ongoing production. In addition, these loans cannot be considered as real and actual, but rather as potential and remote in time. The same applies to the working capital loan of PLN 45 million for non-shipbuilding production (item 16 of Table 1b).

(354) Second, the investment loan of PLN 185 million for non-shipbuilding production (item 15 of Table 1b) cannot be regarded at this stage as real and accessible. Poland explained in its clarifications of 7 July 2008 that ISD Polska was in talks with several banks with a view to obtaining this loan. The Commission examined two expressions of interest submitted with the September restructuring plan.

(355) On that basis, the Commission cannot conclude that the plan has demonstrated that the investment loan is real and actual. The plan only showed that ISD Polska was conducting talks with two banks, one of which seemed to be interested in analysing the project. The fact that ISD Polska started work on this project at the beginning of 2007, when it acquired a stake in Gdańsk Shipyard, and has so far failed to secure financing for that purpose is a significant indication.

(356) Third, the Commission notes that the September plan indicates the individual components of the asset sale with a view to generating an own contribution of PLN 240 million (item 13 of Table 1b).

(357) In addition, neither ISD Polska nor Gdynia Shipyard currently has the right to dispose of the principal component of these assets (the land on which the slipways at Gdańsk Shipyard are located). At present there are clear obstacles of a legal nature (the need for Gdynia Shipyard to acquire ownership rights to this land, which is fundamentally linked to the dissolution of Synergia 99, in which Gdynia Shipyard is just one of the shareholders; administrative proceedings on the boundaries of the Gdańsk port) and of a practical nature (the land could be sold only after the three slipways had been disassembled and probably only after the site had been cleaned) that prevent Gdynia Shipyard and ISD Polska from selling these assets. In addition, as explained by the investor, the estimated high revenue from the land sale can be achieved only once a change in the conditions for planning permission has been secured ([72]). The September plan shows that Synergia 99 as the current owner of this plot has not yet taken administrative action to exclude this land from the port area. Although the September plan explains the components of the Synergia 99 project in detail, its actual implementation remains conditional on various events beyond the control of Gdynia Shipyard or ISD Polska, in particular on changes to the boundaries of the port area. The Commission therefore cannot regard this alleged own contribution as real and actual.

(358) ISD has provided an independent evaluation of the land on which the three slipways are located (PLN […] million).

(359) The Commission notes that the assets of Synergia 99 have been evaluated at PLN […] million by the Board of that company. Since the Board issued a statement to that effect for the purpose of concluding a shareholder agreement on the arrangements for dividing the assets in the event of Synergia 99 being wound up, it can be assumed that the Board did not underestimate the value of those assets. An independent expertise commissioned by the Board at the time estimated the market value of the land in question at PLN […] million

(360) In view of the large differences between the two evaluations, reflecting differing assumptions as to the future use of the land, the Commission regards the assumption that the land will be used for upmarket development as optimistic and, in the absence of any specific bids to purchase the land or a more tangible indication of plans to regenerate the area, rather unrealistic. The Commission takes the view that the potential revenue from the sale of the land for industrial or development use should also be estimated, in so far as either scenario is realistic.

(361) The Commission also notes that the estimated investment value of the land on which the slipways are located (PLN […] million) was not reflected in the price paid by ISD for shares in Gdynia Shipyard. According to the September restructuring plan, at end-2007 the net asset value of Gdynia Shipyard amounted to PLN ([…] significant negative value) million. Since that time, the Treasury has implemented capital injections of PLN 515 million and PLN 385 million; further capitalisation of PLN 200 million is planned. If all the other items of the balance sheet remain unchanged ([73]), the yard's net asset value following these capital injections will amount to PLN ([…] positive value) million, while ISD Polska will pay a symbolic price for the shares in Gdynia Shipyard. If the market value of the land on which the slipways are located were properly reflected in the balance sheet, the net asset value would be even higher. In other words, ISD Polska would buy the Gdynia Shipyard shares at a price below their market value, thus receiving State aid. The Commission therefore considers that these assets are 'contaminated' by State aid awarded during the privatisation process and that their sale cannot be regarded as an own contribution free of State aid.

(362) With regard to other the assets earmarked for sale currently on the balance sheet of Gdynia Shipyard or Gdańsk Shipyard, the Commission accepts, on the basis of the information available, the sale or rental of some assets as an actual, real own contribution, if an

([72]) Meeting with ISD Polska on 8 July 2008.

([73]) In the event of a further reduction of the net asset value in 2008 as a result of losses (as compared with PLN 927 million at end-2007), the plan envisages that this will be covered by the Treasury (capital injection of up to PLN 250 million).

evaluation has been provided and substantiated and the sale or rental is based on existing agreements (sale of shares in Euromedicus, sale of shares in Polskie Linie Lotnicze, rental agreements with Eurocynk and with CRIST). These agreements represent an amount of around PLN […] million.

(363) Lastly, in line with established practice ([74]), the Commission takes the view that future cash-flow cannot be considered as an own contribution within the meaning of the Guidelines because it does not represent a real and actual contribution by the company or its shareholders to restructuring costs.

(364) It follows that the only items that can be considered as own contributions are the capital injections to be effected by ISD Polska of PLN 405 million in total and the proceeds from the sale and rental of some assets (PLN 14 million). This own contribution corresponds to 14 % ([75]) of the expected restructuring costs of PLN 3 billion. If the Commission were to accept the proposal of the Polish authorities presented at the meeting of 30 September 2008 to assess the level of the own contribution by way of comparison with the restructuring costs incurred in the yards as of the point in time at which the investors assumed control over the yards, the outcome would be the same (restructuring costs of PLN 3,065 billion with an actual and real own contribution of PLN 419 million i.e. 14 %).

(365) This should be considered in the light of the expected award of additional State aid, which is the basic assumption of the plan: additional capital injection by the State of PLN 1,6 billion (PLN 1,14 billion implemented in June 2008 and PLN 418 million outstanding) and further rescheduling of accumulated public-law liabilities with a nominal value of PLN 496,6 million for 2009-2017. It should be noted that the plan assumes that shipbuilding operations will continue to be dependent on financing by way of advance payment guarantees provided by the Export Credit Insurance Corporation at advantageous terms, this having been incorporated into the financial model of the merged shipyards. The merged yards expect to receive new guarantees by end-2008. In following years too, at least until the end of the restructuring period in 2012, Export Credit Insurance Corporation guarantees should cover the shipbuilding process virtually in full.

(366) In addition, the Commission has to take into account the whole restructuring period, starting from 2002. Considering the substantial State aid which the yard has benefited from in this period, the own contribution as a percentage of restructuring costs is even lower. It is therefore obvious that the own contribution does not even remotely reach the threshold of 50 % of restructuring costs required by the Guidelines.

Restructuring plan of PSC

(367) Although the investor envisages a capital injection of PLN 500 million to partially finance the investment programme, he has also requested an additional capital injection from the State of PLN 515 million in total, rescheduling of public-law debt in an amount of PLN 560 million and coverage of any potential future liabilities of the yard, estimated at PLN 555 million (future losses, penalties for cancelling contracts, litigation). In addition, the plan lists all the other liabilities of the yard in a total amount of PLN 948 million (commercial liabilities vis-à-vis suppliers, shipowners, etc.) and assumes that they will be covered by the State. Lastly, the investor requests additional guarantees from the Export Credit Insurance Corporation at an advantageous premium compared with its normal practice for healthy companies to finance working capital and Treasury guarantees for bridging loans in an amount of PLN 397 million.

(368) The restructuring costs that can be identified on the basis of the limited information contained in the plan cover, at the minimum, accumulated liabilities (accumulated liabilities and loans totalling PLN 1 508 million), expected losses on existing shipbuilding contracts and litigations (PLN 555 million) and investment needs envisaged for the period 2008-2018 (PLN 443 million).

(369) Most of these costs are to be covered by State aid. The proposed own contribution is a capital injection by the investor of PLN 500 million. The Commission notes that no information was submitted on the investor's ability to provide such a capital injection. According to the

([74]) See point 43 of the Guidelines.

([75]) The Commission notes that even if it were to take into account the own contribution form the past (which could be considered as an own contribution within the meaning of the Guidelines) and the respective restructuring costs from the past, the level of own contribution would be equivalent to only 16,5 %.

preliminary offer by PSC, the funds to finance the injection were supposed to be acquired from a third party, a financial investor. In the absence of any proof that the investor is able to provide capital of PLN 500 million, the Commission considers that this measure cannot be regarded as actual and real. In addition, the plan assumes that revenue from the sale of assets generated in the period after accession and revenue from the planned sale of assets to a total amount of PLN 174,5 million should also be regarded as an own contribution within the meaning of the Guidelines. Again, it has not been demonstrated that past transactions were free of State aid and that assumptions concerning planned revenue are realistic. This contradiction concerning the own contribution declared by the investor raises further doubts as to the credibility of assumptions in this respect. Accordingly, the Commission concludes that the plan does not show that the proposed own contribution is significant, actual, real and free of State aid.

(370) The Commission notes that even if the proposed measures (capital injection of PLN 500 million and past and future sales of assets) had been regarded as constituting own contributions, they would correspond to 27 % of the restructuring costs as shown above. In addition, the Commission has to take into account the whole restructuring period, starting from 2002. Considering the substantial State aid which the yard has benefited from in this period, the own contribution as a percentage of total restructuring costs is even lower. It is therefore obvious that the own contribution does not even remotely reach the threshold of 50 % of restructuring costs required by the Guidelines.

(371) On that basis, the Commission takes the view that the yard has not obtained practically any own contribution within the meaning of the Guidelines in the past, and, in so far as it has done so, that contribution is not significant. Moreover, the restructuring plan submitted by the Polish Shipbuilding Company does not ensure a sufficient level of own contribution. As the purpose of an own contribution is to keep State aid to the minimum, in the absence of an own contribution the Commission must conclude that the requirement to limit aid to the minimum necessary has not been met. On the contrary, the restructuring plan of PSC is based on the assumption that additional State aid is awarded, and it concludes that implementation depends on this additional State aid.

Conclusion

(372) On the basis of the foregoing, the Commission concludes that in the past the yard has not obtained practically any own contribution within the meaning of the Guidelines, i.e. which is real, actual and free of State aid. Nor do the joint restructuring plan and the plan presented by PSC ensure a sufficient level of own contribution. As the purpose of an own contribution is to keep State aid to the minimum, in the absence of an own contribution the Commission must conclude that the requirement to limit aid to the minimum necessary has not been met. However, both restructuring plans are based on the assumption that additional State aid is awarded. Overall, there is disproportionate financing of the restructuring by State aid, resulting in undue distortions of competition.

(373) Under the Guidelines, the aid must not provide the company with surplus cash, which could be used for aggressive, market-distorting activities not linked to the restructuring process. While the yard has not been provided with surplus cash, thanks to State guarantees it has benefited from access to working capital that was not available to it on the market. As a result, the yard was able not only to continue operating and fill its order books but also to conclude contracts without having to bear the costs of mitigating the risks associated with changing prices for materials and exchange-rate fluctuations. In other words, the yard was able to use State aid for market-distortive activities not linked to the restructuring process by accepting orders at prices which did not cover the costs incurred. This reinforces the Commission's opinion that State aid was not limited to the minimum necessary for the survival of the yard.

(374) Lastly, the Commission recalls that State aid to companies in difficulty should be used to finance restructuring. Operating aid can be allowed only in as far as is necessary to keep the company afloat pending implementation of far-reaching restructuring. In the case in point, however, genuine restructuring efforts bringing long-term effects have been limited. The State aid mainly ensured that the yard was kept afloat and thus constituted mere operating aid. As such, this aid cannot be considered to have been limited to the strict minimum necessary to enable restructuring to be undertaken.

(375) In the light of the above, the Commission concludes that the requirement that aid be limited to the minimum and be accompanied by a real and significant contribution free of State aid has not been met.

(d) ***Avoidance of undue distortion of competition***

(376) The Commission recalls the preliminary agreement with Poland on the closure of SD I dock. However, in the light of further developments following this agreement and the above conclusions on the first two conditions of the Guidelines, there is no need to assess whether the countervailing measures proposed by Poland were sufficient.

(e) ***Conclusion***

(377) Since the criteria prescribed in the Guidelines for aid to be found compatible with the common market have not been met, the Commission concludes that the measures listed in recitals 209-232 are not compatible with the common market as restructuring aid.

C. OTHER AID

(378) In its submission of 11 July 2007, Poland stated that Gdynia Shipyard had received aid 'other than restructuring aid'. This aid is listed in Table 4.

(379) The Commission recalls that, given that its very existence is in danger, a firm in difficulty cannot be considered as an appropriate vehicle to promote public policy objectives until such time as its viability is assured (point 20 of the Guidelines). Any aid granted to an undertaking in difficulty during the restructuring period, unless it is covered by the exemption regulations, must be notified as aid for restructuring (point 69 of the Guidelines).

(380) Poland has not provided any evidence that the aid referred to in Table 4 above is covered by the exemption regulations.

(381) The Commission concludes that these measures, too, are covered by the present decision and constitute illegal and incompatible restructuring aid.

IV. **CONCLUSION**

(382) The Commission finds that Poland has unlawfully granted the State aid described in recitals 209-232 in favour of Gdynia Shipyard in breach of Article 88(3) of the EC Treaty. This aid is not compatible with the common market under any derogation laid down in the EC Treaty.

(383) To restore the status ex ante, the State aid has to be recovered.

V. **IMPLEMENTATION**

(384) The aid component of the measures granted to Gdynia Shipyard presented in recitals 209-158 of the decision must be recovered. In general, the aid component to be recovered, i.e. the advantage received by the recipient, is equal to the difference between the terms that the recipients could obtain on the market and the terms of the measure granted.

(385) The reference and discount rates announced by the Commission are applied as a proxy for the market rate to measure the aid component, in particular when aid is disbursed in several instalments, and to calculate the aid component resulting from interest subsidy schemes ([76]). In the case of companies in difficulty, such as Gdynia Shipyard, the Commission considers that the reference rate should be increased by at least 400 basis points in order to reflect the high risk involved in the transaction and, additionally, by 200 basis points to reflect the lack of or poor collateral offered by the recipient. As explained above, the value of the collateral provided by the yard is questionable in view of the company's debt/asset ratio. When a company in difficulty cannot obtain any financing on the market, the aid component may be equivalent to as much as 100 % of the nominal value of the funds received ([77]).

(386) In the Commission's view, in the period in which Gdynia Shipyard received the aid referred to in recitals 209-232, it was in serious financial difficulties (as described in recitals 62-66) and was not able to acquire any financing on the market. The yard had negative equity, continued to make losses and did not obtain virtually any financing from the market during the period under review. In such circumstances a market economy operator would not be willing to provide the yard with any financing in view of the inherent high risk.

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

([77]) See for example the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (2000/C 71/07) (OJ C 71, 11.3.2000, p. 14). In point 3.2 the notice says that if, at the time the loan is granted, there is a strong probability that the borrower will default, e.g. because he is in financial difficulty, the value of the guarantee may be as high as the amount effectively covered by the guarantee.

Consequently, the Commission considers that no bank would have agreed to lend to the yard, even at high interest rates, and no bank would have agreed to award a guarantee, even for a high fee.

Calculation of aid component for individual categories of measure

Loans

(387) Since Gdynia Shipyard could not have obtained a loan or guarantee on the market, any loan or guarantee granted to it during the period under review automatically constitutes aid. Accordingly, any guarantee still outstanding has to be terminated immediately, and any loans must be immediately reimbursed.

(388) The reimbursement of any loans granted to the yard is, however, not sufficient to restore the initial situation since until the reimbursement date the yard has had financing at its disposal that it could not normally have obtained from the market. In order to restore the initial situation, an amount should therefore also be recovered which is equivalent to the value of this advantage, the size of which can be approximated only on the basis of the interest rate charged on very risky loans. Therefore the Commission must order the recovery of the difference between the interest rate actually paid by Gdynia Shipyard and a theoretically adequate interest rate for a very high risk loan from the point in time when the loan was granted to the yard until reimbursement by the yard. In connection with the need to determine the interest rate for a very high risk loan, the Commission notice on the method for setting the reference and discount rates indicates that the risk premium may be higher than 400 basis points above the reference rate 'if no private bank would have agreed to grant the relevant loan', which is the situation in this case. In several decisions the Commission took the view that a premium of 600 basis points above the reference rate was an adequate minimum to reflect a high risk situation ([78]). The Commission considers that this is the minimum for loans in the present situation.

Securities

(389) The Commission will take the same approach to guarantees: it must order the recovery of the grant aid equivalent contained in the guarantee from the time of disbursement of the guaranteed loan until termination of the guarantee.

([78]) Recital 68 of Commission Decision of 16 June 2004 on the measures implemented by Spain for Siderúrgica Añón SA (OJ L 311, 26.11.2005, p. 22); Recital 42 of Commission Decision of 11 December 2002 on the State aid implemented by Spain for Sniace SA (OJ L 108, 30.4.2003, p. 35).

(390) As explained in the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees ([79]), the Commission's view is that the grant aid equivalent is equal to either the interest subsidy obtained by virtue of the guarantee (when the guarantee covers a loan granted at a rate below the market rate) or to the amount resulting from the risk factor on the guaranteed sum, minus the premium paid for the guarantee.

(391) In the event of it not being possible to calculate the aid component using these rules, the Commission would consider it appropriate to calculate the difference between the guarantee premium that would be charged on the market and the premium paid by the recipient. The Commission considers that the difference calculated in this way constitutes the aid component of the guarantee. In the Commission's opinion, the premium charged for the free-of-State aid scheme on the basis of which the Export Credit Insurance Corporation runs its programme of export insurance guaranteed by the Treasury, endorsed by the Commission decision of 18 July 2007, could serve as the reference premium for the aforementioned calculation. Again, this premium would need to be increased by at least 400 basis points to reflect the fact that the yard was not eligible for guarantees under the scheme. As such, the guarantees given to the yard involved a considerably higher risk.

(392) As explained above, given that the yard would not be able to acquire any guarantees on the market owing to its precarious financial situation, in order to stop the distortion of competition created by the aid the outstanding guarantees must be terminated immediately.

Advance payment guarantees

(393) In the case of guarantees for advance payments, the Commission notes that advance payments guaranteed by the Export Credit Insurance Corporation are a type of sale contract, not a loan contract, and that no interest is charged on advance payments. Therefore the Commission considers that, in order to calculate the

([79]) Ibidem.

aid component received by the recipient, a comparison should be envisaged between the premium paid by the yard and the premium which would normally be charged on the market. Again, the free-of-State aid scheme used by the Export Credit Insurance Corporation may serve as a reference reflecting the fees charged on the market, and such reference fees should be increased to reflect the additional risk involved when granting aid to a company in financial difficulty.

(394) As is the case for the other guarantees received by the yard and for the same reasons, the Commission notes that any existing Export Credit Insurance Corporation guarantees should be terminated immediately.

Non-enforcement of debts

(395) Continuous non-enforcement of debts by public authorities also constitutes State aid and must be taken into account ([80]). It is similar to a revolving loan granted on preferential conditions and therefore the aid component corresponds to the difference between the interest that would be charged by the market (for a company with a similar rating in a similar financial and economic situation and with similar collateral) and the interest charged by the awarding authority.

(396) In view of the yard's continuing precarious financial situation, the Commission is of the opinion that a market economy creditor would enforce its receivables immediately when they fell due. Therefore the fact that the Polish authorities did not undertake enforcement measures immediately constituted aid and thus the maturity date of any unrepaid liability would be the date on which the aid was made available. The aid component would be equal to the difference between the interest that would be charged on the market (for a company with a similar rating in a similar financial and economic situation and with similar collateral) and the interest charged by the awarding authority.

(397) As any market economy operator would require immediate repayment of debts by the yard, not only the aid component resulting from the insufficient interest charged must be repaid but, in addition, accumulated liabilities must be repaid immediately.

Cancellation of debt

(398) Any cancellation of debt is equivalent to a non-repayable grant and the whole part of the debt that has been written off therefore constitutes aid.

Public-law debts restructured under Chapter 5a

(399) Under the Act of 30 October 2002, public liabilities restructured under Chapter 5a are transferred to the Operator, a company fully owned by the Industrial Development Agency, together with asset components which should be worth at least 25 % of the restructured liabilities. The Operator should then sell these assets and use the revenue thus obtained to repay part of the public-law liabilities. The remainder of these liabilities is then written off by the competent authorities. The Commission therefore considers that the State aid component of this transaction is equal to the value of the public-law liabilities transferred to the Operator, minus the actual value of the assets transferred. According to the Act of 30 October 2002, this would mean that the aid component is equivalent to 75 % of the transferred liabilities at most. However if the value of the assets is higher or lower than the 25 % required by law, the aid component needs to be calculated accordingly.

Capital injection

(400) The Commission notes that capital injections by the State or State-controlled bodies such as the Industrial Development Agency and KPS into companies in difficulty, where no return can be expected are regarded as non-repayable grants ([81]). To undo the distortion of competition caused by the capital injection, the yard would have to repay the full amount of the capital injected.

Implementing arrangements

(401) By letter of 3 November 2008, Poland undertook to implement this decision by way of a sale of assets at the market price through an open, transparent, unconditional and non-discriminatory tender (conducted in accordance with the specific conditions first set out in the Commission's letter of 27 October 2008), and the subsequent liquidation of Gdynia Shipyard. All recovery claims resulting from the present decision must be registered by Poland without delay within the

([80]) See for example the Commission decision of 23 October 2007 on State aid C 23/06 which Poland has implemented for steel producer Technologie Buczek Group (not yet published).

([81]) See for example Commission decision of 20 October 2004 on the State aid C 38/03 implemented by Spain (further restructuring aid to the public Spanish shipyards) (OJ L 240, 16.9.2005, p. 45).

framework of the liquidation of Gdynia Shipyard. By letter of 6 November 2008 the Commission informed Poland that, provided these conditions were met, the sale of assets would not involve new aid to the buyer(s) and the assets could be transferred to the buyer(s) free of any liability resulting from the repayment of the unlawful and incompatible State aid granted to the yards in the past in accordance with the requirement to avoid economic continuity between the aid recipients and the buyers' activity ([82]). The Commission will closely monitor whether the conditions set out in its letter of 27 October 2008 and accepted by the Polish authorities are met in order to determine whether this decision was implemented correctly.

(402) These conditions, which Poland has explicitly undertaken to comply with, are summarised as follows.

(403) The assets (without liabilities) will be privatised by way of an open, transparent, non-discriminatory and unconditional tender. Gdynia Shipyard, together with any remaining assets and liabilities, will be liquidated.

(404) The assets must be sold at the market price (to the highest bidder). Asset components must be put up for sale separately or in a large number of small bundles defined in order to maximise the sale. These bundles must not consist of organised parts of a company or business. However, this definition of the bundles should not prevent potential buyers from presenting a joint bid for several components/bundles.

(405) The tender must be non-discriminatory, i.e. it must ensure that the sale is open to all profiles of potential buyer, without any discrimination as to the purpose of their investment.

(406) No conditions may be attached to the tender (such as maintaining employment or the activity, or the takeover of existing contracts). (The sole criterion for selecting the winning bid should be to maximise revenue for the benefit of the yard's creditors).

(407) The yard's creditors, public and private, including the yard's clients, should have the same ranking and rights as regards the proceeds from the sale of assets that they would have in a bankruptcy procedure.

(408) No new State aid will be granted in the context of the sale, be it in the form of a write-off, State-funded repayment of public-law liabilities or repayment of private creditors, capital injections, loans, guarantees or other measures. Any new public-law liabilities accumulated during the period necessary to complete the sale procedure should be claimed back from the liquidation mass.

(409) The sale will be conducted by an independent administrator, with similar rights and obligations to a bankruptcy receiver. A structure must be created permitting creditors to effectively supervise the sale and ensure that it is conducted on market terms and that their ranking and rights as regards the proceeds are respected. In addition, Poland and the Commission will jointly appoint a monitoring trustee with the specific task of helping the Commission to verify that the sale process and recovery of the aid take place in full compliance with the requirements indicated above. For that purpose, the monitoring trustee will submit regular, detailed reports to the Commission on the different stages of the procedure.

(410) Poland has indicated that it will need to take legislative action to implement the present decision. The Commission recognises that a longer implementation period than normal is therefore warranted, also in view of the number of individual aid measures concerned by this decision and the diversity in terms of their form and duration. The Commission therefore calls on Poland to implement the present decision within 7 months of receiving it,

([82]) See Case C-277/00 *Germany* v *Commission* [2004] ECR I-3925 and Case C-328/99 and C-399/00 *Italy and SMI 2 Multimedia Spa* v *Commission* [2003] ECR I-4035.

HAS ADOPTED THIS DECISION:

Article 1

The State aid described in recitals 209-232 of this decision and awarded by Poland in breach of Article 88(3) of the EC Treaty in favour of Gdynia Shipyard is incompatible with the common market.

Additionally, any advance payment guarantees granted by Poland in breach of Article 88(3) of the EC Treaty in favour of Gdynia Shipyard as of 1 July 2007 until the date of this decision are incompatible with the common market.

Article 2

With regard to the loans obtained from various public bodies referred to in recitals 209-232 of this decision, Poland shall recover aid in an amount equivalent to the difference between the interest rate actually paid by Gdynia Shipyard and the interest rate at which the recipient could have obtained the loan on the market for the period between the point in time when the said loans were granted and the point in time when they were repaid. In addition, if any loan is still outstanding by the time of this decision, it shall be repaid immediately.

Article 3

With regard to the guarantees obtained from the Treasury described in recitals 209-232 of this decision, Poland shall recover aid equal to the difference, for the period between the time when the aid was awarded and the time when the guarantee expired, between the interest rate actually paid by Gdynia Shipyard for the loan secured by virtue of the State guarantee and the interest rate at which the recipient could have obtained the loan on the market, equal to the amount guaranteed multiplied by the risk factor (probability of default), less the guarantee premium paid or equal to the difference between the guarantee premium paid by the recipient and the guarantee premium at which the recipient could have obtained the guarantee on the market. In addition, if any of these guarantees is open at the moment when this decision is taken, it shall be terminated immediately.

Article 4

With regard to the advance payment guarantees granted by the Export Credit Insurance Corporation described in recitals 209-232 of this decision, Poland shall recover aid equal to the difference, for the period between the time when the aid was awarded and the time when the guarantee expired, between the guarantee premium paid by the recipient and the guarantee premium at which the recipient could have obtained the guarantee on the market. In addition, if any of these guarantees is open at the moment when this decision is taken, it shall be terminated immediately.

Article 5

Articles 3 and 4 also apply *mutatis mutandis* to any advance payment guarantees granted by Poland in breach of Article 88(3) of the EC Treaty in favour of Gdynia Shipyard from 1 July 2007 to the date of this decision.

Article 6

With regard to non-enforced liabilities vis-à-vis various public bodies as described in recitals 209-232 of this decision, Poland shall recover aid equal to the difference, for the period between the time when the aid was awarded and the public-law liability was repaid, between the interest rate actually paid by Gdynia Shipyard and the interest rate at which the recipient could have obtained a deferment of maturity of its liabilities from a market economy creditor. In addition, any outstanding public-law liabilities shall be repaid immediately.

Article 7

With regard to write-offs of debt vis-à-vis public bodies as described in recitals 209-232 of this decision, Poland shall recover aid equal to the amount of the write-off.

Article 8

With regard to public-law liabilities restructured under the Act of 30 October 2002 on State aid to enterprises of special significance for the labour market, as amended, as described in recitals 209-232 of this decision, Poland shall recover aid equal to the amount of the public-law liability transferred to the Operator, less the actual value of the recipient's assets transferred to the Operator.

Article 9

With regard to capital injections from various public bodies as described in recitals 209-232 of this decision, Poland shall recover aid equal to the full amount of the capital injected.

Article 10

With regard to direct grants as described in Table 4, recitals 209-232 of this decision, Poland shall recover aid equal to the full amount of the grants.

Article 11

1. Poland shall recover the aid defined in the foregoing articles from the recipient. Recovery shall take place in accordance with the guidelines set out in recitals 384-401 of this decision.

2. The amounts to be recovered shall bear interest from the day on which they were made available to Gdynia Shipyard until their actual recovery.

3. Interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ([83]) and of Commission Regulation (EC) No 271/2008 ([84]) amending Regulation (EC) No 794/2004.

4. Poland shall cancel all outstanding payments of the aid referred to in Article 1 with effect from the date of adoption of this decision.

Article 12

1. Recovery of the aid referred to in Article 1 shall be immediate and effective.

2. Poland shall ensure that this Decision is implemented within 7 months of the date of notification of this Decision.

Article 13

1. Within 2 months of notification of this Decision, Poland shall submit the following information to the Commission:

(a) the total amount (principal and interest) to be recovered from the recipient;

(b) a detailed description of the measures already taken and planned to comply with this Decision;

(c) documents demonstrating that the recipient has been ordered to repay the aid;

(d) documents demonstrating that all advance payment guarantees have been terminated.

2. Poland shall keep the Commission informed of progress with the national measures taken to implement this Decision until all the aid referred to in Article 1 has been recovered. It shall immediately submit, at the request of the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information on the amounts of aid and interest already recovered from the recipient.

This Decision is addressed to Poland.

Done at Brussels, 6 November 2008.

For the Commission

Neelie KROES

Member of the Commission

([83]) OJ L 140, 30.4.2004, p. 1.
([84]) OJ L 82, 25.3.2008, p. 1.

ANNEX

INFORMATION REGARDING THE IMPLEMENTATION OF THE PRESENT DECISION

1. **Calculation of the amount to be recovered**

1.1. Please provide the following details on the amount of unlawful State aid that has been made available to the recipient:

Date(s) (*)	Amount of aid (**)	Currency

(*) Date(s) on which (individual instalments of) the aid was made available to the recipient.
(**) Amount of aid made available to the recipient (gross aid equivalent).

Comments:

1.2. Please explain in detail how the interest payable on the amount of aid to be recovered will be calculated.

2. **Measures planned and already taken to recover the aid**

2.1. Please describe in detail what measures are planned and what measures have already been taken to ensure the immediate and effective recovery of the aid. Please also indicate, where relevant, the legal basis for the measures taken/planned.

2.2. What is the timetable for the recovery process? When will recovery of the aid be completed?

3. **Aid already recovered**

3.1. Please provide the following details on the amounts of aid that have been recovered from the recipient:

Date(s) (*)	Amount of aid repaid	Currency

(*) Date(s) on which the aid was repaid.

3.2. Please attach proof of repayment of the aid amounts specified in the table under point 3.1 above.