COMMISSION DECISION

of 23 March 2011

on the State aid C 28/05 (ex NN 18/05, ex N 517/2000) implemented by Germany for Glunz AG and OSB Deutschland GmbH

(notified under document C(2011) 1764)

(Only the German text is authentic)

(Text with EEA relevance)

(2011/524/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) ([1]) 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 pursuant to the provision(s) cited above ([2]) and having regard to their comments,

Whereas:

I. PROCEDURE

(1) By letter dated 4 August 2000, registered on 7 August 2000, the German authorities notified their intention to provide an aid intensity of 35 % for an investment aid in favour of the establishment of an integrated centre for wood processing in Nettgau (Saxony-Anhalt) by Glunz AG and OSB Deutschland GmbH. The proposed aid was registered with the number N 517/2000.

(2) After the submission of additional information, the Commission adopted, on 25 July 2001, a decision not to raise objections to an aid intensity of 35 % based on the Multisectoral Framework on regional aid for large investment projects ([3]) (hereinafter referred to as 'MSF 1998').

(3) By judgement of 1 December 2004, the General Court decided in case T-27/02 ([4]), Kronofrance/Commission, to annul the above mentioned Commission decision.

(4) Therefore, the Commission has to take a new decision on the basis of the notification of the German authorities of 7 August 2000.

(5) By letter dated 17 December 2004, the Commission asked the German authorities whether they wanted to submit further information to the notification of 7 August 2000 due to the annulment the Commission's decision and sent a reminder on 3 March 2005. The German authorities replied by letter of 23 March 2005, but did not submit additional information at that stage.

(6) Moreover, it has to be noted that the German authorities granted in February 2000 the present aid on the condition that it would be approved by the Commission. The German authorities started to pay out the aid after the no objection decision of the Commission of 25 July 2001.

(7) However, following its annulment by the General Court, the decision of 25 July 2001 must be considered as never to have existed and the German authorities thus did not receive an approval from the Commission on the aid intensity proposed ([5]). The Commission has accordingly transferred the case to the register of illegally granted aid under aid NN 18/05.

(8) By letter dated 20 July 2005, the Commission informed Germany 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) in respect of the aid.

(9) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* ([6]). The Commission invited interested parties to submit their comments on the aid.

(10) The Commission received comments from interested parties. It forwarded them to Germany, which was given the opportunity to react; its comments were received by letters dated 24 October 2005 and 24 January 2006.

([1]) On 1 December 2009, Articles 87 and 88 of the EC Treaty became Articles 107 and 108, respectively, of the Treaty on the Functioning of the European Union (TFEU), which entered into force that day. The two sets of provisions are, in substance, identical.
([2]) OJ C 263, 22.10.2005, p. 7.
([3]) OJ C 107, 7.4.1998, p. 7.
([4]) ECR 2004, II-4177.
([5]) In line with Court case C-199/06 (CELF), ECR 2008, I-469, paragraphs 60-64.
([6]) Cf. footnote 2.

(11) By letter dated 28 February 2006, Germany requested, in the meaning of Article 7(6) of Council Regulation (EC) No 659/1999 ([7]) the suspension of the formal investigation procedure in view of the pending appeals brought by Germany and Glunz AG before the Court of Justice of the European Union (joined cases C-75/05 P and C-80/05 P) against the judgement of the General Court in case T-27/02, Kronofrance/Commission.

(12) By letter of 9 March 2006, the Commission accepted the suspension of the procedure until after the judgement of the Court of Justice in joined cases C-75/05 P and C-80/05 P Federal Republic of Germany and Others v Kronofrance SA.

(13) The Court of Justice in its ruling of 11 September 2008 ([8]) decided to uphold the decision made by the General Court. Following this, the formal investigation procedure in case C 28/05 resumed.

(14) Germany submitted additional information by letter dated 4 August 2009 and, following a request for information of the Commission, by letter dated 19 July 2010.

II. **DETAILED DESCRIPTION OF THE AID**

2.1. *THE AID MEASURE*

(15) The *Landesförderinstitut Sachsen-Anhalt* decided on 29 February 2000 to grant investment aid for the establishment of a centre for wood processing in Nettgau (Saxony-Anhalt) to Glunz AG and OSB Deutschland GmbH. The total aid amounts to EUR 69 797 988.

(16) According to the notification of 4 August 2000, the aid is given in the form of a grant for an amount of EUR 46 201 868 under the 28th Framework of common interest 'Improvement of the regional economic structures' (*28. Rahmenplan der Gemeinschaftsaufgabe 'Verbesserung der regionalen Wirtschaftsstruktur'* ([9])), approved by the Commission. This grant corresponds to 23,17 % gross of the eligible cost.

(17) Furthermore, an investment premium is given on the basis of the Investment Premium Law 1999 ([10]) (*Investitionszulage*), approved by the Commission for an amount of EUR 23 596 120. This investment premium amounts to 11,83 % gross of the eligible investment cost.

(18) According to information submitted by Germany, an amount of EUR […] (*) was already paid out on the basis of the *28. Rahmenplan der Gemeinschaftsaufgabe 'Verbesserung der regionalen Wirtschaftsstruktur'* , while an amount of EUR […] was already paid out as *Investitionszulage*. Thus, an aid amount of totally EUR […] was already paid out by the German authorities to the beneficiaries (out of the agreed total amount of EUR 69 797 988).

2.2. *THE BENEFICIARY*

(19) There are two aid beneficiaries.

(20) One of the aid beneficiaries is Glunz AG, Hamm (North-Rhine-Westphalia) which was founded in 1932 and was then operating in the field of timber-based materials. Since the 1960s, the company manufactures and markets exclusively Particle boards, MDF (*Mittel-dichte Faserplatte* – medium density fibre board), OSB (Oriented Strand Board) and plywood. At the time of the notification, TAFISA, which belongs to the Portuguese SONAE-group, held 96,03 % of the shares of Glunz AG.

(21) The other aid beneficiary is OSB Deutschland GmbH (hereinafter 'OSBD') which belongs at 100 % to TAFISA and thus is an affiliated sister company to Glunz AG as they both have the same mother company TAFIS. OSBD was created on 16 July 1999 and upon full completion of the investment in Nettgau, started with the manufacturing and marketing of OSB products.

2.3. *THE PROJECT*

(22) The investment project is located in Nettgau, Saxony-Anhalt (Germany) an assisted area in virtue of article 107(3)(a) of TFEU. In this region the maximum permitted aid intensity for the support of new investments was 35 % gross with regard to large undertakings at the time of notification.

(23) Glunz AG and OSBD set up, on a land not yet used for industrial purposes, a centre for wood processing which will comprise two combined plants. The first plant, owned by OSB Deutschland GmbH, manufactures OSB. The second plant, owned by Glunz AG, manufactures particle board. The German authorities stated that both plants have their production lines linked to each other by a common technical infrastructure. Moreover, they advanced that both OSB panels and particle board panels are further processed and refined through the same grinding line, the same lamination equipment and the same tongue and groove equipment. In addition, they put forward that particles deriving from the treatment of OSB are used in the neighbouring particle board installation. Furthermore, the German authorities submitted that a central administration will manage both plants including their marketing, supply and distribution activities.

([7]) OJ L 83, 27.3.1999, p. 1.
([8]) ECR 2008, I-6619.
([9]) State aid N 209/99, Commission decision D/105751, 2.8.2000.
([10]) State aid N 702/97, Commission decision D/12438, 30.12.1999.
(*) Covered by the obligation of professional secrecy.

(24) Additionally, the German authorities argue that the concept of the integrated centre for wood processing of Glunz and OSBD offers several advantages thanks to an optimised conception of the installation through a single technical infrastructure in particular as concerned the treatment of the wood panels produced. They advance that it enables an optimal use of the wood assortment including the better utilisation of raw material and internal recycling.

(25) The notification of 7 August 2000 mentions that part of the aid will be granted in favour and the OSB plant and part of it in favour of the particle board plant. The aid foreseen in favour of the OSB plant amounts to EUR 28,61 million for eligible investment cost of EUR 81,8 million, corresponding to an intensity of 35 % gross. The aid granted in favour of the particle board plant amounts to EUR 41,18 million for eligible investment cost of EUR 117,6 million, corresponding to an intensity of 35 % gross.

(26) At the time of the notification, the German authorities estimated that the integrated centre for wood processing in Nettgau would create 355 permanent jobs. The jobs were distributed to the respective plant as follows: 234 jobs would be created in relation to the particle board plant production and 121 in relation to the OSB plant production. The German authorities indicated that 520 indirect jobs created in relevant assisted areas. Amongst them 33 are indirect safeguarded jobs. The new investment in Nettgau was to be realised between January 2000 and end of 2002. The production was intended to start in the course of 2001 and full operation was to be reached after 2 years.

(27) The production capacity of the new OSB-plant was estimated to amount to […] m^3 in 2002. In 1999, the capacity for OSB-products of the TAFISA-group was […] m^3.

(28) In 1999, the capacity for particle board within the Glunz group amounted to […] m^3. According to the German authorities, the total production capacities will reach […] m^3, thus the new plant in Nettgau will create new capacities of […] m^3.

III. REASONS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

(29) The maximum allowable aid intensity under MSF 1998 is determined on the basis of a calculation which involves the application of a number of assessment factors, and, in particular, the factor indicating the state of competition in the sector concerned ('factor T'), for which there are four levels: 0,25, 0,5, 0,75 and 1. It can only be set at 1 if the sector (defined at the lowest NACE level) is not facing overcapacity (overcapacity test) and/or if the relevant market (defined as the product envisaged and its substitutes) is not in relative decline (declining market test).

(30) The Commission, in its decision to initiate the procedure laid down in Article 108(2) of the TFEU, had doubts as to definition of the relevant market to which OSB belongs and consequently could not establish whether the market is in decline or not for defining the competition factor 'T'.

IV. COMMENTS FROM INTERESTED PARTIES

(31) The Commission received on 22 November 2005 a joint submission ([11]) by competitors belonging to the KronoGroup Switzerland (Kronotex GmbH & Co. KG, Kronoply GmbH & Co. KG and Kronofrance S.A.).

(32) In their submission, the KronoGroup companies argued in favour of a market definition comprising OSB and softwood plywood. Hardwood plywood is significantly more expensive and is used predominantly in areas (furniture and decorative applications) where OSB and softwood plywood are not or hardly used. They referred to a study made by Jaakko Pöyry ([12]) and to a publication of the Finnish Forest Research Institute substantiating this claim.

(33) KronoGroup raised some further issues which can be summarized as follows.

(34) KronoGroup claims that the Commission, when calculating whether the market was in decline, should use data for the period until 1999 as such data were already available at the time of the initial approval decision (July 2001) which was later annulled by the General Court. It also alleges that in the period 1995-99, particle board had a negative average growth rate of – 4,626 %. The submission however acknowledges that in the period 1994-99, particle board had a positive average growth rate of 0,456 % (even if below the growth of the EEA manufacturing industry as a whole).

(35) KronoGroup also claims that the Commission, rather than calculating a common aid intensity for the whole project, should assess separately the aid to the OSB plant and the aid to the particle board plant as the two investments, the two production lines and the two product markets can clearly be separated. This would entail a separate calculation of all the assessment factors for the two plants.

([11]) The information was formally submitted by the law firm 'Luther Willma Buchholz Baierlein und Nierer' in the name of the KronoGroup companies.

([12]) Structural Panel Supply and Demand in Europe, 10 December 2003.

(36) KronoGroup further alleges that in parallel to its investment in Nettgau, Glunz closed down its particle board plant in Sassenburg (located at a distance of 30 km, although in a different Land, i.e. Lower Saxony ([13])). It cites newspaper articles according to which the entire workforce of the plant in Sassenburg was taken over in the new plant in Nettgau. This, according to KronoGroup, is contrary to the aim of the MSF 1998 to create jobs in the region concerned for those living in the region, and these jobs should not be taken into account when determining the capital/labour factor and the regional impact factor defined in the MSF 1998 (both of which build on the number of jobs created by the investment).

(37) Finally, KronoGroup also claims that the Commission should have ordered an injunction to provisionally recover the aid pursuant to Article 11(2) of Regulation (EC) No 659/1999 (recovery injunction for unlawful aid) since Glunz and OSBD obtained substantial competition advantages through the partly disbursed aid.

V. **COMMENTS FROM GERMANY**

(38) The observations of Germany can be summarised as follows.

5.1. *COMMENTS WITH REGARD TO THE DEFINITION OF THE RELEVANT MARKET FOR OSB*

(39) Germany considers that the relevant market regarding OSB consists of OSB and plywood in the end-use applications of packaging, hoarding, roofing, flooring and sheathing/walls. This market is not declining.

(40) The end-use applications in which OSB substitutes plywood broadly correspond to the main areas of application for softwood plywood. In key areas of application of hardwood plywood (furniture industry, construction industry and fitting out of transport vehicles), however, OSB cannot be used because of its technical characteristics. Including OSB in the overall market for hardwood and softwood plywood would not therefore be in line with the actual conditions on the markets concerned. This is confirmed in an expert opinion dated 21 October 2005 drawn up by Jaakko Pöyry.

(41) Jaakko Pöyry estimates the following percentages for the substitution potential of OSB in the above areas of application: packaging 40-60 %; hoarding 70-80 %; roofing 70-90 %; flooring 50-80 %; sheathing/walls 70-90 %.

(42) In the furniture industry, OSB is not suitable for visible applications owing to its surface characteristics. The surface of OSB is not visually attractive since it is manufactured using oriented strands of wood which makes it rough and uneven. OSB cannot therefore be decoratively coated. OSB is only suitable for non-visible furniture parts (e.g. support structure for upholstered furniture). In the area of non-visible furniture parts, however, OSB cannot compete in terms of price with the far cheaper types of particle board, which are generally used in this context.

(43) In the construction industry (formwork), it is crucial that the sheathing/shuttering/framework materials used with regard to poured-in place concrete have a smooth surface. Owing to the unevenness caused by the manufacturing process, OSB has to be specially coated for fair-faced concrete in order to ensure that the fair-faced concrete has an even surface. This further processing is expensive and raises the price of the end product. In comparison with plywood, OSB is only competitive if it can be re-used on several occasions as a framework. However, for practical reasons, this will not necessarily be the case. Since the boards are heavily used at construction sites, their surface may become damaged. If cracks appear, there is a danger that the OSB will become warped by water or moisture or deformed in some other way. Therefore, repeated use of expensive processed OSB is not necessarily possible. In addition, the edges of OSB may be unstable and susceptible to moisture. Furthermore, materials used as a framework for cement need to be very difficult to split and bend. In this respect, OSB does not satisfy the demands which the construction industry makes of framework materials. Softwood plywood on the other hand is in view of its relatively low cost and even surface very suitable for this use, as can be seen by the volume actually used for formwork.

(44) In the area of transport vehicles, it is also important that the surface should be even as the boards used here often have to be coated. Coating OSB is for various reasons often not easily practicable. Even if OSB is coated, for example with melamine paper, there is a risk that the coating will crack owing to the uneven surface of the OSB. When a lift truck is being loaded, pressure is put on the surface at certain points. There is a danger that in such cases in a damp or wet environment, water may seep into the board causing it to become deformed or warped. Stable surface coating can only be guaranteed by expensive further processing. The surface of OSB is, unlike hardwood plywood, which is relatively resistant to scratches, pressure points etc. given the particular

([13]) This area was not an assisted region under the German regional aid map applicable in the period 2000-06.

hardness of its surface, also otherwise not sufficiently resistant to withstand the effects of pressure in the field of transport.

(45) Assessment of the scope for substituting OSB with softwood plywood on the one hand and hardwood plywood on the other rests largely on the technical properties and possible uses of OSB and on the price difference compared with hardwood plywood. Whereas hardwood plywood is superior to softwood plywood and OSB in all technical respects, the price difference between hardwood plywood on the one hand and OSB and softwood plywood on the other means that hardwood plywood lacks competitiveness in the areas of application dominated by OSB and softwood plywood. It would therefore be wrong to assume that OSB can be substituted by all types of plywood, including hardwood plywoods.

(46) There exists a large overlap between the market for OSB and plywood in the end-use applications of packaging, hoarding, roofing, flooring and sheathing/walls on the one hand and the market for OSB and softwood plywood on the other. There is only a difference between the two market definitions in relation to the construction industry (formwork). OSB is unsuitable for this area, whereas softwood plywood is eminently usable and is indeed employed. The core common message is that hardwood plywood must not be included in the market for OSB.

5.2. *COMMENTS ON THE EVOLUTION OF THE MARKET FOR PARTICLE BOARD*

(47) Germany considers that the competition factor should also be set at 1 for the particle board market, which should not be regarded as declining, as there is a strong upward trend within the meaning of paragraph 7.8 of the MSF 1998.

(48) To substantiate this, Germany submitted a study by Professor Stefan Collignon (Harvard University, the Minda de Gunzburg Center for European Studies) [14] according to which long-term growth in the market for particle board between 1972 and 2003 was 36 % faster than in manufacturing industry as a whole. Germany is of the opinion that under paragraph 7.8 of the 1998 MSF, this strong, long-term upward trend means that the particle board market cannot be regarded as in decline.

5.3. *COMMENTS ON ASSIGNING AID INTENSITY TO DIFFERENT PARTS OF THE PROJECT*

(49) In Germany's view, should the Commission nevertheless take the view that the competition factor 'T' is 0,75 for the particle board market while it is 1 for OSB, the common aid intensity must be determined for overall project in Nettgau on the basis of the contribution margins of the two production lines, i.e. for OSB and particle board production.

(50) The contribution margin is the amount which a product contributes to covering fixed costs and to achieving the company's net profit. It is calculated as the difference between earnings and the variable costs incurred directly for that product.

(51) By using contribution margins as a reference, the aid intensity would be assigned to the individual parts of the investment project in Nettgau in accordance with the actual contribution of OSB and particle board, as products, to the operating result.

5.4. *COMMENTS ON OTHER POINTS RAISED BY KRONOGROUP*

(52) Germany considers the assessment of the aid should be based on facts that were known on 7 August 2000, i.e. at the time of the notification.

(53) According to Germany, this results from the interpretation of the MSF 1998. Germany refers in this respect to point 3.1 of the MSF 1998, which provides that the maximum allowable aid intensity is identified on the basis of the regional aid ceiling valid at the moment of notification. Moreover, point 3.6 of the MSF 1998 foresees the calculation of market share prior to the aid application. Also, the Annex to the MSF 1998 indicates in the section 'ex-post control' the possibility for the Commission to verify the accuracy of the information provided in the context of the notification.

(54) Germany claims furthermore that apparent consumption data for 1999 were not known at the time of the notification. In any event, in order to obtain the average annual growth rate of apparent consumption over 5 years, as required in point 7.8 of the MSF 1998, apparent consumption data covering 6 years instead of five as proposed by KronoGroup are necessary. This is due to the fact that the growth rate for a given year is calculated by comparing apparent consumption in 2 distinct years.

(55) As regards the alleged relocation of jobs, Germany confirms the closing of the plant in Sassenburg. Germany explained in this respect that the Sassenburg plant was the oldest particle board plant of Glunz and was making significant losses. Therefore, it had no chance to survive and had to be closed, independently of the new investment of Nettgau. […] employees that had previously been employed in Sassenburg were transferred to Nettgau (making up […]% of the workforce there).

[14] Professor Collignon is a member of the Supervisory Board of Glunz AG.

(56) In their comments on the observations of the KronoGroup, the German authorities add that in any event, the MSF 1998 only requires that the new jobs be created in the region concerned, but not that they have to be filled with employees from this region. The main aim is to foster the development of the assisted region in question.

(57) Germany indicated that some of the machinery were also transferred from Sassenburg to Nettgau; these however were excluded from the eligible costs of the project and thus did not receive aid. In any event, with a book value of some EUR […], these machines represent a very small part of the overall investment project.

VI. **ASSESSMENT OF THE AID**

(58) The following assessment is based on the facts, figures and situations as they were known at the time of the notification on 7 August 2000. Since some time has elapsed between the original notification and the current decision, situations might have changed, markets might have developed and facts concerning the project might have turned differently than was originally planned. However, this cannot be taken into account by the Commission in this assessment. In general, the Commission has to take a decision before the investment is actually carried out, on the basis of estimates of future perspectives and market figures. The aid intensities are nevertheless not adapted afterwards if some years later figures show that the market has, for example, turned out differently. Although in the present case the Commission has to take a decision more than 10 years after the original notification took place, it must nevertheless base its assessment on the facts and situations known at the time of notification and not on information arising thereafter.

6.1. *EXISTENCE OF AID UNDER ARTICLE 107(1) TFEU*

(59) The present aid measure was granted by a Member State and through State resources in the sense of Article 107(1) TFEU (see point 2.1 of the present decision). The aid confers an advantage to Glunz and OSBD as they otherwise would have had to bear the whole costs of the investment on their own. As a significant volume of the concerned wood boards is transported across international borders, there exists an international trade in the wood-industry concerned. Therefore, financial advantages favouring the two concerned companies may distort competition in a way that can affect trade between Member States. Consequently, the Commission considers that the notified measure constitutes State aid to Glunz AG and OSBD within the meaning of Article 107(1) TFEU.

6.2. *NOTIFICATION REQUIREMENT*

(60) According to Article 108(3) TFEU, Member States have to notify all aid measures before putting them into effect. The proposed aid is to be granted in the context of two regional schemes which were already approved by the Commission.

(61) However, under the rules laid down in the MSF 1998, the aid intensity to be granted for large investment projects is excluded from the scope of application of approved schemes if aid to the relevant investment project exceeds certain thresholds.

(62) The planned aid amounts totally to EUR 69 797 988. If the aid is considered as concerning a single investment project, the notification requirement laid down in point 2.1(ii) of the MSF 1998 is fulfilled as the total aid is at least EUR 50 000 000.

(63) As mentioned under point 2.3 of the present decision, the German authorities argued extensively in their notification that the present aid measure concerns a single investment project.

(64) Point 7.2, second paragraph of the MSF 1998 stipulates that an investment project should not be artificially subdivided into sub-projects in order to escape the notification obligation. In the present case this would however not occur. Indeed, even if it was considered that the investment concerns two distinctive investment projects, the notification requirements would still be fulfilled for the investments in the Glunz plant and in OSBD plant.

(65) The Commission thus concludes that the aid is to be notified and assessed according to the MSF 1998.

6.3. *THE THREE ASSESSMENT CRITERIA OF THE MSF 1998*

(66) Under the MSF 1998, the Commission has to identify, in order to determine the maximum allowable aid intensity for a proposal to award aid, the maximum aid intensity (regional aid ceiling) which a company could obtain in the assisted area concerned within the context of the authorised regional aid system valid at the moment of notification.

(67) As the notification took place on 7 August 2000, the regional aid map 2000-06 is applicable ([15]). Nettgau in Saxony-Anhalt is a region falling under Article 107(3)(a) TFEU, with a regional aid ceiling of 35 % GGE at the time of notification. The Commission notes that the proposed aid intensity of 35 % gross corresponds with the applicable regional aid ceiling.

(68) According to the rules laid down in the MSF 1998, the Commission has then to assess three specific adjustment factors that have to be applied to the percentage figure of 35 % in order to calculate a maximum allowable aid intensity for the project in question, namely, the competition factor (T), the capital/labour factor (I), the regional impact factor (M).

([15]) OJ C 340, 27.11.1999, p. 8.

(69) It is recalled here that according to the KronoGroup, rather than calculating a common aid intensity for the whole project, the Commission should assess separately the aid to the OSB plant and the aid to the particle board plant as the two investments and the two product markets can clearly be separated.

(70) The Commission notes in this respect that point 7.2 of the MSF 1998 defines an 'investment project' as an initial investment in fixed assets in the creation of a new establishment, the extension of an existing establishment or engaging in an activity involving a fundamental change in the product or production process of an existing establishment.

(71) The German authorities provided detailed arguments concerning the links that exist between the two plants, set up on the same site by two sister companies of the same group. Both plants have their production lines linked to each other by a common technical infrastructure. Both OSB panels and particle board panels are further processed and refined through the same grinding line, the same lamination equipment and the same tongue and groove equipment. In addition, particles deriving from the treatment of OSB are used in the neighbouring particle board installation. Furthermore, a central administration will manage both plants including their marketing, supply and distribution activities.

(72) In light of the strong technical, functional and administrative links that exist between the two plants set up on the same site, the Commission considers that the investments in the OSB and particle board plant form a single investment project, i.e. an initial investment in the creation of a new establishment. Consequently, the maximum allowable aid intensity will be calculated for this overall investment project.

6.3.1. COMPETITION FACTOR (T)

6.3.1.1. ***Applicable rules***

(73) According to point 3.2 of the MSF 1998, the authorisation of aid to companies operating in sectors which are in structural overcapacity poses particular risks for the distortion of competition. Indeed, any capacity expansion, which is not compensated by capacity reductions elsewhere, will exacerbate the problem of structural overcapacity. The Commission notes that the notified project will create new capacities on the European market. The competition factor has thus to involve an analysis of whether the proposed project would take place in a sector or sub-sector suffering from structural overcapacity.

(74) Pursuant to point 3.3 of the MSF 1998, when sufficient data on capacity utilisation is available, the Commission has to limit the determination of the competition factor to the existence or not of structural/serious overcapacity in the sector or sub-sector concerned.

(75) According to point 3.4 of the MSF 1998, it is only in the absence of sufficient data on capacity utilisation that the Commission will consider whether the investment takes place in a declining market. However, following the Judgement of 1 December 2004 (T-27/02, Kronofrance SA/Commission), the General Court ruled that point 3.4 and 3.10 of the MSF 1998 must be understood as meaning that, where the data on capacity utilisation in the sector concerned does not allow the Commission to reach the positive conclusion that there is structural overcapacity, the Commission must consider whether the market in question is a declining market. The Court of Justice in joined cases C-75/05 P and C-80/05 P Federal Republic of Germany and Others v Kronofrance SA upheld the judgement of the General Court.

(76) Therefore, the Commission will first analyse if there is sufficient data on capacity utilisation and then it will, if the data on capacity utilisation is not sufficient or if this data shows there is no structural overcapacity, analyse if the market is in decline on the basis of data on apparent consumption. Moreover, following point 3.6 of the MSF 1998, the Commission has still then to analyse if the beneficiary(ies) of the aid, prior to making an application for aid, does already have a market share of 40 %.

(77) The market data on capacity utilisation has to be established at the lowest available segmentation of the NACE classification. Moreover, in order to establish whether the market is in decline and whether the market share ceiling is exceeded, the Commission also has to define the relevant market of the product(s) concerned by the investment project.

6.3.1.2. ***The product(s) concerned***

(78) The investment project concerns the production of OSB (Oriented Strand Board) and particle board.

(79) Particle board is a wood panel made of the crushing of roundwood-shaving and/or recycled wood-shavings which are agglomerated by an organic binder. It is mainly used in the furniture industry and for internal house finishing.

(80) OSB is a wood panel made of wood strands composed in three layers. The raw material used to make OSB is pine wood. OSB is mainly used in the prefabricated building industry, the packaging industry and for the restoration of old buildings. OSB was invented in the 1950s in North America. During the 1980s and 1990s it has

gained wide acceptance in the wood panel market and was used as a substitute for the more expensive (softwood) plywood.

6.3.1.3. ***Relevant market***

(81) According to point 7.6 of the MSF 1998, the relevant product market(s) compromises the products envisaged by the investment project and, where appropriate, its substitutes considered by the consumer (by reason of the products' characteristics, their prices and their intended use) or by the producer (through flexibility of the product installations). The relevant geographical market compromises usually the EEA or, alternatively, any significant part of it if the conditions of competition in that area can be sufficiently distinguished from other areas of the EEA.

Relevant product market

(82) As mentioned above, the project concerns the production of OSB and particle board. According to the German authorities, the production facilities do not allow to produce distinct products but only variations of the same products, i.e. with a different surface quality. The German authorities thus argue that, from the manufacturing point of view, substitution at the production side through flexibility of the production installations should be excluded.

(83) At the demand side, particle board and OSB are to a certain extent substitutable, namely in the field of prefabricated building industry. However, the substitution between particle board and OSB seems to be very limited as it would be less than 10 % of the market size ([16]). This limited substitution seems to be due to the differentiation in end-uses and the significant price difference (EUR 285/m^3 for OSB to EUR 117/m^3 for particle board). The Commission considers that this is too marginal to justify that OSB and particle board would be assigned to the same product market.

(84) In its decision to initiate the procedure laid down in Article 108(2) of the TFEU, the Commission considered that particle board constituted a separate product market. Since this finding has not been contested, the Commission concludes that for the purposes of this assessment particle board constitutes a relevant product market on its own.

(85) As regards OSB, the decision to initiate the procedure laid down in Article 108(2) of the TFEU indicated that substitution to a certain extent seems to exists in the EEA between OSB and (certain types/segments of) plywood.

(86) Plywood is a versatile polymer wood composite. It is basically made up of an uneven number of thin layers of wood called veneer joined together by a synthetic or natural adhesive. There exist softwood plywood and hardwood plywood. As the name suggests, one sort of plywood is made of softwood (which means made of trees [fir, pine, spruce, hemlock] characterized by its needles and being for the most part evergreen; the term does not refer to the hardness of the wood) and the other sort of hardwood (which means made of the botanical group of trees that have broad leaves, produce a fruit or nut, and generally go dormant in the winter).

(87) Because of the doubts as to the extent of substitutability of OSB and different types/segments of plywood, the Commission invited interested parties to comment on the relevant market to which OSB belongs.

(88) The comments received from Germany and one of the aid beneficiary's main competitors, i.e. the KronoGroup point to the same relevant market which comprises OSB and plywood in the end-use applications of packaging, hoarding, roofing, flooring and sheathing/walls. It is only in these end use applications that a substitution potential of more than 50 % exists between OSB and plywood. Due to different performance criteria in the transport (strength/weight) and also the appearance markets (furniture), the substitution potential is very limited (less than 20 %). These arguments and the degree of substitutability in the different end uses were supported by several studies prepared by Jaakko Pöyry ([17]).

(89) The above end-use applications almost the same as those of softwood plywood (the only difference being that softwood plywood is also widely used in a further application, i.e. formwork where OSB is not suitable). On the other hand, OSB and hardwood plywood do not substitute each other to the extent that they could be considered as belonging to the same relevant market.

(90) Therefore, the Commission defines the relevant market to which OSB belongs as OSB and plywood in the end-use applications of packaging, hoarding, roofing, flooring and sheathing/walls, which to a very large extent corresponds to the market of OSB and softwood plywood.

([16]) Jaako Pöyry Consulting, The Development of Wood-Based Panel Industry – Capacity Utilisation Rate and Substitution between OSB and Particle board in the European Economic Area 1993-1998, 20.6.2000.

([17]) Expert Opinion on OSB Substitution Potential of Plywood and Mill Capacity Calculations. Jaakko Pöyry, 15 September, 2000. Substitution between OSB and Plywood in the European Economic Area. Jaakko Pöyry, 13 February 2001.

The relevant geographical market

(91) Although a significant volume of wood boards is transported across international borders, boards are a bulky, heavy product. As a result it is generally too expensive to transport it over great distances, the transport radius being restricted to some 800 km. The various supply areas can be seen as a series of overlapping circles with their centres at the production plant. Given the dispersion of the individual production plants and the various degrees of overlap for the natural supply areas, so that effects can be transmitted from one circle to another, it is appropriate to define the EEA as the relevant geographical market for both products concerned ([18]).

6.3.1.4. ***Data on capacity utilisation***

(92) Pursuant to point 7.7 of the MSF 1998, structural overcapacity is deemed to exist when, on average over the last 5 years, the capacity utilisation rate of the relevant sector or subsector is more than two percentage points below that of manufacturing as a whole. Serious structural overcapacity is deemed to exist when the difference with respect to the average for manufacturing is more than five percentage points.

(93) According to footnote 13 of the MSF 1998, the market data on capacity utilisation has to be established at the lowest available segmentation of the NACE classification. The Commission considers that the production of particle board and OSB by, respectively, Glunz and OSBD corresponds well to that of the total NACE 20.20 products (manufacture of veneer sheets; manufacture of plywood, lamin board, particle board, fibre board and other panels and boards) since the production of particle board, plywood and OSB accounts for 81 % of the total production of wood-panels in Europe ([19]). Therefore, the Commission esteems that it can base its assessment on capacity utilisation data for the NACE 20.20 segment.

(94) The German authorities provided figures on the average annual capacity rate from 1994 to 1998 (which are the 5 years for which data was available at the moment of the notification) in the EEA for the NACE code 20.20 corresponding to the manufacturing of wood panels. These data, obtained from a study of an independent expert ([20]), comply with the requirements of point 7.7 of the Multisectoral Framework since they correspond to the sector at the lowest segmentation of the NACE classification.

(95) The expert has defined the basis of annual capacity calculation as the daily (23 hours) capacity of the line for 300 days in a year. This basis of annual capacity calculation has been calculated on the basis on information obtained from industry and the expert's Wood-Based Panel Mill Databank which includes capacity information by individual mills and press lines. The figure of 23 hours/300 days takes into account the variation in machinery type/age and mill configurations when determining the capacity of a line.

(96) The study concluded that the average annual capacity utilisation rate from 1994 to 1998 (which are the years for which data was available at the moment of the notification) in the EEA amounts to 88,8 % for particle board, to 80,4 % for OSB, to 88,8 % for the combined particle board and OSB rate and to 85 % for wood-based panels in total (NACE 20.20).

(97) The capacity utilisation rate of the wood-panels industry (NACE 20.20) in the EEA is detailed in the following table:

	1994	1995	1996	1997	1998
Total production, 1 000 m^3	30,673	32,412	32,566	35,178	36,481
Total capacity, 1 000 m^3	36,776	37,148	40,034	40,545	41,787
Utilisation Rate	**83 %**	**87 %**	**81 %**	**87 %**	**87 %**

(98) The Commission took also into consideration a second study ([21]) carried out on its behalf. This second study took as a basis a daily capacity (22 hours) of 345 days a year and came to an average of 81,8 % for the years 1995 to 1997. This study did not however provide any data for the remaining years of the period 1994-98 and seems to be based on the average annual capacity of modern plants only.

([18]) See also case No IV/M.599, Noranda Forest/Glunz, OJ C 298, 11.11.1995.

([19]) Michel Vernois, Centre Technique du Bois et de l'Ameublement, Paris, Expertise Report, Market Structure and Competition in the European Wood Industry, 2001.

([20]) Jaako Pöyry Consulting, The Development of Particle board and OSB Consumption and Capacity Utilisation Rate in the EEA 1993-1998, 14.4.2000.

([21]) Cf. footnote 19.

(99) According to point 3.1 of the MSF 1998, the Commission will, where appropriate, utilise external independent data to assess the likely impact on competition in the relevant market; where this is not easily obtainable, however, the Commission will give full weight to representations made by Member States. In the present case, the Commission considers the study provided by the German authorities to be sufficiently reliable. In any event, the other study, although not providing complete information, would lead to the same result.

(100) Over the period 1994-98, the average annual utilisation capacity rate for the EU manufacturing industry as a whole amounts to 81,72 %.

(101) Taking into account the above, the Commission concludes that the investment project will result in a capacity expansion in a sector where no overcapacity exists. However, following the Judgement of the General Court, when the Commission reaches the positive conclusion that there is no structural overcapacity, which is the case at present, the Commission has to analyse if the market is in decline or not.

6.3.1.5. ***Data on apparent consumption***

Applicable rules

(102) According to point 3.4 of the MSF 1998, the Commission should for the purpose of defining whether the relevant market is in decline, compare the evolution of apparent consumption of the product(s) in question (that is, production plus imports minus exports) with the growth rate of EEA manufacturing industry as a whole.

(103) Following point 7.8 of the MSF 1998, the market for the product(s) in question will be deemed to be in decline if, over the last 5 years, the average annual growth rate of apparent consumption of the product(s) in question is significantly (more than 10 %) below the annual average of EEA manufacturing industry as a whole, unless there is a strong upward trend in the relative growth rate of demand for the product(s). An absolutely declining market is one in which the average annual growth rate of apparent consumption over the last 5 years is negative.

Market to which particle board belongs

(104) The annual average growth rate of the whole EEA manufacturing industry for the years 1993-98 ([22]) is 5,78 %.

(105) A study from an independent consultant ([23]) gives data on value of the apparent consumption of particle board in billion EUR shows the following results for the years 1993-98 (which are the 6 years on which data existed on the moment of the notification). This data can be presented as follows:

Billion EUR	1993	1994	1995	1996	1997	1998	Growth/a
Particle board	4,61	4,78	5,91	4,98	5,71	5,65	4,15 %

(106) The Commission notes that the difference between 5,78 % and 4,15 % is more than 10 %. The outcome would be the same if data until 1999 (i.e. over the period 1994-99), as argued for by KronoGroup, would be taken into account.

(107) In its observations, Germany refers to point 7.8 of the MSF 1998 according to which the market is not considered to be in relative decline (despite the fact that its annual growth rate is below that of the EEA manufacturing industry as a whole) if there is a strong upward trend in the relative growth rate of demand for the product. Germany substantiates this by a study which shows that in the period 1973 to 2003 apparent consumption of particle board grew 36 % faster than value added in the manufacturing industry.

(108) The Commission considers that this argument is not sufficient to prove that there exists a strong upward trend in the relative growth rate of demand for particle board. This condition of the MSF 1998 aims at a situation where, although the average annual growth rate of the relevant market over the last 5 years is low, the latest couple of years show a clearly increasing growth trend which might continue in the years to come, i.e. in the short term, when the aided investment comes on stream. This would ensure that the distortive effects of the aid remain limited.

([22]) Data on apparent consumption for 6 years are necessary in order to calculate average annual growth over a period of 5 years.

([23]) Jaakko Pöyry 'The development of wood-based panels consumption in the EEA 1993-1999'.

(109) The study, however, works with very long term data that do not allow predictions for the immediate future which is more relevant for the assessment of the investment's impact. Moreover, it presents data until 2003 that were not available at the time of the initial notification in 2000.

(110) Therefore, the Commission considers that the market for particle board is in relative decline according to point 7.8 of the MSF 1998 and the competition factor 'T' for this product should be set at 0,75.

Market to which OSB belongs

(111) As mentioned already above, the annual average growth rate of the whole EEA manufacturing industry for the years 1993-98 is 5,78 %.

(112) The notification by Germany contains a study from an independent consultant ([24]) which gives data on value of the apparent consumption in billion EUR in the EEA for the years 1993-98 for OSB and plywood in the end-use applications of packaging, hoarding, roofing, flooring and sheathing. These data are as follows:

	1993	1994	1995	1996	1997	1998	Growth/a
OSB	0,05	0,06	0,08	0,10	0,13	0,18	31,321 %
Plywood segments	0,46	0,55	0,55	0,48	0,50	0,49	1,175 %
OSB and plywood segments ([1])	**0,51**	**0,61**	**0,63**	**0,58**	**0,63**	**0,67**	**5,765 %**

([1]) In the end-use applications of packaging, hoarding, roofing, flooring and sheathing.

(113) Thus for the relevant market consisting of OSB and segments of plywood in the end-use applications of packaging, hoarding, roofing, flooring and sheathing, the difference in growth between 5,78 % and 5,765 % is not more than 10 %. Consequently, according to point 7.8 of the MSF 1998, this relevant market is not in decline and a competition factor 'T' of 1 applies for the market to which OSB belongs.

6.3.1.6. ***Market shares on relevant market***

(114) In assessing the competition factor, the Commission has also, following point 3.6 of the MSF 1998, to check whether the market shares of the group to which Glunz and OSBD belong in the relevant market is at least 40 %, which would imply that the risk exists that the award of maximum levels of aid normally permitted in the region concerned may unduly distort competition.

(115) The German authorities submitted market share data at the level of the EEA ([25]) for the years 1999 (before the investment) and 2002 (after the investment) of the SONAE group, the parent company of TAFISA to which Glunz and OSBD belong. These data are as follows:

Product markets	1999 (before investment)	2002 (after investment)
Particle boards	[…] %	[…] %
OSB and plywood segments ([1])	[…] %	[…] %

([1]) In the end-use applications of packaging, hoarding, roofing, flooring and sheathing.

(116) The provided data show that the market share of the SONAE group did not exceed 40 % in the relevant markets. Therefore, the established competition factors do not have to be reduced.

6.3.2. CAPITAL/LABOUR FACTOR (I)

(117) It is recalled here that in its comments, KronoGroup considered that the jobs relocated following the closure of Glunz' particle board plant in Sassenburg should not be taken into account when determining the capital/labour factor and the regional impact factor (both of which build on the number of jobs created by the investment). According to KronoGroup, taking into account these jobs would be contrary to the alleged aim of the MSF 1998 to create jobs in the region concerned for those living in the region.

([24]) Report by Jaakko Pöyry 'The development of OSB and Plywood Consumption in the European Economic Area 1993-1998'.
([25]) As it existed at the time of the initial notification in 2000.

(118) The Commission considers that the notion of 'job creation' within the meaning of the MSF 1998 has to be interpreted in the context of the assisted region, as it is through the creation of jobs in this region that the project contributes to regional development. Therefore, it seems justified to accept that 'jobs created' means jobs that are new to the region concerned. Moreover, the creation of jobs in the assisted region, even if the posts are filled with employees commuting from a neighbouring area (which in the present case is a non-assisted region of the same Member State), undoubtedly benefits the region concerned through its spill-over effects and thus fulfils the main aim of regional aid.

(119) Therefore, the Commission will take these jobs into account when determining the capital/labour factor and the regional impact factor applicable for the investment project.

(120) The MSF 1998 lays down a capital-labour factor which aims at adjusting the maximum aid intensity with a view to favour those projects which effectively and better contribute to the reduction of unemployment through the creation of a relatively more important number of new direct jobs.

(121) The different capital-labour factors are listed under point 3.10.2 of the MSF 1998. The total investment amounts to EUR 199 400 000 for the creation of 355 jobs. This corresponds to the ratio EUR 561 700/job. In such a case, the competition factor 'I' for the adjustment of the maximum aid intensity is to be set at 0,8.

6.3.3. REGIONAL IMPACT FACTOR (M)

(122) The regional impact factor takes into account the beneficial effects of a new aided investment on the economy of the assisted region. The Commission considers that job creation can be used as an indicator of a project's contribution to the development of a region. A capital-intensive investment may create a significant number of indirect jobs in the assisted region concerned and any adjacent assisted region. Job creation in this context refers to jobs created directly by the project together with jobs created by first-tier suppliers and customers in response to the aided investment.

(123) The German authorities estimated at the time of the notification of 7 August 2000, the indirect jobs to be created as a result of the investment upon full completion of the centre for wood processing to be a total amount of 520 and broken down as follows according to the needs of each production:

	OSB production Indirect jobs	OSB production Contingencies	Particle board production Indirect jobs	Particle board production Contingencies	Total
Forestry activities	61	11	70	12	154
Wood transport to the plants	42	8	77	14	141
Paste transport to the plants	5		8		13
Fuel transport to the plants	2		3		5
Melanin paper transport			1		1
Transport from plants to customers	50	9	76	14	149
Supply of services (maintenance, repair of facilities)	17	3	17	3	40
Cleaning services	5		5		10
Housing, consumer goods for staff	2		5		7
Total	**184**	**31**	**262**	**43**	**520**

(124) The calculation of the estimated job creation is based on the following calculation.

(125) According to the German authorities, the most important source of indirect job creation (309) generated by both productions is the transport sector for supply of materials and for delivery of final products to customers.

(126) As far as the OSB-production is concerned, the forecasted manufacturing of approx. […] m^3 OSB-products should result in sales of about […] m^3. The production of one m^3 final product will need about […] m^3 wood resulting in approx. […] m^3 wood/year. Estimates for paste and chemicals amount to […] tons and for fuel to […] tons/year.

(127) Raw material for the OSB products is 100 % forest wood originating within a radius of approx. 100 km around the plant. The volume needed per day is estimated at […] m^3 transported in trucks with a capacity of […] m^3. On the basis of two trips per day and a capacity of […] m^3, this will result in 39 trucks and 39 drivers, further 8 contingencies and 3 mechanics, and to a total of 50 indirect jobs. However, the Commission considers that contingencies do not comply with the definition of jobs set out in points 3.7 and 7.5 of the MSF 1998 ([26]). Therefore 42 indirect jobs can be accepted for the transport of materials to the plant.

(128) The forecasted sales of […] m^3 would result, over 251 working days, in a volume of […] m^3 OSB-products per day transported in trucks with a capacity of […] m^3. 46 trips per day will need 46 drivers, further 9 contingencies and 4 mechanics and will result in a total of 59 new indirect jobs. Taking out the contingencies, the indirect job creation for the transport of final products to the customers is 50.

(129) The production capacity in the particle board plant is estimated per year at approx. […] m^3 raw particle board and […] m^3 coated board. The sales are forecasted to reach […] m^3 for the first product and […] m^3 for the latter. The difference between capacity and sales forecast results from the fact that a significant part of particle board will enter in the coating process. The total demand for wood is set at […] m^3/year. Estimates for paste and chemicals amount to […] tons and for fuel to […] tons/year.

(130) The forest wood also originates from a periphery of approx. 100 km around the plant. The volume needed per day is estimated at […] m^3 forest wood, further […] m^3 packing wood and […] m^3 wood shavings. The transport capacity is indicated at […] m^3 forest wood or […] m^3 packing wood respectively wood shavings. This, results in 72 daily trips conducted by 72 drivers and, together with 14 contingencies and 5 mechanics, would lead to 91 indirect jobs. Taking out the contingencies, the indirect job creation for the transport of material to the particle board plant is thus 77.

([26]) Permanent full-time jobs in direct relation with the project.

(131) The forecasted sales of […] m^3 per year would result, over 251 working days, in a volume of […] particle board per day, which will be transported in trucks of a […] m^3 capacity. The estimates of 71 drivers, 14 contingencies and 5 mechanics are reduced by 14 contingencies and the Commission accepts 76 indirect jobs created for the transport of the final product to the customers.

(132) The German authorities did not provide explanations with regard to the 19 indirect jobs created for the transport of paste, fuel and melamine paper for both plants. However, the Commission considers this figure as realistic.

(133) In total, the Commission considers that the indirect job creation in the transport sector can be set at 264.

(134) The forestry activities, providing the second important source of indirect job creation, are carried out on 251 days/year.

(135) The production of OSB requires a daily volume of […] m^3 wood of which 95 % are produced mechanically and 5 % manually. The mechanical production of […] m^3 involves 25 gangs comprising 2 machineries and 2 forestry workers, plus one supplementary job attached to six gangs, performing each […] m^3/day. This results in 54 jobs. The manual production of […] m^3 involves 13 forestry workers performing each […] m^3/day. The German authorities estimate that in addition to the 67 indirectly created jobs, 13 jobs will be created for contingencies leading to a figure of 80 indirect jobs. However out of the 67 indirectly created jobs, only 61 are created in the assisted region and adjacent assisted regions and will therefore be taken into account.

(136) The production of particle board requires a daily volume of […] m^3 wood of which 95 % are produced mechanically and 5 % manually. On the basis of the same calculations as carried out in the case of the pre-forestry activities for the OSB-production, the German authorities estimate the creation of indirect jobs at 41, including 5 jobs for contingencies. However out of the 41 indirectly created jobs, only 32 are created in the assisted region and adjacent assisted regions and will therefore be taken into account.

(137) With regard to the volume of […] m^3/day of packing wood, the German authorities estimate at 36 the number of indirect jobs for collecting, transporting and sizing, further 7 jobs for contingencies and 7 jobs for the purchase of material, for logistic purposes, etc... Out of the 43 indirectly created jobs, only 38 are created in the assisted region and adjacent assisted regions.

(138) In total, the Commission considers that the indirect job creation in forestry activities can be set at 131.

(139) The German authorities did not provide explanations for the creation of 51 indirect jobs plus 6 contingencies in the service sector as well as for housing and consumer goods. The Commission, considering that some of these jobs should be shared by both plants, estimates that the figure of only 45 indirect jobs is realistic.

(140) Taking into account the above, the total number of indirect jobs created in the assisted region and adjacent assisted regions amounts to 440. If the indirect safe-guarded jobs were not included, the overall number of indirect jobs would be 407. The amount of 440 or even 407 compared to the total direct job creation of 355 would in any event lead to a ratio that is, in both cases, more than 100 % which leads to the regional impact factor 'M' of 1,5.

6.3.4. MAXIMUM ALLOWABLE AID INTENSITY FOR THE INVESTMENT PROJECT

(141) The maximum allowable aid intensity according to the formula R × T × I × M ([27]) as mentioned under point 3.10 of the MSF 1998.

(142) Since the competition factor 'T' is different for the two products concerned (i.e. 1 for OSB and 0,75 for particle board), it has to be established how to arrive at a single competition factor applicable for the whole project. The MSF 1998 does not provide guidance in this respect.

(143) In a similar case under the MSF 1998 which concerned two distinct products which were assigned different competition factors (C 15/06 Pilkington ([28])), the Commission noted that since the project in question concerns a completely integrated production site, it would be artificial to weigh the two competition factors by the relative value of the investments concerning each of the two products. In that case, the Commission used therefore the proportion of the capacities created for the two products for the weighing.

(144) The present case, as explained in point 2.3 of this decision, concerns two combined plants (one for OSB and one for particle board production), linked to each other by a common technical infrastructure and a common administration. It is possible to identify the eligible costs associated with each of these plants. Therefore, in contrast to the Pilkington decision, it is also be possible to calculate to common competition factor with reference to the relative share of the two products in the eligible investment costs.

(145) In their comments on the opening decision, Germany proposed a third way of weighing the different competition factors related to the two products, namely on the basis of the contribution margin ([29]) (*Deckungsbeitrag*) of the two production lines. According to Germany, this would ensure that account is taken of the contribution of each of the products concerned to the operating income.

(146) Depending on the approach followed, the combined competition factor for the investment project as a whole would be 0.86 (calculation based on relative capacities ([30])), 0,85 (calculation based on relative investment costs ([31])) or 0,92 (calculation based on the relative contribution margins ([32])).

(147) Since the other two assessment factors necessary to calculate the maximum allowable aid intensity for the project are 0,8 (capital/labour factor, 'I') and 1,5 (regional impact factor, 'M'), the final maximum aid intensity according to the formula R × T × I × M as mentioned under point 3.10 of the MSF 1998 would be respectively 36,12 %, 35,70 % and 38,64 %. In all cases the aid intensity of 35 % as notified by the German authorities complies with the MSF 1998.

(148) Therefore, it is not necessary to decide which method to use for the calculation of the combined competition factor. In any event, the method proposed by Germany (which leads to the most favourable result) should be rejected on the grounds that it uses data from 2004, not available at the time of the notification.

6.3.5. NO RECOVERY INJUNCTION

(149) It is recalled here that an aid amount of totally EUR […] was already paid out by the German authorities to the beneficiaries (out of the agreed total amount of EUR 69 797 988).

([27]) Where 'R' is the authorised maximum aid intensity for large companies in the assisted area concerned, 'T' is the competition factor, 'I' is the capital-labour factor and 'M' is the regional impact factor.

([28]) OJ L 49, 20.2.2009, p. 18.

([29]) The contribution margin is the difference between revenues and variable costs that are linked to a product. Contribution margin can be thought of as the fraction of sales that contributes to offset the fixed costs. Alternatively, unit contribution margin is the amount each unit sale adds to profit.

([30]) In the notification, the production capacity of the new OSB-plant was estimated to amount to […] m^3 (42 %), whereas the particle board plant creates new capacities of […] m^3 (58 %). The combined competition factor would therefore be equal to 0,42 × 1 + 0,58 × 0,75 = 0,86.

([31]) The OSB plant has eligible investment costs of EUR 81,8 million (41 %), while the particle board plant's eligible costs amount to EUR 117,6 million (59 %). This would result in a combined competition factor of 0,41 × 1 + 0,59 × 0,75 = 0,85.

([32]) According to the German authorities, the relative contribution margin of the OSB plant was 68,5 % and that of the particle board plant was 31,5 % in 2004. Therefore, the combined competition factor is calculated as 0,685 × 1 + 0,315 × 0,75 = 0,92.

(150) KronoGroup in its comments argued that the Commission should have ordered an injunction to provisionally recover the aid pursuant to Article 11(2) of Regulation (EC) No 659/1999 (recovery injunction for unlawful aid).

(151) In this respect it should be noted that such an injunction decision has never been taken. A recovery injunction is an unusual step which the Commission may adopt only in very specific conditions laid down in Article 11 of the Procedural Regulation (EC) No 659/1999. KronoGroup has not put forward convincing arguments showing that these conditions are fulfilled; in any event, the Commission takes the view that a recovery injunction would not have been appropriate in the present case.

VII. **CONCLUSION**

(152) The Commission finds that Germany has unlawfully implemented the aid in question in breach of Article 108(3) of the Treaty on the Functioning of the European Union. However, the aid intensity of 35 %, employed by Germany, is compatible with the provisions of the MSF 1998,

HAS ADOPTED THIS DECISION:

Article 1

The State aid Germany has implemented for Glunz AG and OSB Deutschland GmbH, amounting to EUR 69 797 988, is compatible with the internal market within the meaning of Article 107(3)(a) of the Treaty on the Functioning of the European Union.

Article 2

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 23 March 2011.

For the Commission
Joaquín ALMUNIA
Vice-President