DECISIONS

COMMISSION DECISION

of 6 July 2010

on measure C 48/07 (ex NN 60/07) implemented by Poland for WRJ and WRJ-Serwis

(notified under document C(2010) 4476)

(Only the Polish text is authentic)

(Text with EEA relevance)

(2010/612/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

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

Having regard to Protocol No 8 of the Accession Treaty on the restructuring of the Polish steel industry [1],

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

Whereas:

1. PROCEDURE

(1) The Commission was made aware of irregularities in the Polish steel tubes sector during monitoring of the restructuring of the Polish steel industry. After the accession of Poland to the EU, checks were carried out *ex officio* on aid to Walcownia Rur Jedność Sp. z.o.o. ('WRJ') and WRJ-Serwis Sp. z.o.o. ('WRJ-Serwis'). The Commission requested information from the Polish authorities by letters dated 6 April 2005, 4 August 2005, 3 November 2005, 4 May 2006, 17 November 2006 and 11 July 2007. The Polish authorities replied by letters dated 7 June 2005, 29 September 2005, 2 December 2005, 18 May 2006, 31 May 2006, 10 January 2007 and 3 August 2007.

(2) By letter dated 23 October 2007 the Commission informed Poland that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union ('TFEU') [3] in respect of several measures awarded to WRJ and WRJ-Serwis.

(3) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* on 24 November 2007 [4]. The Commission invited interested parties to submit comments on the measures.

(4) The Commission received comments from one interested party. It forwarded them to Poland, which was given the opportunity to react; its comments were received by letter dated 16 February 2009. Poland's response to the initiation of the formal investigation procedure was submitted by letters dated 21 January and 1 February 2008.

(5) The Commission requested further information on 16 February 2009, which Poland submitted by letter dated 4 June 2009.

2. DETAILED DESCRIPTION OF THE MEASURES

2.1. The beneficiaries

2.1.1. *WRJ*

(6) WRJ is based in Katowice and employs 12 persons for administrative purposes. 40,736 % of the shares in WRJ are held by Towarzystwo Finansowe Silesia Sp. z o.o. ('TFS'), a 99,6 % State-owned company. Another 7,235 % of shares are held by Walcownia Rur Silesia S.A. ('Walcownia Rur Silesia'), a 100 % subsidiary of TFS.

(7) The other shareholders are:

— PIW Enpol Sp. z o.o. (share of 19,009 %),

— Polskie Górnictwo Naftowe i Gazownictwo S.A. (share of 8,3 %),

[1] OJ L 236, 23.9.2003, p. 948.
[2] OJ C 282, 24.11.2007, p. 21.
[3] With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty became Articles 107 and 108 respectively of the TFEU. The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty where appropriate.
[4] See footnote 2.

— Kulczyk Privatstiftung (share of 4,533 %),

— Huta Jedność (share of 0,817 %),

— several other minority shareholders, each holding shares ranging from 0,004 % to 3,4 %.

(8) WRJ was created in 1995 in order to construct a new seamless tube rolling mill with a production capacity of 160 000 tonnes per year ('the WRJ project').

(9) Another company named Huta Jedność initially started construction of a 400 000 tonne seamless tube rolling mill in 1978, but work was stopped in 1980 when State subsidies were suspended. After various attempts to restart the project, Huta Jedność filed a motion for bankruptcy including liquidation of assets, which was rejected by the court. Huta Jedność is currently a company in liquidation with activities consisting in leasing out its production assets to other companies and acting as a utilities provider.

(10) The WRJ project comprised elements of the infrastructure as well as some of the machines and equipment collected earlier by Huta Jedność for the original project and was to be built on a piece of land previously owned by Huta Jedność. New investors were invited to participate in the WRJ project, which started in 1997. Implementation of the project was stopped in 2001 and since then the investors have withdrawn from it. Although it seems that 86 % of the work has been realised, WRJ has never commenced production.

(11) On 4 September 2007 Walcownia Rur Silesia, a wholly-owned subsidiary of TFS set up to consolidate the Polish steel tube sector (see recitals 15 to 17 below), had filed for bankruptcy of WRJ including the liquidation of its assets. Katowice District Court declared WRJ bankrupt on 23 January 2008 and ordered the liquidation of its assets, for which it appointed a bankruptcy receiver. It seems that so far none of WRJ's assets have been sold under the bankruptcy proceedings.

2.1.2. *WRJ-Serwis*

(12) WRJ-Serwis was created in 2001 following the transformation of Zakład Usług Energomechanicznych 'Jedność' S.A., which had been established in 1999. Its shareholders are TFS (share of 54,66 %), PIW ENPOL Sp. z o.o. (share of 36,77 %), Commplex Sp. z o.o. (share of 8,29 %) and Huta Jedność (share of 0,28 %).

(13) The original purpose of WRJ-Serwis was to implement part of the WRJ project and to provide WRJ with better credit opportunities. However, WRJ-Serwis has never commenced any investment activities, but has been producing seamless cold drawn steel tubes since May 2004, after Huta Jedność stopped production at the drawing mill at the beginning of 2004. This activity is conducted on the basis of assets leased initially from Huta Jedność. These assets were subsequently taken over by ING Bank Śląski S.A. and finally by Walcownia Rur Silesia. In addition, WRJ-Serwis acquired 9/10 of the perpetual usufruct of the land on which the WRJ project is located as well as 9/10 ownership of the buildings erected on that land.

(14) WRJ-Serwis ceased operating in April 2008, when Walcownia Rur Silesia took over production of steel tubes at the drawing mill.

2.1.3. *Consolidation of WRJ and WRJ-Serwis and attempts to privatise them*

(15) TFS started looking for a strategic investor for WRJ and WRJ-Serwis in 2004. In 2005, interested parties were invited to tender, and two submitted bids. Finally, a framework agreement was concluded with one of the bidders on the acquisition of the assets of WRJ and WRJ-Serwis, free of any encumbrances; however, this was terminated in October 2006 as the conditions had not been met. TFS launched a new tender procedure in December 2006 but did not receive any binding offers.

(16) Following a new invitation to tender sent out in 2007, TFS decided to consolidate WRJ and WRJ-Serwis to make it easier to privatise them. To that end, TFS created two new companies, namely FEREX Sp. z o.o. ('FEREX') and Walcownia Rur Silesia. TFS holds 100 % of shares in both companies. Through Walcownia Rur Silesia and FEREX, TFS acquired the assets required to implement the WRJ project and took over the debts of WRJ and WRJ-Serwis:

(a) Walcownia Rur Silesia became a creditor of WRJ by acquiring receivables due from WRJ of PLN 168 940 469 and PLN 95 595 057 from the banking syndicate and Stalexport respectively. In addition, Walcownia Rur Silesia purchased the movable assets of the drawing mill from the banking syndicate led by ING Bank Śląski;

(b) FEREX also became a creditor of WRJ by acquiring from the banks receivables due from WRJ of PLN 142 941 270,43 in total, secured by a mortgage on land owned by WRJ and WRJ-Serwis.

(17) In August 2008 another attempt was made by the Polish authorities to sell WRJ, WRJ-Serwis, FEREX and Walcownia Rur Silesia. TFS and Walcownia Rur Silesia invited interested parties to take part in negotiations for the joint purchase of Walcownia Rur Silesia's assets, the share capital of FEREX, TFS receivables due from FEREX and TFS shares in the capital of WRJ-Serwis. The procedure ended on 15 January 2009 and did not result in the sale of any of the assets offered.

2.2. **The measures under assessment**

(18) The measures awarded to WRJ consist of capital investments by TFS (2.2.1), guarantees provided by TFS (2.2.2) and security provided by the Treasury (2.2.3). The measures awarded to WRJ-Serwis consist of capital investments by TFS (2.2.4).

2.2.1. *Capital investments in WRJ by TFS*

(19) The first capital investment of TFS in WRJ took place on 26 June 2002, when WRJ's shareholders decided to increase the share capital. TFS was allocated shares with a nominal value of PLN 15 million in exchange for receivables. These receivables were owed to TFS by Huta Andrzej and Huta Katowice and amounted to PLN 15 million. The capital increase was registered and came into effect on 22 November 2002.

(20) The second increase in share capital took place on 17 January 2003, when WRJ's shareholders decided to increase the share capital of the company again. TFS was allocated shares with a nominal value of PLN 40 million in exchange for receivables owed to TFS by WRJ (debt for equity swap). The receivables had a nominal value of PLN 40 million and TFS had taken them over earlier, in December 2002, from ING Bank Śląski S.A. The capital increase was registered and came into effect on 25 August 2003.

2.2.2. *Provision of guarantees to WRJ by TFS*

(21) In 2001 TFS granted a guarantee covering up to PLN 5 million of a loan amounting to PLN 20 million. The loan had been granted to WRJ in 1999 by the Regional Environmental and Water Management (WFOŚiGW).

(22) In 2001 TFS granted a guarantee covering up to PLN 50 million of a loan amounting to PLN 115 million. The loan had been granted to WRJ in 1996 by the National Environmental and Water Management (WFOŚiGW).

2.2.3. *Provision of security to WRJ by the Treasury*

(23) On 14 October 1997 the Treasury granted a guarantee covering 45 % of principal and interest on two loans amounting to PLN 262,5 million in total. These loans consisted of a foreign-currency credit facility and a PLN credit facility, both granted by a banking syndicate in 1997.

(24) On 2 January 2003 the state guarantee was increased to 55 % by the Cabinet when it signed the relevant documents. The increase in the guarantee has not been implemented.

2.2.4. *Capital investments in WRJ-Serwis by TFS*

(25) TFS made capital interventions in WRJ-Serwis in December 2003 with the objective of obtaining a majority shareholding in the company in order to gain control over the WRJ project. By decision of December 2003, the shareholders of WRJ-Serwis agreed that TFS could acquire shares in the company. The shares had a nominal value of PLN 7 910 000. TFS acquired the shares mainly in exchange for receivables due to TFS from Huta Jedność. Those receivables were transferred to WRJ-Serwis. TFS also paid for the shares in cash (PLN 890 000) and with a contribution in kind (metal chips of Huta Jedność for further processing; transfer value PLN 450 000). The share acquisition agreement was signed on 8 June 2004. The capital increase was not registered until 17 August 2007.

(26) Simultaneously with TFS, shares in the increased share capital were taken up by one of the existing shareholders, PIW Enpol Sp. z o.o., and a new shareholder, Commplex Sp. z o.o. (both private companies). The companies acquired the shares by assigning receivables due from Huta Jedność to WRJ-Serwis.

3. **GROUNDS FOR OPENING THE FORMAL INVESTIGATION**

(27) As described in recital 3, the Commission decided on 23 October 2007 to open a formal investigation procedure ('the opening decision'). In the opening decision the Commission first expressed its view that it was competent to decide on the case and that the measures in question constituted State aid that was not compatible with the Internal Market.

3.1. **Applicable law and Commission competence**

(28) In the opening decision, the Commission took the view that Articles 107 and 108 TFEU (then Articles 87 and 88 of the EC Treaty) did not normally apply to aid granted before accession which was no longer applied after accession. However, the provisions of Protocol No 8 of the Accession Treaty on the restructuring of the Polish steel industry ('Protocol No 8') could be regarded as *lex specialis* in relation to Articles 107 and 108 TFEU, which extended State aid monitoring under the TFEU to any aid granted for the restructuring of the Polish steel industry between 1997 and 2006. Accordingly, the Commission would in principle be competent to assess such aid.

(29) As regards whether tube producers such as WRJ and WRJ-Serwis are part of the 'steel industry' for the purposes of Protocol No 8, the Commission considered the following: Protocol No 8 was based on the national restructuring programme (Restructuring and Development Plan for the Polish Iron and Steel Industry, ('the NRP')). The scope of the NRP and Protocol No 8 was not limited to the scope of Annex I of the Treaty establishing the European Coal and Steel Community ('the ECSC Treaty'), but also covered certain steel sectors such as seamless tubes and large welded tubes.

(30) According to the opening decision, firstly, this interpretation was in line with the definition of the steel industry under the EU State aid rules, namely the definition in Annex B to the Multisectoral Framework ([5]). Secondly, this followed from the NRP, of which half of the beneficiaries were tube producers. Indeed, Huta Jedność, the predecessor of WRJ and WRJ-Serwis, participated in the restructuring programme process and was explicitly mentioned in the draft NRP several times, but was in the end not considered as a potential beneficiary, as at the time there were plans to wind it up following its bankruptcy in 2002.

(31) As a result, the Commission took the view that the prohibition on awarding aid not caught by the NRP and Protocol No 8 applied to Huta Jedność, WRJ and WRJ-Serwis.

3.2. **Existence of State aid**

(32) As regards the investments made in WRJ by TFS and the security given to the company by TFS, the Commission expressed strong doubts that they would have met the requirements of the market economy investor principle. WRJ was facing difficulties at the time the measures were taken and would not have itself been able to raise the funds on the capital market. The Commission also doubted that there would have been a sufficient return on investment. Lastly, it took the view that the investments could hardly be justified by the fact that TFS intended to privatise WRJ at a later date.

(33) As regards the guarantee provided by the Treasury to WRJ, the Commission noted that it was not clear whether WRJ had been in difficulty at the time when the guarantee was granted, i.e. in 1997. On the other hand, as regards the increase of the guarantee in 2003, WRJ could be considered as being in difficulty and the Commission therefore expressed doubts as regards the compliance of this increase of the guarantee with the market economy investor principle.

(34) As regards the investments made in WRJ-Serwis by TFS, the Commission expressed doubts that they would have met the requirements of the market economy investor principle. The Commission noted that the company was in difficulty in 2003 and therefore considered it doubtful that the investments had promised a reasonable return.

3.3. **Compatibility of the State aid**

(35) The Commission could not identify any grounds on which the potential State aid could have been declared compatible, as investment or restructuring aid to the steel sector between 1997 and 2006 was prohibited under Protocol No 8 and hence under the EU State aid rules.

4. **COMMENTS FROM POLAND ON THE OPENING DECISION**

(36) Poland submitted its comments on the opening decision by letters dated 21 January and 1 February 2008. In summary, Poland did not agree with the Commission's interpretation of Protocol No 8 and reiterated its view that the measures in question did not constitute State aid.

4.1. **Applicable law and Commission competence**

(37) Poland considers that generalisations should not be made on the basis of Protocol No 8, which constitutes an exception to the non-intervention rule concerning State aid before accession.

(38) Firstly, it points out that tube producers and their products were not included in Annex I to Protocol 2 to the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part ([6]) ('Protocol 2 to the Europe Agreement') and therefore did not fall within the scope of its application.

(39) Secondly, the prohibition on granting State aid to tube producers in the Member States was introduced on 24 July 2002, when Annex B to the Multisectoral Framework, which defined the scope of the term 'steel industry', entered into force. According to that definition, the seamless tube and large welded tube sector were part of the 'steel industry'. Accordingly, the NRP approved by the Commission in 2003 and Protocol No 8 also included tube producers. Previously, when the ECSC Treaty was applicable, the tube sector had been excluded.

(40) Poland concludes that Protocol No 8 has to be interpreted in such a way that before 24 July 2002 aid granted to tube producers was not subject to the Commission's control (as with any other interventions which occurred before the Accession Treaty entered into force). After that date, the tube producers were subject to the said restrictions.

(41) As regards the beneficiaries' awareness, Poland points out that WRJ-Serwis can be classified as a steel producer only as of 2004, when it started to use the drawing mill facilities, and that prior to that date, state interventions could not be regarded as constituting State aid to the steel industry.

(42) Lastly, Poland emphasises that the WRJ project is not a continuation of the fomer Huta Jedność project.

([5]) See Annex B to the Multisectoral Framework (OJ C 70, 19.3.2002, p. 8), which has applied since 24 July 2002 (paragraph 39) and which was replaced by Annex 1 to the Guidelines on national regional aid for 2007-12 (OJ C 54, 4.3.2006, p. 13).

([6]) OJ L 348, 31.12.1993, p. 2.

4.2. **Existence of State aid**

(43) In addition, Poland claims that TFS, although controlled by the Treasury, is operating on market terms to generate profits. The actions it took as regards WRJ and WRJ-Serwis did not result from any particular control or supervision by the state. Accordingly, the Treasury did not necessarily exercise control within the meaning of the Stardust Marine judgement ([7]).

(44) As regards the capital increases in WRJ and the guarantees provided by TFS, Poland considers that TFS did not inject any significant funds into the WRJ project. Indeed, the exchange of receivables in return for shares in WRJ was more economically rational than direct enforcement of those receivables. In addition, at the time of TFS' investment in WRJ, TFS was in possession of business plans that showed the profitability of the WRJ project. Lastly, the banking syndicate was also willing to provide further financing to WRJ at that time. Accordingly, TFS acted like a market economy investor.

(45) Poland considers the increase of the state guarantee to WRJ to be in line with the market economy investor principle, as it was secured with valuable collateral and WRJ paid a market rate guarantee fee to the Treasury. In addition, the guarantee was contingent on the banks recommencing financing of the WRJ project, which did not take place. Accordingly, the increase in the guarantee was never implemented and Poland considers that no advantage accrued to WRJ.

(46) The capital intervention in WRJ-Serwis is considered to comply with the market economy investor principle. Firstly, private shareholders took up shares together with TFS. Secondly, WRJ-Serwis was not in a difficult financial situation and TFS took the decision in view of the profits to be generated in the future by WRJ-Serwis. Finally, TFS was able to assume control over WRJ-Serwis and the property on which the WRJ project was built.

(47) As regards the consolidation of WRJ and WRJ-Serwis, Poland argues that this was the only way of enabling the WRJ project to be rapidly taken over and completed by a private investor while also ensuring maximum recovery of the capital so far injected by the state.

5. **COMMENTS FROM INTERESTED PARTIES**

(48) The Commission received comments from one interested third party which strongly opposed the subsidies given by Poland. The party recalls that pipes were never products caught by the ECSC Treaty and that the pipe industry had to restructure at its own costs, without having been granted State aid. Acceptance of the aid in this case would harm the European pipe industry. The party also states that accepting the aid might jeopardise its attempts to demonstrate that some pipe-importing countries are importing into the EU at dumped or subsidised prices. Lastly, the party argues that the European seamless steel pipe industry was in a special economic situation, with overcapacity in Europe and a need to export large quantities, while imports from China increased in 2007.

6. **POLAND'S COMMENTS ON THE OBSERVATIONS OF THE INTERESTED PARTY**

(49) The observations of the interested party were forwarded to Poland, which submitted its comments on 16 February 2009. Poland supports the view that there should be transparent rules on fair competition in the tube market.

(50) Poland agrees with the third party that pipes were never a product caught by the ECSC Treaty and reiterates that the 'steel sector' did not include tube producers until the Multisectoral Framework came into force on 24 July 2002. Accordingly, the ban on State aid in the tube sector has only applied since 24 July 2002, when the 'expanded' definition of the steel sector came into force.

(51) Lastly, Poland reiterates that WRJ never started production activities and WRJ-Serwis stopped production in 2008. Poland emphasises that it has never granted State aid to WRJ.

7. **ASSESSMENT OF THE MEASURE**

7.1. **Applicable law and Commission competence**

(52) The measures in question were granted before the accession of Poland to the European Union (i.e. before 1 May 2004). In principle, Articles 107 and 108 TFEU do not apply to aid which was granted before accession and which no longer applies after accession ([8]). By derogation from this general rule, and therefore on an exceptional basis, the Commission is competent to review State aid granted by Poland in the context of the restructuring of its steel industry before accession on the basis of Protocol No 8 to the Accession Treaty.

([7]) Case C-482/99 *Stardust Marine* [2002] ECR I-4397.

([8]) In paragraph 90 of the judgment of 1 July 2009 in joined cases T-273/06 and T-297/06 *ISD Polska and Others* v *Commission*, the General Court confirmed that '[…] it is common ground that, in principle, Articles 87 EC and 88 EC do not apply to aid granted before accession which was no longer applicable thereafter'. See also paragraph 108 of Commission Decision 2006/937/EC of 5 July 2005 on State aid C-20/04 (ex NN 25/04) in favour of Huta Czestochowa S.A. (OJ L 366, 21.12.2006, p. 1) and paragraphs 202 et seq of Commission Decision 2010/3/EC of 6 November 2008 on State aid C 19/05 (ex N 203/05) granted by Poland to Stocznia Szczecińska (OJ L 5, 8.1.2010, p. 1).

7.1.1. *The lex specialis nature of Protocol No 8*

(53) Protocol No 8 contains provisions allowing Poland to conclude the restructuring of its steel industry initiated before accession. The pre-accession restructuring of the Polish steel sector was carried out on the basis of Protocol 2 to the Europe Agreement, as extended by a decision of the EU-Poland Association Council ('the Decision of the Association Council') ([9]).

(54) Protocol 2 to the Europe Agreement granted Poland a so-called 'grace period' of five years, from 1992 to end-1996, during which it was allowed to restructure its ECSC steel sector with State aid.

(55) This grace period was extended by the Decision of the Association Council for a further period of eight years starting on 1 January 1997, or until the accession of Poland to the EU. In this period, Poland could exceptionally, in respect of 'steel products', grant State aid for restructuring purposes under the terms and conditions enshrined in Protocol 2 to the Europe Agreement (as extended by the Decision of the Association Council) and on the basis of the NRP, which Poland submitted to the Commission in April 2003. After assessment of the NRP by the Commission, the Member States approved the Polish proposal in July 2003 ([10]).

(56) Protocol No 8 allows the Commission to monitor after Poland's accession State aid granted by Poland to the steel sector on the basis of Protocol 2 to the Europe Agreement (as extended by the Decision of the Association Council) and the NRP. In addition, Protocol No 8 empowers the Commission to recover aid given in breach of Protocol 2 to the Europe Agreement and the NRP. Accordingly, Protocol No 8 is *lex specialis* allowing, on an exceptional basis and by derogation from the general regime, the retroactive monitoring and review of State aid granted by Poland to the Polish steel industry before accession. This was confirmed by the Court, which held that Protocol No 8 is *lex specialis* in relation to Articles 107 and 108 TFEU which extends the review of State aid carried out by the Commission pursuant to the TFEU to aid granted for the reorganisation of the Polish steel industry during the period from 1997 to 2003 ([11]).

7.1.2. *Scope of the Commission's retroactive control competence under Protocol No 8*

(57) In the context of this procedure, the Commission must assess whether the exceptional retroactive control competence described in recitals 53 to 56 above also covers measures granted before accession by Poland to tube producers. To this end, the legal bases applicable to this case, i.e. Protocol No 8, read in conjunction with Protocol 2 to the Europe Agreement and the Decision of the Association Council, must be interpreted with a view to determining whether their provisions cover measures granted to Polish tube producers before accession.

(58) It is a generally-recognised principle of law that the provisions of *lex specialis* which derogates from the general regime must be interpreted *stricto sensu*. A strict interpretation of the above-mentioned legal bases (see recitals 59 to 65 below) leads to the conclusion that the exceptional retroactive control competence of the Commission is limited to pre-accession measures granted to ECSC producers, thereby excluding measures to tube producers.

7.1.3. *Interpretation of the legal bases*

(59) Points 12 and 18 of Protocol No 8 lay down the monitoring and retroactive control competences of the Commission with respect to pre-accession aid to the Polish steel industry. Point 12 empowers the Commission and the Council to monitor the implementation of the NRP before and after accession, until 2006. Point 18 empowers the Commission to order recovery of State aid granted in breach of the conditions laid down in Protocol No 8.

(60) Point 1 of Protocol No 8 stipulates that State aid granted by Poland for the restructuring of 'specified parts of the Polish steel industry' shall be deemed compatible with the internal market provided that 'the period provided for in Article 8(4) of Protocol 2 on ECSC products to the Europe Agreement […] has been extended until the date of accession', the terms set out in the NRP are respected, the conditions set out in Protocol No 8 are met and 'no State aid for restructuring is to be paid to the Polish steel industry after the date of accession'.

(61) Point 2 of Protocol No 8 stipulates that the restructuring of the Polish steel sector, as described in the individual business plans of the companies listed in Annex 1, shall be completed no later than 31 December 2006. Point 3 of Protocol No 8 indicates that only the companies listed in Annex 1 to the Protocol are eligible for State aid in the framework of the Polish steel restructuring programme.

([9]) Decision No 3/2002 of the EU-Poland Association Council of 23 October 2002 extending the period set in Article 8(4) of Protocol 2 on European Coal and Steel Community (ECSC) products to the Europe Agreement (OJ L 186, 25.7.2003, p. 38).

([10]) Council Decision 2003/588/EC of 21 July 2003 on the fulfilment of the conditions laid down in Article 3 of Decision No 3/2002 of the EU-Poland Association Council of 23 October 2002 extending the period set in Article 8(4) of Protocol 2 on European Coal and Steel Community (ECSC) products to the Europe Agreement (OJ L 199, 7.8.2003, p. 17).

([11]) Case T-288/06 *Huta Czestochowa* [2009] ECR II-2247, paragraph 44.

(62) Point 1 of Protocol No 8 refers explicitly to Article 8(4) of Protocol 2 to the Europe Agreement, as extended by Decision of the Association Council. Protocol 2 to the Europe Agreement only applied to 'ECSC steel products' (Article 8(4) of Protocol 2) and even listed the steel products in an Annex. The latter reproduced the list of ECSC products as laid down in Annex I to the ECSC Treaty, where the definition of 'ECSC steel products' expressly excludes tubes ('steel tubes (seamless or welded) […] bright bars and iron castings (tubes, pipes and fittings, and other iron castings)').

(63) The ECSC Treaty expired on 23 July 2002. As of that date, State aid to the steel industry was brought under the general EC regime. On that occasion it was decided to broaden the definition of the European steel sector to include tube producers. This was codified in Article 27 and Annex B to the Multisectoral Framework, which defined the EU steel sector as including 'seamless tubes, pipes and hollow profiles' as well as 'welded iron or steel tubes and pipes'. This extended definition of the steel sector was subsequently taken over in Annex I to the Guidelines on national regional aid for 2007-2013 ([12]), and in Point 29 of Article 2 of the General Block Exemption Regulation ([13]).

(64) However, neither Protocol 2 to the Europe Agreement nor the Decision of the Association Council was explicitly amended to incorporate this broadened definition of the EU steel sector including tube producers. Protocol 2 to the Europe Agreement had expired on 31 December 1996. The Decision of the Association Council extended the validity of Protocol 2 to the Europe Agreement from 1 January 1997 for eight years or until the date of Poland's accession (whichever came first). Article 1 of the Decision of the Association Council refers to 'steel products' in general, but its scope of application is also specifically linked to Article 8(4) of Protocol 2 to the Europe Agreement, which covered ECSC steel products only. In particular, the extension of Protocol 2 to the Europe Agreement was made conditional on the submission by Poland to the Commission of a NRP and business plans for its beneficiaries that both met 'the requirements listed in Article 8(4) of Protocol 2 and that have been assessed and agreed by its national State aid monitoring authority (the Office for Competition and Consumer Protection)' (Article 2 of the Decision of the Association Council).

(65) In the light of the above, the Commission concludes that point 18 of Protocol No 8, interpreted in the light of points 1 to 3 of Protocol No 8 together with Protocol 2 to the Europe Agreement and the Decision of the Association Council, does not give the Commission competence to control aid granted to Polish tube producers prior to accession.

7.1.4. *Implementing Rules for the Europe Agreement as an interpretation instrument*

(66) In addition to the legal interpretation of the scope of the relevant legal bases (i.e. Protocol No 8, Protocol 2 to the Europe Agreement and the Decision of the Association Council — see recitals 59 to 65 above), the Commission also examined the question of whether the Implementing Rules for the application of the State aid provisions in the Europe Agreement and Protocol 2, as adopted by the EU-Poland Association Council in 2001 ('the Implementing Rules') ([14]), are of relevance in order to determine the scope of the Commission's retroactive control competence with respect to pre-accession measures awarded to Polish tube producers.

(67) As a matter of general principle, the Implementing Rules contain rules of procedure to be distinguished from the substantive State aid provisions in the Europe Agreement and Protocol 2 to the Europe Agreement. It must be noted however that the Implementing Rules also contain specific provisions on the criteria for assessing the compatibility of aid with the Europe Agreement and with Protocol 2 to the Europe Agreement respectively.

(68) The first sentence of Article 2(1) of the Implementing Rules states: 'The assessment of compatibility of individual aid awards and programmes with the Europe Agreement, as provided for in Article 1 of these Rules, shall be made on the basis of the criteria arising from the application of the rules of Article 87 of the Treaty establishing the European Community, including the present and future secondary legislation, frameworks, guidelines and other relevant administrative acts in force in the Community, as well as the case law of the Court of First Instance and the Court of Justice of the European Communities and any decision taken by the Association Council pursuant to Article 4(3)'. This phrase establishes the general principle that the substantive criteria for assessing compatibility of State aid in general with the Europe Agreement are 'evolutive' in the sense of incorporating along the way changes/developments in EU law and jurisprudence.

([12]) OJ C 54, 4.3.2006, p. 13.
([13]) OJ L 214, 9.8.2008, p. 3.
([14]) Decision No 3/2001 of the EU-Poland Association Council of 23 May 2001 adopting the implementing rules for the application of the provisions on State aid referred to in Article 63(1)(iii) and (2) pursuant to Article 63(3) of the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part, and in Article 8(1)(iii) and (2) of Protocol 2 on European Coal and Steel Community (ECSC) products to that Agreement (OJ L 215, 9.8.2001, p. 39).

(69) The second sentence of Article 2(1) of the Implementing Rules refers in particular to the compatibility criteria under Protocol 2: 'Insofar as the aid awards or aid programmes are destined for products covered by Protocol 2 to the Europe Agreement, the first sentence of this paragraph applies fully with the exception that the assessment shall not be made on the basis of the criteria arising from the application of the rules of Article 87 of the Treaty establishing the European Community but on the basis of the criteria arising from the application of the rules on State aid of the Treaty establishing the European Coal and Steel Community'. The wording of this sentence clearly indicates that, contrary to the situation of general aid covered by the first sentence of Article 2(1) (see recital 68 above), for the purposes of aid covered by Protocol 2 to the Europe Agreement, the compatibility criteria evolve by reference to the ECSC Treaty. No specific indications are given as to the evolution of the compatibility criteria after the expiry of the ECSC Treaty in 2002.

(70) Articles 2(2) and 2(3) of the Implementing Rules lay down the mechanism whereby changes to the EU compatibility criteria have to be incorporated by Poland. In particular, Poland shall be informed of any changes in the Community compatibility criteria which were not published, and '[w]here such changes do not encounter objections from the Republic of Poland within three months from the date of receiving the official information about them, they shall become criteria of compatibility as provided for in paragraph 1 of this Article. Where such changes encounter objections from the Republic of Poland and having regard to the approximation of legislation as provided for in the Europe Agreement, consultations shall take place, in accordance with Articles 7 and 8 of these Rules'.

(71) Even if Poland did not object within three months to the change made in 2002 to the Community definition of the steel industry to include tube producers, these changes in Community law could not have become applicable to measures that fall outside of the scope of the Europe Agreement, i.e. those that were not covered by the ECSC Treaty. Furthermore, Protocol No 8 is *lex specialis*, and therefore, for determining its scope of application, the Commission cannot rely on the broadening of the definition of the EU steel sector following the expiry of the ECSC Treaty. It must therefore be concluded that a clear distinction must be made between, on the one hand, the 'evolutive' nature of the law applicable to State aid for the steel sector in Poland before accession under the Europe Agreement, and on the other hand, the necessarily strict interpretation of the scope of the Commission's retroactive control competence as stemming from Protocol No 8, Protocol 2 to the Europe Agreement and the Decision of the Association Council.

8. **CONCLUSION**

(72) On the basis of the foregoing, the Commission must conclude that it is not competent to review measures in favour of Polish tube producers before accession, and in particular over the period from 1997 to 2003, on the basis of Protocol No 8. This procedure is closed in view of the fact that the Commission is not competent to assess the measures caught by this procedure,

HAS ADOPTED THIS DECISION:

Article 1

The formal investigation procedure laid down in Article 108(2) TFEU initiated by letter addressed to Poland dated 23 October 2007, is closed in view of the fact that the Commission is not competent under the provisions of Protocol No 8 to the Accession Treaty of Poland to review the measures granted by Poland to WRJ and WRJ-Serwis in 2001, 2002 and 2003.

Article 2

This Decision is addressed to the Republic of Poland.

Done at Brussels, 6 July 2010.

For the Commission
Joaquín ALMUNIA
Vice-President