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II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 8 December 1999

relating to a proceeding under Article 81 of the EC Treaty

(Case IV/E-1/35.860-B seamless steel tubes)

(notified under document number C(1999) 4154)

(Only the English, French, German and Italian versions are authentic)

(Text with EEA relevance)

(2003/382/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation No 17, first Regulation implementing Articles 85 and 86 of the Treaty of 6 February 1962 ⁽¹⁾, as last amended by Regulation (EC) No 1/2003 ⁽²⁾, and in particular Articles 3 and 15 thereof,

Having regard to the Commission Decision of 20 January 1999 to initiate proceedings in this case,

Having given the firms concerned the opportunity to make known their views on the objections raised by the Commission,

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

Commission officials and representatives of the competition authorities of the Member States concerned carried out investigations under Article 14(3) of Regulation No 17 at a number of undertakings, including British Steel plc, Mannesmannröhren-Werke AG and Vallourec SA, to which this decision is addressed. It was the Commission's intention to examine the existence of a possible infringement of Article 85 of the EC Treaty (now Article 81 EC).

(2) The investigations were carried out simultaneously, together with officials from the EFTA Surveillance Authority ('ESA'), following a request pursuant to Article 8(3) of Protocol 23 to the Agreement on the European Economic Area ('EEA Agreement') to investigate a possible infringement of Article 53 of that Agreement.

(3) By decision of 6 December 1995, the ESA, pursuant to Article 10(3) of Protocol 23 to the EEA Agreement, forwarded its dossier to the Commission, since it considered that the documents collected during the investigations showed that intra-Community trade was being affected.

I. THE FACTS

(4) Further investigations in accordance with Article 14(2) of Regulation No 17 were carried out between September 1996 and December 1997 at Vallourec SA, Dalmine SpA and Mannesmannröhren-Werke AG. Subsequently, requests for information under Article 11 of Regulation No 17 were sent to all the undertakings to which this Decision is addressed.

A. Procedure

(1) On 1 and 2 December 1994, acting under a Commission decision of 25 November 1994,

⁽¹⁾ OJ L 13, 21.2.1962, p. 204/62.

⁽²⁾ OJ L 11, 4.1.2003, p. 1.

(5) When Dalmine SpA, Siderca SAIC and Groupe Techint refused to supply some of the information requested, a

decision pursuant to Article 11(5) of Regulation No 17, dated 6 October 1997, was sent to them. Siderca SAIC and Dalmine SpA appealed against the decision to the Court of First Instance of the European Communities. Dalmine's appeal was rejected as clearly inadmissible by order dated 24 June 1998.

- (6) Mannesmannröhren-Werke also refused to supply some of the information requested. A decision in accordance with Article 11(5) of Regulation No 17 was sent to it, dated 15 May 1998.
- (7) On 20 January 1999 the Commission sent a statement of objections to the addressees of this decision and to Siderca and Tubos de Acero de México.
- (8) The firms had access between 11 February and 22 April 1999 to the file which the Commission had compiled on the case. In addition, by letters dated 11 May 1999, the Commission sent copies of the investigation decisions of November 1994 to the undertakings which were not addressees of those decisions and which, consequently, had not had access to them.
- (9) Having replied in writing to the statement of objections, all the addressees of this decision took part in the hearing on the case, which was held on 10 June 1999.

B. Parties

1. Mannesmannröhren-Werke

- (10) Mannesmannröhren-Werke AG ('MRW') is a company constituted under German law, 79 % owned by Mannesmann AG. The latter is a diversified German group whose business covers the fields of mechanical engineering, processing industry engineering, information technology, electronics, the manufacture of vehicle parts, the production, processing and marketing of steel products and the provision of related services. The remaining 21 % of MRW is held by Thyssen Stahl AG, a German steel producer. MRW is the portfolio holding company for all Mannesmann's pipe and tube production activities. It operates in the production of pipes and tubes and the production of steel and input products for pipes and tubes, and in the steel processing sector.
- (11) In the pipe and tube production sectors, MRW has holdings in the following firms: Mannesmannrohr GmbH (100 %), Mannesmannröhren-Werke Sachsen GmbH (100 %), Mannesmann SA — Brazil (76 %), Mannesmann Sümerbank Boru Endüstrisi TAS — Turkey (60 %), Europipe GmbH (50 %), MHP

Mannesmann Hoesch Präzisrohr GmbH (50 %), Röhrenwerk Gebr. Fuchs GmbH (50 %), International Drill Pipe Assembly SA (49 %), and DMV Stainless BV (33,33 %). In addition, MRW holds 100 % of the capital of Mannesmann Handel GmbH, which is responsible for pipe and tube distribution and marketing in the Mannesmann group.

- (12) From 1 October 1997, MRW's activities in the seamless pipe and tube sector have been transferred to Vallourec & Mannesmann Tubes, 45 % of whose capital is owned by MRW.
- (13) MRW controls Vallourec SA following its purchase of Usinor's holding in the company. MRW's turnover in 1998 was DEM 4 570 million (approximately EUR 2 321 million).

2. Vallourec SA

- (14) Vallourec SA ('Vallourec', sometimes referred to as 'VLR' in the documents) is a company constituted under French law. Through its subsidiary, Valtubes, it operates in the production and processing of pipes and tubes and related products; through its subsidiary, Sopretac, it manufactures and processes other ferrous materials. The main subsidiaries of Valtubes are Vallourec Industries, Valti, Vallourec Précision Étirage, Vallourec Précision Soudage, Valinox Welded, DMV Stainless BV (33,33 %), Vallourec Oil & Gas, International Drill Pipe Assembly SA (51 %), Tubular Industries Scotland Ltd, and Valmont. Vallourec's turnover in 1998 was FRF 14 867 million (approximately EUR 2 252 million).
- (15) On 3 June 1997, the Commission authorised the takeover of Vallourec by MRW and the amalgamation of their seamless pipe and tube production. From 1 October, those activities were allocated to Vallourec & Mannesmann Tubes, in which Vallourec has a 55 % stake.

3. British Steel Limited

- (16) Following the merger on 6 October 1999 between British Steel plc and Koninklijke Hoogovens NV, the former became a subsidiary wholly owned by Corus Group plc. This entailed changing both its name and legal form. On 8 October 1999, British Steel plc became British Steel Limited (hereinafter 'BS'). BS is one of the main European steel producers. Its principal activities are the production and distribution of ECSC products. It also produces welded pipes and tubes. Up to 1995, BS produced hot-rolled, finished seamless pipes and tubes. Today, it restricts itself to marketing seamless pipes and tubes via its subsidiary Tubular Supply Services Limited

(TSSL) and to cold-finishing pipes and tubes through its subsidiary Cold Drawn Tubes Limited. BS's turnover in 1998 was GBP 6 228 million (approximately EUR 9 207 million).

4. Dalmine SpA

- (17) Dalmine SpA ('Dalmine') used to be the subsidiary of Ilva (the main Italian steel producer) responsible for the production of seamless pipes and tubes. On 27 February 1996, Techint, a subsidiary of Siderca, acquired control of Dalmine. Apart from Dalmine, the firms in the Techint group which operate in the seamless pipe and tube sector are Siderca SAIC (Argentina) and Tubos de Acero de México SA (Mexico) ('Tamsa'). These three firms present themselves jointly under the name of DST Pipes. Together they produce more than 2 million tonnes of steel pipes and tubes. OCTG (oil country tubular goods, see recital 29) are Tamsa's speciality, and account for the greater part of Siderca's production, while Dalmine specialises in line pipe and engineering pipes and tubes. Dalmine manufactures and sells mainly seamless pipes and tubes, but, through its subsidiary Tubificio di Piombino srl, also produces small-diameter welded tubes. Dalmine's production capacity for seamless pipes and tubes is 930 000 t/yr. Its turnover in 1998 was ITL 1 300 082 million (approximately EUR 669 million).

5. Sumitomo Metal Industries Limited

- (18) The Japanese firm Sumitomo Metal Industries Limited ('SMI') is one of the 20 leading steel producers in the world. It manufactures welded and seamless steel pipes and tubes. SMI is the largest producer of seamless pipes and tubes in Japan. SMI's turnover in 1998 was JPY 1 469 418 million (approximately EUR 10 505 million).

6. Nippon Steel Corporation

- (19) The Japanese firm Nippon Steel Corporation ('NSC') is the world's second-largest steel producer. It manufactures welded and seamless steel pipes and tubes. Its turnover in 1998 was JPY 1 975 062 million (approximately EUR 13 489 million).

7. Kawasaki Steel Corporation

- (20) The Japanese firm Kawasaki Steel Corporation ('KSC') is one of the 15 leading steel producers in the world. It manufactures welded and seamless steel pipes and tubes. Its turnover in 1998 was JPY 836 240 million (approximately EUR 5 711 million).

8. NKK Corporation

- (21) The Japanese firm NKK Corporation ('NKK') is one of the world's 10 leading steel producers. It manufactures welded and seamless steel pipes and tubes. Its turnover in 1998 was JPY 1 013 636 million (approximately EUR 6 923 million).

C. Market

1. Steel pipes and tubes in general

- (22) The steel pipe and tube sector comprises a great variety of pipes and tubes, which are manufactured by different processes for a whole series of uses.
- (23) A distinction is drawn, according to the manufacturing process, between:
- seamless steel pipes and tubes, which are made from pierced and hot reduced solid products without removing any metal, and
 - (longitudinally or spirally) welded steel pipes and tubes; these are made from flat products which are shaped and welded. They may be subdivided into large-diameter pipes (with an external diameter of 406,4 mm or over) and small- or medium-diameter pipes and tubes (with an external diameter of less than 406,4 mm).
- (24) In the last 25 years seamless pipes and tubes have gradually declined as a proportion of all pipes and tubes produced and consumed, in favour of welded pipes and tubes. In 1960, welded pipes and tubes accounted for 52 % of steel pipes and tubes produced worldwide, whereas today they account for 68,5 %. A process of substitution has been going on, therefore, which can be explained, *inter alia*, by the technological progress in the manufacture of welded pipes and tubes, which, with lower production costs, has made it possible to achieve the requirements hitherto met only by seamless pipes and tubes. It is clear, however, that the process of substitution is reaching its limits: for some applications (very high pressures, a high degree of hardness, resistance to high temperatures) only seamless pipes and tubes can be used.

2. The crisis in the steel industry

- (25) Since the 1970s, the Community steel market has been affected by a long, serious crisis, the most notable features of which have been the continuous fall in demand and the collapse of prices. These market conditions have brought with them serious problems of overcapacity, low plant-utilisation rates and prices failing to cover total production costs and ensure the profitability of firms. The crisis in the steel market has

not just hit ECSC steel but has also affected the non-ECSC sectors, which include the pipes and tubes covered by this decision. To combat the crisis, the Commission adopted between 1977 and 1988, pursuant to the ECSC Treaty, production and delivery quota arrangements which were binding to various degrees, backed by price and external trade measures.

- (26) With regard in particular to the pipe and tube industry in the Community, since 1980 Community production has been severely restructured in order to adapt capacity to changing market conditions. By the end of 1990, seamless pipe and tube production capacity had been reduced by about 20 %. Between 1988 and 1991, more than 20 000 jobs were lost. Since early 1991, the worsening situation of Community production, combined with the growing influx of imports, has resulted in draconian decisions having to be taken concerning the continued reduction of capacity to core levels and in the closure of several production mills in Germany, Italy and the United Kingdom.

- (27) In 1972, as part of the anti-crisis trade measures it had adopted, the Commission concluded with the Japanese Government an agreement on the voluntary restraint of exports. In response to the request from the Japanese Ministry of International Trade and Industry (MITI), the six Japanese integrated manufacturers (including the four to which this decision is addressed) concluded a quota agreement in 1975 for exports of steel products to the Community. In 1978, as a back-up measure to the 1977 anti-crisis plan, the Commission adopted an agreement with MITI with a view to establishing price discipline that would prevent disruption of the Community market and thus ensure the preservation of traditional trade patterns⁽³⁾. Although focused on ECSC products, the agreement provided that both parties should endeavour to avoid disturbance in the markets for iron and steel products of first-stage processing (including pipes and tubes). The 1978 agreement was extended until 1987. As part of an arrangement between the Commission and MITI, the authorisation granted by MITI to the quota agreement concluded by the Japanese firms was renewed until 1990.

3. Product markets

- (28) The products concerned in this case are seamless, carbon-steel pipes and tubes (that is, not stainless steel pipes and tubes), in particular those used by the oil and gas industry, which account for 40 % to 50 % of the

consumption of seamless pipes and tubes⁽⁴⁾. An oil well serves to bring up petroleum or gas from the formation or deposit some two to five thousand metres below the earth's surface up to ground level (onshore) or the seabed (offshore); the oil or gas is then transported to the refinery. The seamless pipes and tubes used by this sector of industry include two major categories.

(a) Borehole pipes and tubes (OCTG)

- (29) Borehole pipes and tubes are commonly called OCTG (oil country tubular goods). OCTG are either plain end pipes or pipes joined by (standard or premium) threading. They have special characteristics as a result of various finishing, conditioning and control operations (heat treatment, ultrasound investigation, hydrostatic pressure testing, internal and external coating). In the Mannesmann/Vallourec decision⁽⁵⁾, the Commission concluded that OCTG comprised two different product markets:
- casings and tubings. Casings ensure that the walls of the borehole hold (they have to be able to resist the great pressures resulting from movements in the rock), while tubings bring the oil or gas to the surface. There is a single worldwide standard for casings and tubings (API 5 CT). The vast majority of such pipes are seamless, although for certain casings welded pipes can be used as well,
 - drill pipes. These carry the bit and perform a dual function: they transmit a rotary motion to the bit and ensure that the drilling fluid circulates. They are connected by special, very advanced threads, which must resist the mechanical tensile and torsional stresses and be watertight. There is only one worldwide standard for such pipes (API 5 D). Only seamless pipes are used.
- (30) The Commission considers that, given the information at its disposal, this definition of the market is also valid in the present case.
- (31) OCTG may be sold unthreaded ('plain ends', which are also defined in the API standard) or threaded. The threads are often cut in the same plant or at least in the same tube company, in which case the term used is a 'mill joint'. Threads may be cut in a threading shop completely separate from the manufacture of the pipes, in which case the term used is a 'shop joint'. This is what happens most frequently in the United States, but there are threading shops in the United Kingdom too.

⁽⁴⁾ Source: reply from BS, dated 26 August 1997, to the Commission's request for information.

⁽⁵⁾ Commission decision of 3 June 1997 in Case IV/M.906 (OJ C 238, 5.8.1997, p. 15).

⁽³⁾ Twelfth general report on the activities of the European Communities, point 453.

(32) The threaded joint on OCTG pipes may be either standard (commonly called 'API') or special (commonly called 'premium' — normally protected by patent). Unlike standard threads, which are not completely tight — despite the grease applied when the pipe is assembled, the thread forms a natural leakage channel after a period of time — premium threads are 'metal-to-metal' tight, which prevents any risk of a leak. There are several premium joints: VAM (used by Vallourec, SMI and BS), NS-CC (used by NS), Fox (used by KSC), NK 3SB (used by NKK), Antares (used by Dalmine) and BDS (used by MRW).

(33) Standard threaded pipes account for about 55 % of the total OCTG sales of the firms to which this decision is addressed. The proportion is 17 % for their sales in the Community (see Annex 2), where since the mid-1980s premium threaded pipes have predominated.

(b) Line pipe

(34) Pipes for carrying oil and gas over medium and short distances are commonly called 'line pipe'. They need to be very firm and hard, highly resistant to high or low temperatures and corrosion, and very weldable. In the abovementioned Mannesmann/Vallourec decision, the Commission considered that such pipes and tubes constituted a separate product market. The Commission considers that, given the information at its disposal, this definition of the market is also valid in this case. On this market, a distinction is drawn between 'project' line pipe, which is subject to individual specifications and intended for particular projects, and 'trade' line pipe, which is standardised and sold from stock. Project line pipe accounts for about 45 % of the total sales of seamless line pipe of the firms to which this decision is addressed. The proportion is 31 % for their sales in the Community (see Annex 2).

4. Geographic markets

(35) In the Mannesmann/Vallourec decision, the Commission took the view that the OCTG market is almost certainly worldwide, given that the cost of transport is negligible compared with the price, that there is only one worldwide standard for each type of tube (API 5 CT for casings and tubings, and API 5 D for drill pipes), and that trade between Europe and the rest of the world is substantial. The Commission considers that, given the information at its disposal, this definition of the market is valid in this case as well.

(36) As regards line pipe, the Commission took the view, in the Mannesmann/Vallourec decision, that the geographic market is at least the European market, given that the cost of transport is not significant, that there is substantial interpenetration of markets and that prices do not differ from one country to another. The Commission considers that, given the information at its disposal, this definition of the market is valid in this case as well.

5. Supply

(a) Production and external trade

(37) As the table in Annex 1 shows, the Community is the main production area for seamless pipes and tubes in the world. It exports about 45 % of its production and is thus the leading world exporter, closely followed by Japan and Latin America.

(38) Within the Community, six countries produce seamless pipes and tubes. Germany, Italy and France together account for 85 % of Community production.

(39) OCTG and line pipe account for about 50 % of world production of seamless pipes and tubes.

(40) The geographic distribution of the seamless OCTG deliveries of the addressees of this decision is given in Annex 3. The principal destination is China (27 %), followed by Europe (20 %), and the Middle and Far East (10 % each).

(41) The geographic distribution of the seamless line pipe deliveries of the addressees of this decision is given in Annex 4. The principal destination is Europe (26 %), followed by the Far East (24 %), North America (13 %) and the Middle East (12 %).

(b) Principal producers

(42) Standard pipes and tubes and more sophisticated, high quality pipes and tubes are manufactured on the same rolling mills and machines and, depending on their final application, subsequently undergo specific finishing: threading, special joints, heat treatment, shaping, elongation. The largest manufacturers (MRW-Vallourec, the Techint group, SMI, NSC, NKK, KSC and US Steel) are present on all product markets. Other manufacturers have specialised in some of the markets.

(c) Trend of production capacity

- (43) Between 1975 and 1994 the global production capacity for seamless pipes and tubes increased by 20 %. The trend differed, however, according to geographic area. In western Europe and the United States, after an increase in capacity between 1975 and 1980, there was a gradual reduction, which is currently still continuing. In Japan, capacity increased until 1985, but from that date started to decline. In central and eastern Europe, production capacity has been more or less stable since 1975. Lastly, in Asia and Latin America, production capacity has not stopped growing. As a result there has been a geographic shift in supply.
- (44) The trend in the supply of seamless pipes and tubes is closely linked to that in the oil market. At the end of the 1970s world demand for oil pipes and tubes increased sharply. This gave rise to the construction of new pipe mills in Japan, China and the USSR, which came on-stream in the mid-1980s. With the collapse in demand from 1982 on, the industry was hit by a crisis and capacity reductions became necessary.
- (45) Currently there is an excess of global capacity, which some sources put at 40 %. This is confirmed by the replies from the addressees of this decision to the Commission's requests for information under Article 11 of Regulation No 17.

6. Demand

- (46) Between 1960 and 1980, world consumption of seamless pipes and tubes increased steadily (with the exception of 1975) at a rate of 5 % a year. After 1980 it began to decline, currently reaching a level slightly above that of 1960 and should, according to some sources, stabilise in future.
- (47) Demand is characterised by large cyclical variations, linked to those in the oil market. For instance, according to the forward programme for steel for the first half of 1999 and for 1999 as a whole ⁽⁶⁾, after expanding very favourably in 1997 and into the first half of 1998, the steel pipe and tube market declined sharply towards the end of 1998, in particular on account of the collapse in oil-industry demand and the lack of new pipeline construction projects.

⁽⁶⁾ OJ C 24, 29.1.1999, p. 2.

- (48) The main consumers of OCTG and line pipe are oil prospecting and extraction firms, which as a rule buy their pipes and tubes through international tenders.

- (49) World consumption of seamless OCTG is about 5,1 million tonnes a year; world consumption of seamless line pipe is also 5,1 million tonnes a year ⁽⁷⁾.

- (50) The consumption of seamless OCTG within the Community and in Germany, France, Italy and the United Kingdom is illustrated by the following table:

(in thousand tonnes)

Seamless OCTG	Average consumption 1990 to 1995
Germany	14
France	8
Italy	84
United Kingdom	136
Community	289

Source: Data supplied by the firms and foreign trade data.

- (51) The consumption of seamless line pipe within the Community and in Germany, France, Italy and the United Kingdom is illustrated by the following table:

(in thousand tonnes)

Seamless line pipe	Average consumption 1990 to 1995
Germany	10
France	29
Italy	119
United Kingdom	70
Community	289

Source: Data supplied by the firms and foreign trade data.

⁽⁷⁾ Source: Provvedimento n. 3630 dell'Autorità Garante della Concorrenza e del Mercato (C2311) Techint Finanziaria-Siderca/Dalmine. Bolletino N. 7-1996 dell'Autorità Garante della Concorrenza e del Mercato, p. 55.

- (52) Consumption in the United Kingdom thus accounts for about 35 % of Community consumption of seamless OCTG and line pipe.

D. Europe-Japan club

- (53) The documents copied by the Commission during the investigation of 1 December 1994 reported on meetings between European and Japanese producers of seamless steel pipes and tubes known as the 'Europe-Japan club'. They also referred to 'fundamentals', which appeared to govern relations between these producers. On 17 September 1996, during an investigation pursuant to Article 14(2) of Regulation No 17, Vallourec made a written statement in response to oral requests for explanations from Commission officials concerning the Europe-Japan club and the 'fundamentals'. The statement contained a description of the basic rules of the agreement ('fundamentals'), the products concerned, the duration of the agreement and the practical details of its operation.
- (54) The main information in the statement is confirmed by BS's reply of 31 October 1997 to the request for information from the Commission: '[...] In practice, domestic markets were reserved to the local producers in the first instance' ⁽⁸⁾ (page 11932) ⁽⁹⁾. These assertions are corroborated by the statements made in June 1995 to the public prosecutor in Bergamo by several Dalmine managers, in particular a [...], who maintained he had attended the meetings (page 8220 ter 1-29).

1. Beginnings of the 'agreement'

- (55) The Europe-Japan club began operating in 1977. In its statement, Vallourec writes:

'Ces échanges ont commencé après la chute du marché de 1977 (postérieure au premier boom pétrolier)' (page 6258) ⁽¹⁰⁾.

2. Products, participants and organisation of the club

(a) Products

- (56) According to Vallourec's statement, the products which are the subject of the agreements described above are API OCTG and seamless project line pipe.

(b) Participants

- (57) According to the replies from Vallourec (page 6355), BS (page 11932), NSC (pages 13547 to 13549), NKK (pages 14456 and 14457, 14491 to 14498), SMI (pages 14176 and 14177) and KSC (page 14605) to the Commission's requests for information, the European members of the club were BS, Dalmine, Mannesmann and Vallourec, while the Japanese ones were Kawasaki, NKK, Nippon Steel and Sumitomo Metals.

(c) Organisation

- (58) According to Vallourec's statement, meetings of club members were held at three levels:

— experts,

— managers, and

— presidents.

- (59) The links between these meetings are clear from the 'Timetable for OCTG/Line pipe' tabled by BS at the meeting on 23 September 1993: the Europeans coordinate their positions during preparatory meetings and then discuss them with the Japanese and the Latin Americans at the three levels mentioned at recital 58 (page 4912) ⁽¹¹⁾.

- (60) The meetings of the Europe-Japan club took place twice a year at irregular intervals. During an investigation carried out on 17 September 1996 pursuant to Article 14(2) of Regulation No 17, Vallourec gave the dates of some of these meetings from 1992 to 1994 (14 April 1992 in Florence, 23 October 1992 in Tokyo, 19 May 1993 in Paris, 5 November 1993 in Tokyo and 16 March 1994 in Cannes) (page 6358). Documents photocopied at Vallourec (pages 15586 and 4350) allude to meetings of the Europe-Japan club in 1989 and 1991.

3. Principles

- (61) There are three pillars to the agreement on OCTG and line pipe, as described by Vallourec:

⁽⁸⁾ Original English.

⁽⁹⁾ The page numbers cited in brackets are those in the file.

⁽¹⁰⁾ 'This trade began after the 1977 fall in the market (following the first oil boom).'

⁽¹¹⁾ Thus in 1993, the meeting of 5 November was prepared by meetings of the Europeans during the summer, meetings of the European-Japanese-Latin American working parties in the autumn, a meeting of the European presidents on 23 September (at which the 'paper for president on octg and project line pipe' was discussed) and a meeting of European and Japanese managers.

(a) observance of domestic markets (the 'fundamentals');

(b) [...];

(c) [...].

(a) 'Fundamentals'

(62) According to Vallourec's statement, the basic rule of the agreement (referred to in the documents as 'fundamentals') consists in observing the domestic markets of the different producers. The United Kingdom (off-shore) was regarded as semi-protected: a competitor had to contact the local producer of oilfield pipes and tubes before making a bid (page 6257). The document 'entretien BSC' (pages 15596 to 15599) confirms this rule.

(63) In its reply to the questions raised during the investigation under Article 14(2) of Regulation No 17, on 22 April 1997, MRW describes the 'fundamentals' as follows:

'Mir ist der Begriff "Fundamentals" nur im Zusammenhang mit Verhaltensweisen europäischer und japanischer Hersteller aus der Vergangenheit (dh vor 1.4.1995) bekannt. Nach meiner Kenntnis, handelt es sich bei den "Fundamentals" um eine Übereinkunft betreffend OCTG-Rohre und Project linepipe, die im wesentlichen den Schutz der jeweiligen Heimatmärkte bezweckte. Dies bedeutete, daß japanische Hersteller in diesen Bereichen nicht in europäischen Märkte vordringen sollten, während europäische Hersteller nicht nach Japan liefern sollten.' (page 10990A) ⁽¹²⁾.

(64) In his statement of 1 June 1995 to the public prosecutor in Bergamo, Mr [...], [...] between 1991 and the end of 1992, and then the marketing manager for that division until the end of 1994, said:

'le gare d'appalto [...] venivano costantemente vinte dalla Dalmine, in quanto nelle riunioni dei club dei produttori (cartelli) che si tenevano due volte l'anno, una volta in Europa ed una volta in Giappone, si stabiliva un gentlemen agreement per il quale ciascun produttore avrebbe avuto diritto di vincere in patria le gare d'appalto, sulla base di una regola internazionalmente accettata per cui, fatta pari a 100 l'offerta dell'operatore nazionale, gli altri operatori si impegnano ad offrire un prezzo superiore di un tasso variabile tra l'8 e il 10 %... Se taluno degli operatori, in violazione del patto, sottoquota un concorrente sul mercato domestico, subisce come sanzione minacce di ritorsione tali da ritirare l'offerta, ma ciò non capita perché

la regola è rigidamente osservata.' (page 8220 ter, p. 12) ⁽¹³⁾.

(65) In its written answer of 4 April 1997 to the question put during the investigation of 13 February 1997 concerning the substance of the 'fundamental rules', Dalmine maintains that:

'esse possano riflettere la posizione dell'industria comunitaria dei tubi in acciaio senza saldatura ... Questa posizione si è sviluppata su due linee: attuazione di un processo di razionalizzazione ...; contatti con l'industria giapponese la cui capacità produttiva superava la domanda. I contatti si riferivano all'esportazione di tubi (specialmente quelli per l'industria petrolifera) in aree diverse dalla CE (quali Russia e Cina) e volgevano anche a limitare l'esportazione di tubi alla CE in seguito alla chiusura degli impianti di British Steel e quindi a proteggere l'industria comunitaria dei tubi senza saldatura.' ⁽¹⁴⁾ (pages 15099 to 15101).

(66) In its reply of 31 October 1997 to the Commission's request for information, BS states with regard to the Europe-Japan club: 'In practice, domestic markets were reserved to the local producers in the first instance.' ⁽¹⁵⁾ (page 11933).

(67) The 'fundamentals' are also mentioned in the Vallourec internal memo (pages 15591 to 15594) concerning a meeting held on 1 June 1990 (according to the Vallourec internal memo of 24 July 1990) between BS and Vallourec:

'L'analyse de VLR est qu'il ne faut pas ouvrir la porte aux Japs en les favorisant d'un british content. Il faut jouer les fondamentaux à fond, la première démarche étant d'écrire via le pt du Club aux pt Jap pour signaler les

⁽¹²⁾ 'I am only aware of the concept of "fundamentals" in connection with past practices (i.e. prior to 1 April 1995) between European and Japanese producers. So far as I know, "fundamentals" relates to an agreement concerning OCTG and project line pipe which was aimed primarily at protecting domestic markets. This meant that the Japanese producers were not supposed to penetrate the European market in these sectors, while European producers were not to deliver to Japan.'

⁽¹³⁾ 'Contracts put out to tender by AGIP-Italia were constantly won by Dalmine, since the meetings of the producers' clubs (cartels), held twice a year, once in Europe and once in Japan, established a gentlemen's agreement under which each producer was to be entitled to win tenders in its home country, on the basis of an internationally accepted rule according to which if the domestic operator's bid was equal to 100, the other operators undertook to bid a price higher by a proportion varying between 8 and 10 % An operator that breaks the agreement by underquoting a competitor on the domestic market will be threatened with reprisals so as to make it withdraw the bid, but that never happens because the rule is rigidly observed'.

⁽¹⁴⁾ 'they may reflect the position of the Community seamless pipes and tubes sector This position has developed on two lines: implementation of a rationalisation process ...; contacts with the Japanese industry, whose production capacity was exceeding demand. These contacts related to exports of pipes (particularly those intended for the oil industry) to zones other than the EC (Russia and China) and they were also intended to limit pipe exports to the EC after the closure, of British Steel's mills and, consequently, to protect the Community seamless pipe and tube industry.'

⁽¹⁵⁾ Original English.

implantations des shojas en UK. Il paraît ambitieux d'imaginer que BSC puisse organiser un sharing key en PJ japonais alors que SMI se casse les dents sur ce point depuis de longs mois.' ⁽¹⁶⁾ (page 15598).

- (68) Examination of the deliveries of the members of the Europe-Japan club shows that this principle was observed.

SEAMLESS OCTG AND LINE PIPE

Share of domestic producer in the deliveries of BS, Dalmine, MRW, Vallourec, SMI, KSC, NSC and NKK

Destination	1990	1991	1992	1993	1994	1995
Italy	> 90 %	> 90 %	> 90 %	> 90 %	> 90 %	> 90 %
Germany	97 %	91 %	99 %	87 %	92 %	87 %
France	92 %	82 %	86 %	86 %	84 %	85 %
United Kingdom ^(a)	81 %	84 %	78 %	79 %	84 %	78 %
Japan	100 %	100 %	100 %	100 %	100 %	100 %
Total, club	90 %	88 %	88 %	87 %	91 %	87 %

Source: Replies from the firms to requests for information under Article 11.

^(a) From 1991, Vallourec's, Dalmine's and MRW's deliveries of OCTG to the United Kingdom are regarded as domestic deliveries following the closure of the British Steel plant.

- (69) It is in the light of this protection of domestic markets that the following sentence contained in Vallourec's internal memo of 20 June 1994 [...] must be interpreted: 'STDM devrait tout de même respecter à peu près le UK en échange de notre protection du Mexique et de l'Argentine, mais dans le reste du monde il essaiera de développer ses ventes au maximum' ⁽¹⁷⁾ (page 15813).

(b) 'Special markets'

- (70) [...].

- (71) [...].

⁽¹⁶⁾ 'VLR's view is that we should not open the door to the Japs by allowing them a British content. We must play the fundamentals for all their worth, the first step being to write via the pt of the Club to the Jap presidents drawing attention to the presence of the shoshas in the UK. It seems ambitious to imagine that BSC can organise a sharing key in Japanese PJ when SMI has got nowhere on this point for many months.'

⁽¹⁷⁾ 'All the same, STDM should more or less leave the UK alone in exchange for our protection of Mexico and Argentina, but in the rest of the world it will try to expand its sales as much as possible.'

(c) Sharing of other markets

- (72) [...].

- (73) [...].

- (74) [...].

- (75) [...].

- (76) [...].

- (77) Such cooperation also applied to particular projects (page 4283).

4. Plain-end supply contracts concluded between BS, Vallourec, Dalmine and MRW

- (78) In the context of the protection of domestic markets ('fundamentals'), the cessation of hot-rolled seamless pipe and tube production proposed by BS in 1990 raised the question of the 'non-domestic' nature of the British market. Vallourec and BS therefore introduced the concept of 'fundamentals improved'. The record of a meeting between Vallourec and BS on 24 July 1990 establishes under the heading 'Respect du UK par les Japonais':

'MRW est le seul producteur européen qui fasse peur aux japonais et qui puisse donc imposer un respect des "fundamentals improved". MRW aurait un intérêt à la défense des "fundamentals" sur le UK puisqu'il fournirait une partie des plain end pipes après l'arrêt de Clydesdale ... VLR insiste sur le fait que toute alliance en Europe doit être faite avec une part suffisamment forte pour MRW' ⁽¹⁸⁾ (pages 15586 et seq.).

At the end of the meeting, the record reads:

'BS et VLR s'accordent pour dire que ce renforcement de la CEE est jouable et doit aboutir à des "fundamentals improved" qui interdiraient aux

⁽¹⁸⁾ 'MRW is the only European producer who frightens the Japanese and who can therefore enforce the "fundamentals improved". It would be in MRW's interest for the "fundamentals" to be defended in the UK, since it would supply some of the plain end pipes after the closure of Clydesdale VLR stressed the fact that any alliance in Europe must be made with a sufficiently strong share for MRW.'

japonais l'accès du UK même après que Clydesdale aurait été fermé. PhV ⁽¹⁹⁾ ajoute qu'un respect à 100 % des "fundamentals" en UK est impossible mais que si les exceptions ne dépassent pas 15 000 tonnes par an, la situation sera supportable. BS évoque toutefois la possibilité d'acheter des plain ends à UTM, SIDERCA et TAMSA pour éviter leur concurrence sauvage' ⁽²⁰⁾ (page 15587).

(79) Following the closure of Clydesdale, BS concluded agreements for the supply of plain-ends for TSSL (its heat-processing and threading subsidiary) with:

- Vallourec (24 July 1991) for [...] % of BS's requirements (page 12867 et seq.),
- Dalmine (4 December 1991) for [...] % of BS's requirements (page 12910 et seq.), and
- MRW (9 August 1993) for [...] % of BS's requirements (page 12948 et seq.).

(80) The possibility of sharing supplies of plain ends among the Europeans, and the link between the prices and quantities sold by BS and the sales of plainends by the Europeans, had already been considered by Vallourec in March and May 1990 in connection with the closure of Clydesdale: '... si ... on peut obtenir des Japonais qu'ils n'interviennent pas sur le marché UK, et que le problème se règle entre Européens. Dans ce cas on partagerait effectivement les tubes lisses entre MRW, VLR et Dalmine. Dans ce scénario II, on aurait probablement intérêt à lier les ventes de VLR à la fois au prix et au volume du VAM vendu par BSC' ⁽²¹⁾ (pages 15624 and 15625); (in the contracts, the prices of the plain end pipes which MRW, Vallourec and Dalmine undertook to supply to BS depended on the prices of the threaded tubes sold by BS); 'MRW/DALMINE/VLR obtiennent que BSC achète ses tubes lisses en priorité aux

Européens que se répartissent cette fourniture selon une règle stricte' ⁽²²⁾ (page 15611). Two months later (24 July 1990) the fact that MRW would supply plainends to BS was regarded as settled: 'MRW aurait un intérêt à la défense des "fundamentals" sur le UK puisqu'il fournirait une partie des plain end pipes après l'arrêt de Clydesdale' ⁽²³⁾ (page 15586).

(81) Through these contracts, BS undertook:

- to meet all its plain-end requirements, which it had previously met from its Clydesdale plant, from Vallourec ([...] %), MRW ([...] %) and Dalmine ([...] %),
- to inform Vallourec, MRW and Dalmine every quarter of the prices it charged, and
- to inform Vallourec, MRW and Dalmine every year of the quantities of plain-ends that it consumed.

(82) In turn, Vallourec, MRW and Dalmine undertook to supply BS with quantities of plain ends (unknown in advance) and not to impose discriminatory prices and conditions of sale as compared with other customers operating on the British continental shelf. These agreements were concluded for a period of five years. After such time, they remain in force if none of the parties has given 12 months' notice of termination.

5. Reorganisation of the club

(a) Crisis of 1993

(i) Disruptive factors

(83) Several factors disrupted the equilibrium of the agreement:

- the restructuring of the European industry, in particular the cessation of seamless pipe and tube activity by BS and the possible closure of New Tubemeuse ('NTM'),
- the rise of the Latin American producers, which made it difficult to apply the sharing keys worked out in the Europe-Japan club,

⁽¹⁹⁾ Ph. Varley, representative of BS.

⁽²⁰⁾ 'BS and VLR agree that this strengthening of the EEC is viable and must result in "fundamentals improved" which would stop the Japanese from having access to the UK even after Clydesdale had been closed. PhV added that 100 % respect for the "fundamentals" in the UK was impossible but that if the exceptions did not exceed 15 000 tonnes a year, the situation would be tolerable. BS mentioned, however, the possibility of buying plain ends from UTM, SIDERCA and TAMSA to avoid cut-throat competition on their part.'

⁽²¹⁾ '... if ... we can persuade the Japanese not to intervene on the UK market and that the problem should be settled among Europeans. In that case, plain ends would effectively be shared between MRW, VLR and Dalmine. In this second scenario, it would probably be in our interest to link VLR's sales to both the price and the volume of VAM sold by BSC'.

⁽²²⁾ Vallourec document entitled 'Réflexions stratégiques concernant les relations de VLR avec SMI et BSC' dated 2 May 1990. 'MRW/DALMINE/VLR are getting BSC to buy its plain ends as a matter of priority from the Europeans, who share out this supply in accordance with strict rules'.

⁽²³⁾ 'The defence of the "fundamentals" in the UK would be in MRW's interest, since it would supply some of the plain-end pipes after the closure of Clydesdale'.

— the growing importance of welded OCTG, whose share of the world market can be estimated at 20 %, despite regional disparities (in Europe, the share of welded OCTG is very low — about 5 % — whereas it may be as much as 50 % in, say, the United States).

(ii) Position of the Europeans

(84) The document entitled 'Paper for presidents on OCTG and project linepipe' ⁽²⁴⁾ (pages 4902 to 4908) ('paper for presidents') and the '(g) Japanese' document ⁽²⁵⁾ (pages 4909 to 4914) note these disruptive factors and clarify the position of the Europeans at the Tokyo meeting on 5 November 1993. In substance, the Europeans want the current restructuring of the European industry mainly to benefit European producers by reserving the European market (including the offshore regions). The proposed action plan consists in:

— determining the tonnage which the Japanese and the Latin Americans can deliver in Europe,

— threatening the Japanese, if they do not comply, with:

(a) [...];

(b) [...];

(c) not restructuring the European industry and ensuring the withdrawal of NTM;

(d) lodging a dumping complaint.

(b) Meeting of 5 November 1993

(85) The Tokyo meeting gave rise to a new tripartite agreement, the content of which is reflected in a document (the 'sharing-key document') (page 7320) handed to the Commission on 12 November 1997 by a party not involved in the proceedings (which asked for its identity not to be revealed). According to the informant, the source for this document is a commercial agent of one of the participants at the said meeting.

Three main topics were discussed:

⁽²⁴⁾ This was a preparatory document for the meeting of the presidents of the European firms held on 29 September 1993 in Paris, prior to their meeting with their Japanese and Latin American counterparts on 5 November. According to the handwritten note on the document, the latter was transmitted to Vallourec on 23 September 1993 by AS (A. Stewart of British Steel).

⁽²⁵⁾ This document was one of the preparatory documents for the meeting of the presidents of the European firms, prior to their meeting with their Japanese and Latin American counterparts on 5 November 1993. According to the handwritten note on the document, the latter was transmitted to Vallourec on 23 September by AS (A. Stewart of British Steel).

— the consequences of enlarging the club to include the Latin Americans,

— the consequences of restructuring the European industry,

— [...].

(i) The consequences of enlarging the club to include Latin America

(86) The sharing-key document confirms that the approaches made to the Latin Americans were partly successful. [...]. Nevertheless, the Latin American producers expressed a specific reservation concerning observance of the European market ⁽²⁶⁾ (page 7320) and delivered significant quantities to Europe. The sharing-key document expressly contradicts Vallourec's reply to the oral questions asked at the investigation on 18 December 1997 and Siderca SAIC's and Tamsa's replies to the statement of objections, according to which the exploratory approaches made by the Europeans to the Latin Americans in late 1993 were unsuccessful.

(ii) Effect of restructuring the European industry on the agreements

(87) Both in the preparatory document and in the agreement itself, a distinction should be made between the closure of the Belgian producer NTM and the withdrawal of British Steel.

Closure of NTM

(88) Following the closure of the market in the former USSR and the reduction of world demand for oil pipes and tubes in 1992 to 1993, the financial situation of NTM deteriorated sharply. This led its parent company, Soconord, to seek a partner which would be interested in particular in the threading plants. These were more competitive than the heat-processing plants (electric furnace and rolling mill). Negotiations took place [...], but were not successful. NTM's production was closed down altogether on 31 December 1993; the threading installations and rolling mill were transferred to Iran from August 1996.

(89) As the 'paper for presidents' and '(g) japanese' documents show, the possible closure of NTM was used

⁽²⁶⁾ 'LA agreed the above share except for European market. For European tenders, liaison shall be discussed case by case in a cooperative sense'.

as a negotiating, weapon to try and obtain reciprocal concessions from the Japanese. Since NTM's deliveries were concentrated in the Middle and Far East and were not inconsiderable, its possible closure was very advantageous, given the sharing keys, for the Japanese and the South Americans.

Purchase by Vallourec of British Steel's OCTG finishing activities

- (90) The continued operation of pipe and tube production units in the United Kingdom — the result of a rationalisation programme — would show non-European competitors that the United Kingdom was still a primary producer within a strong European industry (pages 4626 to 4640). As the 'paper for presidents' document shows, the Europeans wanted to ensure that the cessation of the 'seamless pipe and tube' activity of BS would not alter either the sharing keys or the status of the UK market:

'Although the Japanese have agreed not to request changes in our agreements if the EC seamless industry were to restructure, there is no guarantee that they would follow this precept if British Steel were to exit the tubemaking or finishing in the UK' ⁽²⁷⁾ (page 4902).

- (91) On 21 January 1993 BS sent Vallourec (and probably MRW and Dalmine as well) outline proposals for a seamless pipe and tube restructuring agreement for discussion at a meeting at Heathrow on 29 January 1993 between Mannesmann, Vallourec, Dalmine and British Steel (page 4628). The document states: 'British Steel has indicated its intention to withdraw eventually from seamless tube manufacture. It seeks to do this in an orderly and controlled manner in order to avoid disruption in the supply of tubes to its customers and to assist these producers who acquire the business to retain the order load ... Discussions have been held over the last six months between British Steel and other producers interested in acquiring assets from British Steel and British Steel believes that there is a consensus to proceed along the lines described in this paper' ⁽²⁸⁾. One of the proposals consisted in transferring the OCTG activities to Vallourec while maintaining in force

the contracts for the supply of plain ends between BS and Vallourec, MRW and Dalmine, without changing the proportions. The same day, a meeting took place between MRW and BS, in the course of which MRW 'agreed that Vallourec should take the lead in the future ownership of the OCTG Business' ⁽²⁹⁾ (page 4626). The Dalmine document entitled 'Seamless steel tube system in Europe and market evolution' (page 2053), dated May/August 1993, stated that a solution to the BS problem which was appropriate to everybody could only be found in a European context; the fact that Vallourec was acquiring the BS plant was also accepted by Dalmine.

- (92) On 22 February 1994, Valtubes (a subsidiary of Vallourec) took control of BS's Scottish plants specialising in heat processing and VAM threading and set up the company Tubular Industries Scotland Limited (TISL), the leader on the North Sea market for threaded pipes with premium or standard joints ⁽³⁰⁾. On 31 March 1994, Vallourec, which would have been able to cancel the contracts signed by BS (clause 9(i)) and hence would have had an extra outlet for its production of plain ends, renewed the plain ends supply contracts concluded by BS with Dalmine and MRW referred to in recital 79. The contract with MRW was still in force on 24 April 1997 (the date of the investigation at MRW). The contract concluded between TISL and Dalmine is still in force, but, following the statement of objections, the parties agreed, as a precautionary measure, that if the Commission maintained its objections in the final decision the contract would be rescinded retroactively to 30 March 1999.

- (93) On 31 March 1994 BS signed with Vallourec (TISL) a contract for the supply by BS [...] of certain types of small-diameter OCTG plain ends. The contract expired with the closure of Wednesfield in December 1995. It cannot of course be viewed separately from the purchase by Vallourec, one month earlier, of British Steel's Scottish plants specialising in heat processing and VAM threading.

- (94) The sharing-key document shows that the restructuring of the European industry influenced the negotiations and that these ended, as far as the Japanese producers were concerned at least, in the way the Europeans had wanted: Europe was reserved for them. However, the Latin Americans expressed their disagreement on this score.

⁽²⁷⁾ Original version.

⁽²⁸⁾ Original version.

⁽²⁹⁾ Original version.

⁽³⁰⁾ Vallourec Annual Report 1994 (page 14617).

(iii) Chinese market

(95) [...].

6. End of the agreement

(96) Although the last meeting of which any trace exists in the file took place in March 1994, it is clear from Vallourec's statement that the Europe-Japan club stopped operating only in 1995.

(97) MRW maintains that the fundamentals belong to the past (namely to the period before Mr [...] took up his post on 1 April 1995).

(100) From 1977, the firms BS, Dalmine, MRW, Vallourec, KSC, NKK, NSC and SMI reached a consensus as to their marketing policies for seamless API OCTG pipes and tubes and project line pipe in different geographic areas. What is involved, therefore, is an agreement within the meaning of Article 81(1) of the Treaty whose existence is attested by several documents apart from the statements of Vallourec and Dalmine (see recitals 62 to 69): the 'paper for presidents', dated 23 September 1993 mentioned in recital 84, talks of 'the current agreements' and 'our agreements'. In the 'record of the discussion with JF in Brussels', the 'agreements' are mentioned as a synonym for the 'club' or the '*système actuel*' ('current system'). The sharing-key document clearly states: 'The following sharing key was agreed' ... '50 % increase of price was agreed' ... 'above agreement is valid through end of March 94' ⁽³²⁾ (page 7320).

II. LEGAL ASSESSMENT

A. General

(98) Article 81(1) of the Treaty prohibits as incompatible with the common market all agreements between undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which directly or indirectly fix purchase or selling prices or any other trading conditions, limit or control production, markets, technical development, or investment, and share markets.

B. The Europe-Japan club

1. Nature of the infringement

(99) The Commission considers that for a restriction to constitute an agreement within the meaning of Article 81(1) of the Treaty it is not necessary for the agreement to be legally binding on the parties. There is an agreement if the parties reach a meeting of minds on a plan which limits, or is likely to limit, their commercial freedom by determining their mutual course of action on, or their non-participation in, a market. Neither contractual penalties nor implementing procedures are required. Nor does the agreement have to be in writing ⁽³¹⁾.

2. Object and effect of the agreement

(101) In the statements of the different producers, the content of the agreement is presented as follows:

— the relations between producers are governed by fundamental rules ('fundamentals') which prohibit everyone from selling in the national markets of competitors party to the agreement,

— [...],

— [...],

— [...],

(102) Thus the object of the agreement was to restrict competition in the common market by providing that the domestic markets of the different producers (namely the German, French, Italian, British and Japanese markets) should be respected inasmuch as the supply of seamless pipes and tubes in Member States where a national producer was established was limited by the other producers party to the agreement refraining from supplying those markets.

(103) The two parts of the 'Europe-Japan' agreement, [...], would also be caught by Article 81 of the Treaty if it were established that those practices enabled producers to limit supply within the common market or, directly or indirectly, to fix the price thereof. In the case in

⁽³¹⁾ Commission Decision 86/398/EEC of 23 April 1986 in Case IV/31.149 — Polypropylene (OJ L 230, 18.8.1986, p. 1, recital 81). See also T-1/89 Rhône-Poulenc [1991] ECR II-867, paragraph 120 and Joined Cases T-305/94 etc. *Limburgse Vinyl Maatschappij* (not yet published), paragraph 715.

⁽³²⁾ Original English.

point, the Commission is not able to provide evidence of such a restrictive effect on the common market. Nor can it provide evidence of the agreement having restrictive effect in the territory covered by the EEA Agreement outside the Community. The Europe-Japan agreement, therefore, is covered by this decision only in so far as it provided for the observance of domestic markets ('fundamentals') and concerned Member States.

- (104) As the Court of Justice of the European Communities held in *ACF Chemiefarma*, 'the sharing out of domestic markets has as its object the restriction of competition and trade within the common market' ⁽³³⁾. It has been consistently held that 'for the purposes of Article 85(1) it is unnecessary to take account of the actual effects of an agreement where its object is to restrict, prevent or distort competition' ⁽³⁴⁾. The table in recital 68 shows, however, that the domestic markets were respected.

3. Impact on trade between Member States

- (105) An agreement on the observance of domestic markets affects trade between Member States in so far as it concerns sales from a producer in the common market intended for another Member State and even where it relates to sales in the common market from a third country ⁽³⁵⁾.
- (106) The producers, by concerting their action, were able to alter the tonnages of pipes and tubes which each of them, in the absence of concerted action, would have sold on the markets of the Member States ⁽³⁶⁾. The impact on intra-Community trade is appreciable, since deliveries of the products covered by the agreement by the firms to which this Decision is addressed on the four 'domestic' markets concerned account for about 15 % of Community consumption of seamless OCTG and line pipe.

⁽³³⁾ Case 41/69 [1970] ECR 661, paragraph 128..

⁽³⁴⁾ Case 123/83 *BNIC v Guy Clair* [1985] ECR 391, paragraph 22.

⁽³⁵⁾ Case 51/75 *EMI Records v CBS United Kingdom* [1976] ECR 811, paragraph 28. Commission Decisions 74/634/EEC of 29 November 1974 (IV/27.095 — Franco-Japanese ball-bearings agreement (OJ L 343, 21.12.1974, p. 19)), 75/77/EEC of 8 January 1975 (IV/27.039 — Preserved mushrooms (OJ L 29, 3.2.1975, p. 26)) and 75/497/EEC of 15 July 1975 (IV/27.000 — IFTRA rules for producers of virgin aluminium (OJ L 228, 29.8.1975, p. 3)).

⁽³⁶⁾ See the Commission Decision 73/109/EEC of 2 January 1973 relating to proceedings under Articles 85 and 86 of the EEC Treaty (IV/26.918 — European sugar industry) (OJ L 140, 26.5.1973, p. 17).

4. Participation by the firms

- (107) The European and Japanese producers acknowledged that there had been meetings between them and admitted having taken part in them. In their replies to the various requests for information sent to them, the firms gave the Commission the dates of some of these meetings held between 1992 and 1994, but they acknowledge that the club was set up in the late 1970s (Vallourec's statement gives the start of the concerted action as 1977). In their replies to the statement of objections, the Latin American producers supplied the Commission with figures showing their deliveries to Europe, which, together with the express reservation concerning their respect for the European market, led the Commission to withdraw the objections relating to them.

5. Duration of the infringement

- (108) According to Vallourec's statements, the meetings of the Europe-Japan club started in 1977 (page 6257). They continued until 1995 (page 6257). However, in view of the agreements on the voluntary restraint of exports concluded between the Commission and the Japanese Government (see recital 27) the Commission will take into account the existence of an infringement only from 1990 onwards.

6. Conclusion as to the applicability of Article 81(1) of the Treaty

- (109) In view of the above, the Commission takes the view that all the firms to which this decision is addressed infringed Article 81(1) of the Treaty by agreeing to respect the others' domestic markets.

C. Contracts concluded between British Steel, Vallourec, Dalmine and MRW

1. Nature of the infringement

- (110) Even though three separate contracts were concluded on different dates, they were the fruit of an agreement made originally between Vallourec and BS (see recital 78). Vallourec renewed them in agreement with BS, Dalmine and MRW as part of the restructuring of the European industry (see recital 91).

2. Object and effect of the contracts

- (111) The object of these contracts was the supply of plain ends to the leader of the North Sea OCTG market, and

their purpose was to maintain a domestic producer in the United Kingdom with a view to securing respect for the fundamentals in the Europe-Japan club. The main object and effect of the contracts was to share between MRW, Vallourec and Dalmine (Vallourec from 1994) all the requirements of their competitor, BS. The contracts made the purchase prices of the plain ends dependent on the prices of the pipes and tubes threaded by BS. They also contained a restriction on BS's freedom of supply (on Vallourec's from 1994) and forced it to communicate to its competitors the selling prices applied and the quantities sold. In addition, MRW, Vallourec (until February 1994) and Dalmine undertook to supply a competitor (BS, then Vallourec from March 1994) with quantities not known in advance.

- (112) Article 81(1) of the Treaty expressly mentions as being incompatible with the common market all agreements which have as their object or effect the sharing of markets. Contracts whose object and effect is to share supplies to the principal producer of threaded pipes and tubes in a market representing nearly half of the Community's OCTG consumption (see recital 50) involve an appreciable restriction of competition within the common market.

3. *Impact on trade between Member States*

- (113) Intra-Community trade is affected, since the contracts concern deliveries to the United Kingdom from France, Germany and Italy. The impact is appreciable, since deliveries to the United Kingdom of the products covered by the agreement account for about 20 % of Community consumption of seamless OCTG.

4. *Participants*

- (114) The participants in this agreement were Vallourec, MRW, Dalmine and BS (the last named until February 1994 only).

5. *Duration of the infringement*

- (115) For BS, the infringement lasted from July 1991 (date of the signing of the contract with Vallourec) to February 1994 (date of the purchase by Vallourec of the BS plants). For MRW, it lasted from August 1993 (date of the signing of the contract with BS) to at least 24 April 1997 (see recital 92). For Vallourec the infringement lasted from July 1991 to March 1999. For Dalmine, it lasted from December 1991 (date of the signing of the contract with BS) to March 1999 (see recital 92).

6. *Conclusion as to the applicability of Article 81(1) of the Treaty*

- (116) In view of the above, the Commission takes the view that MRW, BS, Dalmine and Vallourec infringed Article 81(1) of the Treaty by concluding contracts for sharing supplies of plain ends to BS (to Vallourec from 1994).

D. *Inapplicability of Article 81(3) of the Treaty*

- (117) Since the agreements referred to in this decision were not notified and do not satisfy the conditions laid down in Article 4(2) of Regulation No 17, Article 81(3) of the Treaty does not apply.

E. *Arguments of the parties*

1. *On the procedure*

(a) *Investigation decisions of November 1994*

- (118) The Japanese firms and Dalmine and MRW contest the legality of the decisions on the basis of which the Commission carried out investigations in December 1994, and hence the Commission's right to use the documents obtained during those investigations. According to these firms, the system established by Article 56 of the EEA Agreement rules out the possibility of the ESA and the Commission combining their powers ('one-stop shop'). If the Commission suspected an infringement of Article 81 of the Treaty, it alone would have been competent and would not have acted at the ESA's request.

- (119) In the Commission's view, this argument must be rejected, since the purpose of the decisions which the institution, on the basis of the information it held, adopted in November 1994 concerning the existence of agreements and/or concerted practices was twofold, namely to check whether the practices might:

— affect trade between Member States (infringement of Article 81 of the Treaty), and/or

— affect trade between the contracting parties to the EEA Agreement (infringement of Article 53 of the Agreement).

In addition, the ESA's request concerned only part of the EEA (Norway), whereas the investigations carried out by the Commission were on a much wider scale, as is clear from the wording of the investigation decisions.

Contrary to what the firms maintain, the Commission was therefore competent to carry out the investigation at the ESA's request and to carry out its own investigations in order to establish the possible existence of other infringements.

- (120) The dual legal basis — the EC Treaty (in particular former Article 85) and the EEA Agreement (in particular Article 53) — was consequently lawful, since at that stage of the inquiry the Commission could not determine whether the facts indicated infringements of Article 81 of the Treaty only or infringements of Article 53 of the EEA Agreement as well. After investigation of the facts and after the transfer of the case by the ESA, the Commission was also the only body responsible for continuing the proceeding in the context of the EEA Agreement.

(b) Use by the Commission of the sharing-key document

- (121) All the firms, except MRW and BS (who have not made their views known in this respect) challenge the fact that the Commission can use the sharing-key document, since its source, author, date and the occasion on which it was created are not specified. However, the Commission is entitled not to identify its sources of information when it has been requested not to. It may use a document of this type where several factors make it likely that it is authentic:

- the document drawn up by Vallourec on 27 January 1994 (pages 4822 and 4823) notes the existence '*des accords*' ('of the agreements') or of a '*système actuel*' ('current system') or a '*club*', and the figures quoted in it [...] coincide with those which, according to the sharing-key document, were agreed upon,
- certain points covered by the agreement in the sharing-key document [...] were specifically discussed in the proposals of the European producers for the November meeting,
- the list of club meetings of which the Commission has cognisance (see recital 60) shows that the meeting following that of November 1993 in Tokyo was held in March 1994 in Cannes. The sharing-key document mentions that the next meeting of the Presidents will be held in March 1994.

- (122) In any event, the Commission did not adduce the document in isolation, but as one item in the body of evidence.

(c) Access to the file

- (123) MRW maintains that it did not have access to the internal documents of the ESA which the latter forwarded to the Commission in December 1995.
- (124) The Commission considers that these were working documents of a public authority, forwarded pursuant to Article 10(3) of Protocol 23 to the EEA Agreement. They must therefore be treated as internal documents and, in accordance with the Commission notice on access to the file ⁽³⁷⁾, may not be made accessible.
- (125) Dalmine emphasises that several passages in the non-confidential (and hence accessible) versions of certain documents in the file had simply been concealed, without a summary of their content being supplied. This practice is alleged to be inconsistent with the abovementioned Commission notice on access to the file.
- (126) The Commission is obliged to protect undertakings' legitimate interest in ensuring that third parties do not know their business secrets or other confidential information. The Commission considers that the practice of concealing confidential passages whilst leaving the documents generally comprehensible is acceptable.

(d) Time limit for replying to the statement of objections

- (127) MRW and Dalmine claim that the time limit allowed by the Commission for replying to the statement of objections was not sufficient, given the large number of documents and the different languages in which they were written.
- (128) The Commission granted the firms a period of two months in which to reply, in accordance with the practice it has followed since 1993 (see 23rd report on competition policy, point 207).

2. As to the facts

(a) Existence of the agreement

- (129) In their written replies to the statement of objections and during the hearing, Vallourec and Dalmine explicitly

⁽³⁷⁾ OJ C 23, 23.1.1997, p. 3, points I(A)(3) and II(A)(2).

acknowledged the existence of the Europe-Japan agreement described by the Commission for standard OCTG and project line pipe. BS, while declaring that it did not contest the facts, questioned the existence of the agreement ('British Steel submits that if there was an agreement as alleged, it should be assessed in its economic context ... The reasons why such an agreement would not have restricted competition within the Community to an appreciable extent, suggest that there would not have been any commercial rationale for such an agreement — which calls into question whether in fact there was an agreement of the kind alleged in the SO' ⁽³⁸⁾). MRW did not express an opinion on the facts described by the Commission.

meetings between European and Japanese producers and, if so, in what capacity they attended' ⁽³⁹⁾ (page 14159).

'SMI felt it important to stress that it relied on recollections of SMI employees since, without having documents and records, it could not be absolutely certain as to the accuracy of the employees' accounts' ⁽⁴⁰⁾ (page 14430).

'To the best of Mr [...] (NKK) knowledge, there is no information other than that... contained in our reply dated 7 November 1997' ⁽⁴¹⁾ (page 14493).

'The fact that KSC only has hearsay information concerning these meetings means that the information it can provide to the Commission is necessarily vague' ⁽⁴²⁾ (page 14616).

(130) KSC maintains that it is not in a position to show that the facts described by the Commission in the statement of objections are incorrect. The company, along with NSC, NKK and SMI, disputes that the evidence is sufficient to substantiate participation in an agreement aimed at protecting domestic markets. NKK, while acknowledging that at the meetings the European producers had asked it to respect their domestic markets, argues that it maintained its commercial strategy based on its own decisions without feeling bound by such requests. SMI contends that domestic markets were discussed precisely in order to exclude them from a 'global sharing key'.

(132) The Japanese firms maintain that between 1977 and 1995 they delivered large quantities of OCTG and line pipe to the British North Sea market. The fact that they did not deliver to Germany, France and Italy was due to objective economic reasons which do not imply the existence of an agreement to respect domestic markets. According to these firms, the British market has special features compared with the other three markets:

(131) As far as the Commission is concerned, as it pointed out during the hearing without receiving an answer from the firms, the documents cited in recitals 62 to 67 and in recital 100 constitute a body of reliable, accurate and consistent evidence which is sufficient to demonstrate the existence and substance of the agreement. First, the statement made by [...] Vallourec [...] is sufficiently clear and accurate and is corroborated by the other documents. Secondly, the Japanese firms acknowledged that they were unable to provide clarification regarding the meetings of the Europe-Japan club:

— the North Sea is an offshore area which is not part of the customs territory of the Community. Thus, imports into the area do not bear customs duties and are not subject to anti-dumping proceedings,

— the North Sea market is very attractive in terms of both quantity (it is the largest in the Community) and price (the pipes used there are 'premium' threaded ones and hence more expensive). Consequently, the transport costs from Japan can be absorbed in an economically viable manner.

'NSC cannot exclude the possibility that some of its former employees who were responsible for the seamless tube business participated in such meetings prior to July 1995' (page 13548). 'NSC cannot confirm whether its former employees attended

(133) On the other hand, according to the Japanese firms (and BS), there were considerable barriers to sales by Japanese firms in the other Community markets, namely:

⁽³⁹⁾ Original English.

⁽⁴⁰⁾ Original English.

⁽⁴¹⁾ Original English.

⁽⁴²⁾ Original English.

⁽³⁸⁾ Point 1.6 of its reply to the statement of objections.

- the Commission's commercial policy (see recital 27),
- customs duties were fixed at 9 % of the price of the pipes and tubes,
- the quantities of pipes and tubes consumed were tiny and the average contract size was assumed to be very small,
- transport costs: according to some of the Japanese estimates, these were more than 20 % of the fob. price of standard threaded pipes,
- national approval standards and requirements,
- delivery times from Japan: from four to six weeks,
- the very strong position of the European producers on their national markets,
- the threat of anti-dumping proceedings,
- national preference on the part of oil producers and gas distribution firms which were public undertakings,
- public procurement rules, which granted no rights to non-Community firms.

(134) The Commission considers that it is sufficiently established that there was an agreement which, *inter alia*, provided for the observance of domestic markets. The fact that the Japanese firms did not export to the common market has its natural explanation in that agreement. Furthermore, after examining the economic factors put forward by the firms, the Commission concludes that they are not such as to preclude the existence of the agreement as described in recitals 61 to 77, for the following reasons:

(135) Firstly, the fundamentals were only part of a wider agreement which governed all the commercial relations (except for the American and Canadian markets) of the European and Japanese producers. Like any agreement, it was based on a balance of the specific interests of each party, which may diverge. Thus, even if in the view of the Japanese firms the continental European markets were not interesting, it is likely that the substance of the agreement would have been different, or its very existence called into question, if observance of the European domestic markets had not been included in it.

(136) Secondly, the supposed barriers to entry were not such as to make it impossible for the Japanese to sell on the domestic markets of the European producers. On the contrary, it is clear from several documents that the

European firms considered the sales of the Japanese firms, whether of finished products or of plain ends to be threaded locally (pages 15611 and 15623), as a genuine threat. This clearly shows that the existence of the agreement to respect domestic markets really did prevent the Japanese producers from exporting to European markets.

(137) The economic arguments put forward by the firms cannot be accepted for the following reasons:

- the trade measures adopted by the Commission to combat the steel crisis, and more specifically the agreement with the Japanese authorities, were designed to avoid market disruptions. While they may have managed to persuade the Japanese firms not to export to Europe until 1990, they do not justify the continuation of this policy beyond that date,
- given the structural overcapacity in the sector (see recital 45) and the high fixed costs, any sale at a price above the variable cost helps to cover the fixed costs and hence to reduce total production costs. Consequently, even markets where the consumption of the products in question was not very great are definitely of interest to all producers,
- the Japanese firms export, by sea and all over the world, more than 95 % of their production of oil pipes and tubes. In the submissions made by these firms at the hearing, freight prices to Europe were presented in isolation, i.e. it was assumed that vessels carry only a small tonnage of pipes and that their sole destination is Europe. However, this does not take account of the fact that it is possible to bulk cargoes, which would reduce the cost. Furthermore, in shipping, distance is not a factor which determines price. Also, the prices referred to were not real costs but estimates, since no comparison was made between the real transport costs incurred by the firms and the real production costs, which would have made it possible to establish whether sales did not cover costs,
- as regards the alleged difference in national approval standards and requirements, it should be pointed out that the API standard is a worldwide one and that any approval requirements on the part of consumers apply throughout the world,
- delivery times from Japan, for OCTG of API standard and for 'project' line pipe, are the same as for premium threaded pipes, for which the firms did not think that they represented an obstacle,

- the very strong position of the European producers on their national markets, rather than being an obstacle for the Japanese firms' exports to Europe, demonstrates, in the Commission's view, that the fundamentals were respected,
 - the argument that the threat of anti-dumping proceedings prevented Japanese exports to Europe cannot be accepted by the Commission. No anti-dumping proceedings were initiated against Japanese imports of steel products, and some of those which were initiated against other countries (which concerned seamless pipes and tubes as a whole) did not succeed. Furthermore, the Japanese (and the European) firms were subject to anti-dumping proceedings in the United States in respect of several steel products, which did not result in their withdrawal from the US market,
 - as to the 'national preference' of oil producers and gas distribution firms, the Japanese firms did not give an example of a tender of theirs which had not been accepted. Without tenders, it is impossible to conclude contracts,
 - the public procurement rules did not make it impossible for the Japanese firms to conclude contracts.
- (138) The Commission recognises that where sales to Europe are concerned the Japanese producers had certain disadvantages on account of distance and customs duties. However, these disadvantages do not explain their absence from the European market for such a long period.

(b) Duration of the agreement

- (139) The Japanese firms point out that the Vallourec statement says that talks began after 1977 but does not specify the exact date. Dalmine contends that, even if the talks did start in 1977, there is nothing to indicate that they resulted in an agreement as described by the Commission, and that this could have materialised later. According to these firms, the Commission cannot simply rely on Vallourec's statement to establish the agreement as starting in 1977. For its part, SMI did not object to the Commission considering that the meetings started in the mid-1980s.

- (140) The Commission bases its arguments on the Vallourec statement in this respect and considers that no firm has provided specific information which casts doubt on it.
- (141) With regard to the end of the agreement, KSC, SMI, NKK and Dalmine maintain that they did not attend any meeting of the Europe-Japan club after 1994.
- (142) The Commission considers that it is not necessary to hold a meeting in order to participate in an agreement which has existed for such a long time. The Vallourec statement of 17 September 1996 mentions that talks with the Japanese firms had finished a little more than a year beforehand. It should also be taken into account that the investigations took place in December 1994. For these reasons, the Commission has concluded in recital 108 that the agreement lasted from 1977 to 1995 (except in the case of BS).

3. On the legal assessment

(a) The Europe-Japan club

- (143) The Japanese firms and BS argue that if there had been an agreement to respect domestic markets it would not have affected competition within the common market, since, in order to sell, the Japanese firms would have had to overcome the obstacles described above (see recital 133). BS, for its part, contends that it did not sell on the domestic markets of the other producers because, following the construction of its pipe mill, it had chosen to concentrate on its domestic market and, consequently, an agreement with a view to its non-participation would have had no effect on competition.
- (144) However, where it is established that an agreement has as its object the restriction of competition within the meaning of Article 81(1) of the Treaty, it is superfluous to take account of its specific effects on the market (see recital 104), as this question is relevant only in so far as determining the amount of any fines is concerned ⁽⁴³⁾.
- (145) The Japanese firms also use as an argument the fact that they sell directly to final users (oil firms) and that therefore the products are not resold later. Accordingly, the agreement does not affect intra-Community trade within the meaning of Article 81(1) of the Treaty. The Commission considers that this argument ignores the fact that, apart from the four Japanese firms, four European firms took part in the agreement, part of which concerned the observance of domestic markets.

⁽⁴³⁾ Case T-14/89 *Montedipe* [1992] ECR II-1155, paragraph 264.

In the Commission's view, such an agreement is likely to influence trade flows between the Member States concerned in a way that conflicts with the achievement of the objectives of a single market among Member States. For the reasons set out above (see recital 106), intra-Community trade is likely to be affected appreciably by this agreement.

(b) Contracts concluded between BS, Vallourec, Dalmine and MRW

(146) Firstly the four parties deny that the three contracts are the result of an agreement among them: they were negotiated and concluded separately and individually.

(147) The Commission considers, however, that, as is clear from recitals 78 to 81, there was an agreement between BS and Vallourec (on Vallourec's initiative, as part of the renewal of the VAM licensing contract) that BS should obtain its supplies of plain ends from MRW, Dalmine and Vallourec so as to preserve the 'domestic' character of the UK market vis-à-vis the Japanese firms. Furthermore, in 1993, the four firms had reached a consensus to maintain these contracts (see recital 91) as part of the restructuring of the European industry, which they also championed vis-à-vis the Japanese producers. For these reasons, the Commission considers that the contracts are contrary to Article 81(1) of the Treaty.

(148) Secondly, the four parties maintain that these contracts were justified from the commercial standpoint and that their substance is not contrary to Article 81(1) of the Treaty.

(149) BS asserts that for specific economic reasons it had decided as early as 1990 to stop production of hot-rolled seamless pipes and tubes (Clydesdale); this took place in April 1991. Its finishing plant at Airdrie (Imperial) continued to operate in the short term and required reliable supplies of plain ends. The percentages allocated to the three partners are explained by the fact that, given the volatile nature of demand in the United Kingdom, it would have been very risky for BS to commit itself to buying fixed quantities for five years or to tie itself to a single supplier. As the firm was dependent on a Vallourec licence for its OCTG production, Vallourec was in a strong position to become its principal supplier ([...] %). With a view to reducing its stocks and storage charges, Dalmine and MRW would have been natural choices, since they could deliver the product in a week, whereas Japanese deliveries would have taken several weeks. In addition,

BS maintains that the formula used for calculating the price of plain ends gave each supplier a margin without restricting competition. Lastly, to apply the formula, BS revealed only the average prices for the previous quarter.

(150) According to Dalmine, its contract with BS gave it an outlet on the biggest market in Europe [...]. Dalmine considers that it did not undertake to supply quantities of plain ends which were unknown in advance, since the quantities were determined every month. Dalmine maintains that, at the very most, it had merely played a secondary role in the conclusion of the contract.

(151) MRW, for its part, contends that its contract with BS enabled it to improve its utilisation of production capacity following the collapse of the market in the former Soviet Union and after it had lost a legal battle with Vallourec over MRW's right to use its own premium joint.

(152) The Commission takes the view that the purpose of these contracts was to maintain BS as a producer in the United Kingdom as part of the fundamentals (see recital 147). Given the structural overcapacity in the seamless pipes and tubes sector at the time (Commission Regulation (EEC) No 3296/92⁽⁴⁴⁾ imposing a provisional anti-dumping duty on imports of certain seamless pipes and tubes originating in Czechoslovakia, Hungary, Poland and the Republic of Croatia referred to a capacity utilisation rate considerably below 75 %, 'which is considered the break-even point for profitability'), BS did not need to fear a shortage of plain ends or deliveries at uneconomic prices. It is clear from the file (pages 15611 and 15612) that, as a result of these contracts, prices on the British market remained high ('Certains clients UK voudront profiter d'opportunité de tubes lisses à prix plus bas que ceux offerts par les Européens à BSC et chercheront à imposer à BSC des tubes lisses d'origine sud-américaine, ce que BSC aura du mal à refuser'⁽⁴⁵⁾). Moreover, to avoid 'cut-throat competition', BS had even mentioned the possibility of buying plain ends from producers other than Vallourec, MRW and Dalmine (pages 15586 to 15587). Lastly, producers established outside Europe would have also been in a position to deliver plain ends within the minimum period of five or six weeks laid down in the relevant contracts⁽⁴⁶⁾. The contracts provided for no other

⁽⁴⁴⁾ OJ L 328, 14.11.1992, p. 15, recital 38.

⁽⁴⁵⁾ 'Some UK customers will want to take advantage of the opportunity to obtain plain ends at lower prices than those offered by the Europeans to BSC and will try and force BSC to use plain ends of South American origin, which BSC will find hard to refuse.'

⁽⁴⁶⁾ According to clause 4, there are three cut-off dates: for instance, for deliveries in March, BS specifies (a) quantities on 15 December, (b) outside diameters on 15 January and (c) all the other order attributes on 25 January (if the delivery is for the first half of March) or 10 February (if it is for the second).

penalty in the event of non-delivery than to include the undelivered tonnage in the calculation of the annual tonnage to which the supplier was entitled, which would simply have reduced de facto the percentage of supplies provided for in the contracts. Hence, the time limit did not have the importance which BS said it gave it.

(153) At all events, the contracts contained clauses which restricted competition.

— By defining the quantities to be delivered to BS in percentage terms instead of fixed amounts, Vallourec, MRW and Dalmine undertook, for the benefit of a competitor, to deliver quantities which were unknown in advance. Thus, for the benefit of a competitor, they partly abandoned taking advantage on the market for threaded tubes of any increase in consumption, since BS's (later Vallourec's) right to ask MRW, Dalmine and Vallourec for unlimited quantities of plain ends enabled it to satisfy any increase in demand. Vallourec, MRW and Dalmine would not have undertaken to deliver quantities which were not known in advance without being certain that BS would not take advantage of this to increase its share of the market in threaded pipes to their detriment. To avoid this, pursuant to clause 9(c), the suppliers could rescind the contracts if they could show that performance had effectively resulted in losses in their trading accounts. In addition, defining quantities in percentage terms deterred competition on quantities between MRW, Vallourec and Dalmine in respect of their supplies to BS.

— As a consequence of the formula adopted for calculating the prices, which made the prices of plain ends dependent on the prices of threaded pipes, Vallourec, MRW or Dalmine lost any interest in initiating competition on the prices of threaded pipes in the United Kingdom. A reduction in the prices of threaded pipes would have entailed a reduction in the prices of the plain ends which these firms had undertaken to supply to BS (later Vallourec); the four parties thus ensured that prices in the United Kingdom remained high.

— The information which BS (later Vallourec) is obliged by the contracts to supply to the other parties (concerning prices and quantities) is information covered by business secrecy. Communication of this information preserved control over the conditions on the British market.

(154) Vallourec maintains that it renewed the contracts for the same reasons that had led BS to conclude them.

(155) The Commission considers, however, that, as the file shows (see recital 91), the renewal by Vallourec had been agreed between the four parties as part of the restructuring of the European industry, in order to maintain 'domestic' production in the United Kingdom.

F. Penalties

1. General

(156) In accordance with Article 15(2) of Regulation No 17, the Commission may by decision, impose on undertakings or associations of undertakings fines of between EUR 1 000 to EUR 1 000 000, or a sum in excess thereof but not exceeding 10 % of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently, they infringe Article 81(1) of the Treaty.

(157) To determine the amount of the fine, the Commission has to take into consideration all the relevant facts and, in particular, the gravity and duration of the infringement.

(158) In the case in point, the Commission will also apply its notice of 18 July 1996 on the non-imposition or reduction of fines in cartel cases ⁽⁴⁷⁾.

2. Gravity of the infringement

(159) In assessing the gravity of the infringement, the Commission takes into account its nature, its actual impact on the market and the size of the relevant geographic market.

(160) The Commission observes that in the case in point the pipes and tubes which were the subject of the agreement (seamless API OCTG and project line pipe) represent only a proportion of the seamless pipes and tubes intended for the oil and gas industry. The API OCTG and project line pipe sold in the Community by the firms to which this Decision is addressed account for only about 19 % of Community consumption of seamless OCTG and line pipe; the rest of the demand is met from seamless OCTG and line pipe not covered by the agreement (more than 50 %) and imports from non-member countries other than Japan (more than 21 %). Moreover, given the technological progress in the manufacture of welded pipes and tubes that has been made over the past 25 years, some of the demand for seamless OCTG and line pipe could be met by medium-diameter welded pipes and tubes, which cost less to produce (see recital 24). Thus the specific impact of the infringement on the market has been limited.

⁽⁴⁷⁾ OJ C 207, 18.7.1996, p. 4.

(161) However, the agreement which is the subject of this decision and whose purpose is the observance of domestic markets constitutes, in principle, a very serious infringement of Community law, since it jeopardises the proper functioning of the single market. Aware that their actions were unlawful, the producers agreed to introduce a secret, institutionalised system designed to restrict competition in an important industrial sector. Furthermore, the four Member States in question account for most of the consumption of seamless OCTG and line pipe in the Community and therefore constitute an extended geographic market.

(162) In view of the above, the infringement must be considered a very serious one. However, the Commission takes into account the fact that the sales of the products concerned in the four Member States in question by the firms to which this decision is addressed amount only to about EUR 73 million a year.

(163) Consequently, the amount of the fine, which reflects the gravity of the infringement, should be fixed at EUR 10 million.

(164) As to the contracts concluded between BS, MRW, Dalmine and Vallourec, the Commission considers that, in fact, these represented only a means of ensuring the application of the principle of respect of domestic markets in the framework of the Europe-Japan Club. For this reason the Commission does not intend to impose an additional fine.

(165) All the firms covered by this decision are large firms. There is therefore no need to differentiate between the amounts adopted.

3. Duration of the infringement

(166) As indicated above (see recital 108), the Commission takes into account the existence of an infringement only from 1990 onwards. The infringement therefore lasted in the case of Vallourec, MRW, Dalmine, KSC, NKK, NSC and SMI from 1990 to 1995. For BS it lasted from 1990 to 1994. Consequently, this is a medium-term infringement, which warrants an increase of 10 % a year in the amount of the fine established on the basis of gravity.

(167) The basic amount of the fine is therefore fixed at EUR 15 million for Vallourec, MRW, Dalmine, KSC, NKK, NSC and SMI and EUR 14 million for BS.

4. Attenuating circumstances

(168) The Commission is mindful that the steel pipe and tube industry has been in crisis for a long time, as indicated in recital 26. Since 1991 in particular, the situation in the sector has deteriorated, which, combined with the growing influx of imports, has resulted in capacity reductions and plant closures.

(169) These considerations warrant a reduction of 10 % in the basic amounts on the grounds of attenuating circumstances.

5. Applicability of the Commission notice on the non-imposition or reduction of fines in cartel cases

(170) Vallourec was the only firm concerned by this decision to supply substantial information on the existence and content of the agreement. The information enabled the Commission to establish the infringement of Article 81(1) of the Treaty with less difficulty. In addition, Vallourec informed the Commission that it was not substantially contesting the facts on which the Commission had based its statement of objections.

(171) This cooperation justifies a reduction of 40 % in the amount of the fine, in accordance with the first and second indents of point D(2) of the abovementioned notice.

(172) In its written reply to the statement of objections and at the hearing, Dalmine informed the Commission that it was not substantially contesting the facts on which the Commission had based its accusations.

(173) It should therefore be granted a reduction of 20 % in accordance with the second indent of point D(2) of the abovementioned notice.

(174) As far as MRW is concerned, the Commission regards its behaviour as ambiguous: although MRW did not contest the facts either in its written reply to the statement of objections or at the hearing, it never clearly expressed its position. MRW refused to supply certain information which the Commission requested in a decision pursuant to Article 11(5) of Regulation No 17. The Commission considers that application of the notice is not warranted in this case. The same also applies to BS which, while declaring that it did not contest the facts, questioned the existence of the agreement as described by the Commission in its statement of objections.

(175) With regard to KSC, NKK, NSC and SMI, the Commission found that there was no effective cooperation which would justify application of the abovementioned notice. These firms contested the existence of the agreement throughout the proceeding,

HAS ADOPTED THIS DECISION:

Article 1

1. Mannesmannröhren-Werke AG, Vallourec SA, British Steel Limited, Dalmine SpA, Sumitomo Metal Industries Limited, Nippon Steel Corporation, Kawasaki Steel Corporation and NKK Corporation have infringed the provisions of Article 81(1) of the EC Treaty by participating, in the manner and to the extent set out in the grounds to this decision, in an agreement providing, *inter alia*, for the observance of their respective domestic markets for seamless standard threaded OCTG pipes and tubes and project line pipe.

2. The infringement lasted from 1990 to 1995 in the case of Mannesmannröhren-Werke AG, Vallourec SA, Dalmine SpA, Sumitomo Metal Industries Limited, Nippon Steel Corporation, Kawasaki Steel Corporation and NKK Corporation. In the case of British Steel Limited, it lasted from 1990 to February 1994.

Article 2

1. Mannesmannröhren-Werke AG, Vallourec SA, British Steel Limited, and Dalmine SpA infringed Article 81(1) of the EC Treaty by concluding, in the context of the infringement mentioned in Article 1, contracts which resulted in a sharing of the supplies of plain end OCTG pipes and tubes to British Steel Limited (to Vallourec SA from 1994).

2. In the case of British Steel Limited, the infringement lasted from 24 July 1991 to February 1994. In the case of Vallourec SA, the infringement lasted from 24 July 1991 to 30 March 1999. In the case of Dalmine SpA, the infringement lasted from 4 December 1991 to 30 March 1999. In the case of Mannesmannröhren-Werke AG, the infringement lasted from 9 August 1993 to 24 April 1997.

Article 3

The firms designated in Articles 1 and 2 shall immediately terminate the abovementioned infringements, if they have not already done so, and shall refrain in future from repeating the acts or behaviour specified in those Articles and from adopting any measures having equivalent effect.

Article 4

The following fines are imposed on the firms mentioned in Article 1 on account of the infringement established therein:

1. Mannesmannröhren-Werke AG	EUR 13 500 000
2. Vallourec SA	EUR 8 100 000
3. British Steel Limited	EUR 12 600 000
4. Dalmine SpA	EUR 10 800 000
5. Sumitomo Metal Industries Limited	EUR 13 500 000
6. Nippon Steel Corporation	EUR 13 500 000
7. Kawasaki Steel Corporation	EUR 13 500 000
8. NKK Corporation	EUR 13 500 000

Article 5

The fines imposed shall be paid within three months of the notification of this decision to the following bank account:

Account No 310-0933000-43
European Commission
Banque Bruxelles Lambert
Agence européenne
Rond-point Schuman 5
B-1040 Brussels.

After the time limit has expired, interest will be charged automatically at the rate applied by the European Central Bank to its repo operations on the first working day of the month in which this decision is adopted, plus 3,5 percentage points, namely 6,5 %.

Article 6

This Decision is addressed to:

1. Mannesmannröhren-Werke AG, Wiesenstrasse 36, D-45473 Mülheim
2. Vallourec SA, 130, rue de Silly, BP 415, F-92 103 Boulogne-Billancourt Cedex
3. British Steel Limited, 15 Marylebone Road, London NW1 5JD, United Kingdom

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- | | |
|---|--|
| 4. Dalmine SpA, Piazza Caduti 6 luglio 1944, n.1, I-24044 Dalmine (Bergamo) | 8. NKK Corporation, 1-1-2 Marunouchi Chiyoda-ku, Tokyo 100-8202, Japan. |
| 5. Sumitomo Metal Industries Limited, Ote Centre Building, 1-3, Ohtemachi 1-Chome, Chiyoda-Ku, Tokyo, 100-8113 Japan | This decision shall be enforceable pursuant to Article 256 of the EC Treaty. |
| 6. Nippon Steel Corporation, 6-3 Otemachi 2-chome, Chiyoda-ku, Tokyo 100-8071, Japan | Done at Brussels, 8 December 1999. |
| 7. Kawasaki Steel Corporation, Hibiya Kokusai Building, 2-3, Uchisaiwaicho 2-chome, Chiyoda-ku, Tokyo 100-0011, Japan | <i>For the Commission</i>
Mario MONTI
<i>Member of the Commission</i> |
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ANNEX 1

SEAMLESS PIPES AND TUBES 1996*(in thousand tonnes)*

	Production	Exports
EEC	3 273	1 472
CEECs	1 278	687
CIS	2 617	695
USA	2 064	467
Latin America	1 678	1 183
Japan	1 938	1 267
China	3 162	234
Other	390	376
Total	16 400	6 381

Source: European Steel Tubes Association.

ANNEX 2

SALES OF SEAMLESS STEEL PIPES AND TUBES FOR THE OIL INDUSTRY (EXCEPT THOSE MADE OF STAINLESS STEEL) BY VALLOUREC, DALMINE, MRW, BS ⁽¹⁾, NSC, SMI ⁽²⁾, KSC AND NKK ⁽³⁾

Average 1990 to 1995

		FRG	France	Italy	UK	Total EU	Total world
Plain end OCTG	EUR million	0,3	0,4	0,6	31,2	33,3	99,6
	Tonnes	301	190	719	57 822	59 549	169 143
Standard threaded OCTG	EUR million	3,9	3,1	1,4	15,8	31,5	463,5
	Tonnes	3 266	3 140	1 514	19 622	38 277	688 601
Premium threaded OCTG	EUR million	13,9	2,7	29,2	63,5	133,7	329,9
	Tonnes	8 452	2 616	31 734	58 152	125 143	361 374
Total OCTG	EUR million	18,0	6,2	31,1	110,5	198,4	892,9
	Tonnes	12 717	5 982	33 966	131 940	223 280	1 241 446
Project line pipe	EUR million	5,1	3,5	9,9	30,0	57,2	192,0
	Tonnes	4 585	4 277	13 355	37 983	71 209	319 028
Trade line pipe	EUR million	1,2	14,4	47,5	19,3	101,1	224,6
	Tonnes	1 831	22 696	77 725	27 659	160 951	396 806
Total line pipe	EUR million	6,4	17,9	57,3	49,4	158,3	416,1
	Tonnes	6 417	26 973	91 580	65 642	232 159	715 834

⁽¹⁾ BS's figures do not include the line pipe products made at its Wednesfield mill.

⁽²⁾ SMI was unable to provide the breakdown for project line pipe and trade line pipe. Consequently, its line pipe figures are not included. Its sales of plain end OCTG are included in the figure for standard threaded OCTG.

⁽³⁾ NKK's sales data are based on the figures published by the Japanese Ministry of Finance. No breakdown has been made between the different categories of OCTG or line pipe at world level. At European level, the figures are NKK estimates. Accordingly, the NKK world data are not included. Similarly, its sales of plain end OCTG are included in the figure for standard threaded OCTG.

ANNEX 3

DELIVERIES OF SEAMLESS OCTG BY VALLOUREC, DALMINE, MRW, BS, NSC, SMI, KSC AND NKK**Average 1990 to 1996**

	Tonnes	%
Italy	31 775	2
Germany	12 329	1
France	5 854	0
United Kingdom	127 419	9
Spain	454	0
Austria	1 821	0
Rest of EU	38 906	3
Norway	74 096	5
EEA	292 725	20
CIS	106 266	7
USA/Canada	132 989	9
South America	69 455	5
Japan	10 524	1
Middle East	153 287	10
Far East	150 703	10
China	403 267	27
Rest of world	136 488	9
Total	1 484 977	100

ANNEX 4

DELIVERIES OF SEAMLESS LINE PIPE BY VALLOUREC, DALMINE, MRW, BS, NSC, SMI, KSC AND NKK**Average 1990 to 1996**

	Tonnes	%
Italy	89 020	10
Germany	9 988	1
France	26 969	3
United Kingdom	62 430	7
Spain	6 655	1
Austria	2 677	0
Rest of EU	24 411	3
Norway	16 078	2
EEA	238 566	26
CIS	61 507	7
USA/Canada	121 818	13
South America	26 106	3
Japan	35 498	4
Middle East	111 670	12
Far East	220 500	24
China	10 846	1
Rest of world	70 505	8
Total	909 657	100

ANNEX 5

IMPORTS FROM NON-MEMBER COUNTRIES (EXCLUDING JAPAN)

Average 1990 to 1995

(tonnes)

	Seamless OCTG	Seamless line pipe
Italy	49 781	27 748
Germany	1 604	4 082
France	1 682	2 163
United Kingdom	3 622	4 395
EU	66 027	56 580

Source: Eurostat.

COMMISSION DECISION**of 2 October 2002****on State aid measure C 44/01 (ex NN 147/98) implemented by Germany for Technische Glaswerke Ilmenau GmbH**

(notified under document number C(2002) 2147)

(Only the German text is authentic)

(Text with EEA relevance)

(2003/383/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

Having called on interested parties to submit their comments ⁽¹⁾ pursuant to Article 88(2) of the EC Treaty and Article 6(1) of Council Regulation (EC) 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ⁽²⁾ and having regard to their comments,

Whereas:

laid down in Article 88(2) of the EC Treaty in respect of the waiver of DEM 4 000 000 of a purchase price (State aid C 19/2000). At the same time, Germany was enjoined to provide all information and data necessary to establish whether investment loans amounting to DEM 17 100 000 allegedly granted by the Kreditanstalt für Wiederaufbau (hereinafter referred to as KfW) under aid schemes authorised by the Commission and aid of DEM 2 000 000 granted under the Thuringia Consolidation Fund, an approved aid scheme, complied with the terms of the relevant schemes ⁽³⁾.

(3) By letter dated 3 July 2000, registered on 7 July, Germany replied to the decision initiating the procedure and to the information order. A meeting with representatives of the German authorities was held on 7 November 2000. By letter dated 27 February 2001, registered on 1 March, Germany submitted further information.

1. PROCEDURE

(1) By letter dated 1 December 1998, registered as received on 4 December 1998, Germany notified restructuring measures for Technische Glaswerke Ilmenau GmbH (hereinafter referred to as TGI) to the Commission in accordance with Article 88(3) of the EC Treaty. Since the aid had already been disbursed, the measures were registered as non-notified aid under number NN 147/98. By letters dated 23 December 1998 and 29 March 1999, the Commission requested additional information from Germany, which was provided by letters dated 18 February 1999, registered on 19 February, and 31 May 1999, registered on 1 June. By letters of 15 September 1999, registered on 20 September, of 4 October 1999, registered on 5 October, and of 29 October 1999, registered on 3 November, Germany submitted further information.

(2) By letter dated 4 April 2000, the Commission informed Germany that it had decided to initiate the procedure

(4) In the context of the formal investigation proceedings in case C 19/2000, the Commission received comments from two interested parties. It forwarded them to Germany for its comments. Germany's comments were received by letters of 13 December 2000, registered on 15 December, and of 27 February 2001, registered on 1 March.

(5) By letter dated 5 July 2001, the Commission informed Germany that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the new aid.

(6) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* ⁽⁴⁾. The Commission invited interested parties to submit their comments on the aid measure.

⁽¹⁾ OJ C 272, 27.9.2001, p. 2.

⁽²⁾ OJ C 83, 27.3.1999, p. 1.

⁽³⁾ OJ C 217, 29.7.2000, p. 10.

⁽⁴⁾ OJ C 272, 27.9.2001, p. 2.

- (7) By letter dated 9 October 2001, registered that same day, Germany responded to the decision initiating the procedure. It provided additional information by letters of 15 March 2002, registered on 18 March, and of 23 April 2002, registered on 24 April. By letter dated 12 June 2002, registered on 13 June, Germany submitted further information.
- (8) The Commission received comments from two interested parties. It forwarded them to Germany, which submitted its response by letter dated 4 February 2002, registered on 4 February.
- (9) Further letters were received from the company concerned, one of 1 March 2002, registered on 4 March, and one of 11 April 2002, registered on 12 April. A meeting with German representatives and the lawyers of the company was held on 17 May 2002. On that occasion the company handed over further information, which was registered on 23 May.
- (10) The waiver was the subject of proceedings in Case C 19/2000 and will not be assessed here. A final negative decision was taken on 12 June 2001⁽⁵⁾. The aid recipient lodged an appeal against this decision on 28 August 2001 (Case T-198/01). By order of 4 April 2002, the President of the Court of First Instance suspended, subject to certain conditions, implementation of Article 2 of the Commission decision, which required recovery of the aid. The Commission contested this order on 18 June 2002.

2. DESCRIPTION

2.1. Aid recipient

- (11) TGI is located in Ilmenau, Thuringia, an area eligible for regional aid under Article 87(3)(a) of the EC Treaty. It was set up in 1994 by two private persons, Mr and Mrs Geiß, with the aim of taking over four of the 12 production lines of Ilmenauer Glaswerke GmbH (hereinafter referred to as IGW), a company that its sole owner, the Treuhandanstalt (hereinafter referred to as THA), had decided to wind up in 1994. The eight remaining production lines were shut down and dismantled.
- (12) TGI is active in the field of technical glassware, laboratory glass, glass for domestic use, sight glass, tubes and rods. In 1997 it had 226 employees and a turnover of DEM 28 048 000.

- (13) The main shareholder ([...]) (*) % of the shares) and managing director of the company, Mr Geiß, was also the sole shareholder and managing director of two other companies active in the same market as TGI:
- Laborbedarf Stralsund GmbH (LS), located in Güstrow, Mecklenburg-Western Pomerania, and
 - Paul F. Schröder & Co. Technische Glaswaren (GmbH & Co.) (PFS), located in Ellerau, near Hamburg.
- (14) In 1997 LS had two employees. It stopped its business activities in 1999. PFS had 74 employees and a turnover of DEM 9 711 000 in 1997. It filed for bankruptcy in January 2000.

2.2. Previous financial measures

- (15) The four IGW production lines (melting tanks) were sold to TGI by means of two asset deals.

2.2.1. Asset deal 1 (contract of 26 September 1994)

- (16) In September 1994 the first three production lines were sold to TGI after negotiations with other potential investors had failed. The sale was approved by the THA, the sole shareholder in IGW, in December 1994.
- (17) The purchase price totalled DEM 5 800 000 and was to be paid in three instalments, the last one at the end of 1999. Payment was secured by a mortgage amounting to DEM 4 000 000 and a bank guarantee of DEM 1 800 000. The latter was covered, in turn, by other counter-guarantees and time deposits.
- (18) In the context of this asset deal, Germany granted the following aid amounting to a total of DEM 58 500 000:

(in DEM)

Financial measure	Amount
Investment loans from the KfW	17 100 000
Investment grants (under joint Federal Government/Länder scheme)	6 750 000
Investment allowances	1 150 000
BvS grants	16 500 000
THA/BvS grants for loss compensation	17 000 000
Total	58 500 000

⁽⁵⁾ OJ L 62, 5.3.2002, p. 30.

(*) [...] represents business secret.

- (19) In addition to investment loans from the KfW amounting to DEM 17 100 000 and investment grants and allowances amounting to DEM 7 900 000, TGI received grants from the Bundesanstalt für vereinigungsbedingte Sonderaufgaben (hereinafter referred to as BvS) for the restructuring of a pilot plant amounting to DEM 16 500 000 and THA/BvS grants for loss compensation for the years 1994 to 1997 amounting to DEM 17 000 000.

2.2.2. Asset deal 2 (contract of 11 December 1995)

- (20) In December 1995 the fourth production line was sold to TGI since no other investor could be found. The purchase price was DEM 50 000.
- (21) In the context of asset deal 2, Germany granted the following aid amounting to a total of DEM 8 925 000:

(in DEM)

Financial measure	Amount
Investment allowances	425 000
Thüringer Aufbaubank loan under the Consolidation Fund	2 000 000
BvS grants for restructuring the fourth production line	4 000 000
BvS investment grants	1 000 000
THA/BvS grants for loss compensation	1 500 000
Total	8 925 000

- (22) In addition to investment allowances amounting to DEM 425 000 and a loan from the Thüringer Aufbaubank amounting to DEM 2 000 000, TGI received BvS grants for the restructuring of the fourth production line amounting to DEM 4 000 000, BvS investment grants amounting to DEM 1 000 000 and THA/BvS grants for loss compensation for the years 1996 to 1998 amounting to DEM 1 500 000.
- (23) The effectiveness of asset deal 2 was dependent on the provision of a bank guarantee by TGI. As this was not forthcoming, asset deal 2 was provisionally ineffective until February 1998.

2.3. Restructuring plan and financial measures

- (24) According to Germany, TGI ran into difficulties as the start-up of the investment project had to be postponed for half a year because the THA approved the terms of asset deal 1 only in December 1994.

- (25) As a consequence, TGI was not able to start the investment project until April 1995, whereas it had planned to start in the last quarter of 1994. This also delayed the rest of the investment project.

- (26) Moreover, TGI was unable to provide, in time, evidence of the guarantee which was a precondition for the implementation of asset deal 2. Accordingly, the BvS did not make available the grants amounting to DEM 4 000 000 for restructuring the fourth production line, with the result that the necessary investments could not be carried out. As TGI had also suffered, since its inception from a continuous lack of liquidity, the whole project was in the balance and by 1997 the company's liquid resources were almost exhausted.

- (27) In order to restore viability, TGI was obliged to solve the liquidity problem and to build up capital and reserves. To this end, concerted action was decided on by the BvS, the Land of Thuringia and the owner of the company in February 1998.

- (28) Germany submitted the following restructuring plan with the notification. The time-frame envisaged was 1998 to 2000.

(in DEM)

Financial requirements	Amount
Purchase price	5 800 000
Restructuring of the fourth production line	4 000 000
Investments (fourth production line)	6 000 000
Projects to improve productivity	1 500 000
General overhaul	3 000 000
Accounts payable to suppliers for 1997	1 750 000
Rent for 1997	175 000
Total	22 225 000

- (29) The purchase price for the first three production lines had still not been paid. In addition, DEM 4 000 000 was needed for the restructuring of the fourth production line and DEM 6 000 000 for related investments. For projects to improve productivity and for a general overhaul of the production lines, DEM 4 500 000 was envisaged. For outstanding accounts payable to suppliers

for 1997 and rent payments originally due in 1997, an amount of DEM 1 925 000 was required.

- (30) The restructuring costs mentioned above were to be financed as follows:

(in DEM)	
Financial measures	Amount
BvS waiver of purchase price	4 000 000
Conversion of bank guarantee for remaining purchase price into mortgage	1 800 000
BvS grants for restructuring of the fourth production line	4 000 000
THA/BvS grants for loss compensation	1 325 000
Investment allowances	475 000
Thüringer Aufbaubank loan from the Consolidation Fund	2 000 000
Own resources (cash flow)	4 175 000
Private investor contribution	3 850 000
Waiver of staff's Christmas bonus	650 000
Release of guarantee for securing jobs	250 000
Total	22 525 000

- (31) The BvS agreed to waive DEM 4 000 000 of the initial purchase price. In addition, the bank guarantee amounting to DEM 1 800 000 under asset deal 1 was converted into a mortgage in order to improve the liquidity situation of the company.

- (32) The BvS finally approved asset deal 2 without insisting on the provision of a bank guarantee, a precondition that had made the contract provisionally ineffective until February 1998. The grants for restructuring the fourth production line amounting to DEM 4 000 000 could therefore finally be paid out. Moreover, the company received THA/BvS grants for loss compensation totalling DEM 1 325 000.

- (33) Investment allowances amounting to DEM 475 000 were granted to the company in the context of the restructuring.

- (34) The company received a DEM 2 000 000 loan from the Thüringer Aufbaubank under the Thuringia Consolidation Fund, as had been agreed in asset deal 2.

- (35) Under the restructuring plan, DEM 4 175 000 of the restructuring costs were to be financed by the company's own resources in the form of cash flow. No details were given on whether this cash flow had already been generated or when it was to be generated. A private investor, who still had to be found, was to contribute DEM 3 850 000 to the restructuring.

- (36) Moreover, a waiver of the staff's Christmas bonus amounting to DEM [...] * had been agreed.

- (37) With the release of the guarantee for securing jobs, DEM 250 000 became available for the restructuring. No further information was given on this guarantee.

- (38) According to the provisional profit and loss account, TGI was expected to have a positive result in 1999. This expectation did not materialise. The planned and the actual figures are shown in the following table:

(in DEM 1 000)							
	1997 (actual)	1998 (plan)	1998 (actual)	1999 (plan)	1999 (actual)	2000 (plan)	2000 (actual) ^(a)
Turnover	28 048	34 800	31 429	38 700	27 371	41 000	24 200
Operating result	[...] *	[...] *	[...] *	[...] *	[...] *	[...] *	[...] *

Note: Business secret (actual 1997 to 1999 and plan 1998: losses; actual 2000 and plan 1999 to 2000: profits).

^(a) Until 30 September 2000.

- (39) According to the latest information submitted by Germany, the company realised a turnover of DEM 32,7 million in 2000 and DEM 35,144 million in 2001. In 2002 it made a profit of some DEM [...]*

2.4. Market analysis

- (40) The products produced by TGI fall within the category of special glass. Special glass accounted for some 6 % of total EU glass output in 1997 and is a sector covering a wide range of different products, with a limited number of producers. TGI is one of the ten companies in the EU producing lighting glass.
- (41) According to the information available to the Commission, ⁽⁶⁾ output growth in the special glass sector in 1997 was more than 5 % up on 1996. The market for lighting glass grew by around 4 % in 1997. This positive trend did not continue as expected in 1998 as a consequence of the Asian crisis. Since mid-1999 the market has been recovering and the turnover of special glass has grown by 3,4 % in Germany. The general outlook remains positive.

2.5. Initiation of the formal investigation procedure

- (42) The Commission initiated the formal investigation procedure in respect of a Thüringer Aufbaubank loan of DEM 2 million allegedly granted under an approved aid scheme. It appeared that the conditions of the approved aid scheme had not been met and it was doubtful whether the loan was compatible with the guidelines on rescue and restructuring aid. For instance, no restructuring plan for restoring the firm's viability had been submitted and there was clearly no contribution from a private investor. The Commission also had doubts about whether the aid recipient qualified as a small or medium-sized enterprise (SME).
- (43) The formal investigation procedure was also initiated in respect of the deferral of the payment of DEM 1,8 million of the purchase price and the conversion of collateral. The Commission suspected that these measures constituted State aid and had doubts about their compatibility with the rescue and restructuring guidelines.

3. COMMENTS FROM INTERESTED PARTIES

- (44) The Commission received comments from TGI itself and from one of its competitors. The comments were forwarded to Germany for its reaction by letters dated 31 October 2001 and 12 November 2001 respectively. It replied to the comments of the competitor on 4 February 2002.
- (45) In its comments on the opening of the procedure, TGI argued that the Commission had violated the principle of sound administration. The proceedings in respect of the waiver of DEM 4 000 000 of the purchase price, it said, had been separated from those in respect of the Thüringer Aufbaubank loan. A negative decision had been taken in the first case, and then the proceedings initiated in the second. As both measures were part of the same restructuring plan, they ought to be assessed in one set of proceedings. Picking out some elements of the restructuring plan rendered it incoherent, with the result that the negative decision in Case 19/2000 prejudged the outcome of the proceedings in respect of the Thüringer Aufbaubank loan.
- (46) TGI also argued that there was no need for an urgent decision on the waiver as the company was in negotiations with an investor and was still adjusting its restructuring plan. The Commission had violated the principle of sound administration by initiating the formal investigation procedure in respect of the conversion of collateral 31 months after having been informed of it. TGI also complained that in its decision to initiate the formal investigation procedure the Commission did not take into account the arguments put forward by Germany and the latest data submitted.
- (47) TGI claimed that the loan from the Thüringer Aufbaubank did not constitute State aid but was a compensation payment to which it was entitled because of the demolition of a building by the *Land* of Thuringia.
- (48) Were the Commission not to accept this reasoning, TGI argued that the loan was covered by the aid scheme under which it was allegedly granted. Were the Commission to conclude that the loan was not covered by the aid scheme, TGI claimed that it could be authorised on the basis of the rescue and restructuring guidelines.
- (49) According to TGI, one of the main problems for the application of the rescue and restructuring guidelines was the absence of a contribution from a private investor who, according to the original restructuring plan, was to have contributed DEM 3,85 million. TGI

⁽⁶⁾ See 1997 Panorama of EU Industry, Vol. 1, Ch. 9, the 1998 Report of the Standing Committee of the EC Glass Industries (CPIV), and the 1999 Annual Report of the Bundesverband Glasindustrie und Mineralfaserindustrie.

made the point that it was now in negotiations with a [...] group of investors and that the negotiations were almost concluded. The group intended to invest DEM [...] in the company. TGI also submitted a letter of intent from the group.

in which TGI operated. Moreover, TGI's activity in the lighting-glass market was very limited.

4. COMMENTS FROM GERMANY

- (50) In its comments on the opening of proceedings, the competitor argued that TGI did not qualify as an SME given that its main shareholder, Mr Geiß, was also the owner of several other companies. These companies had to be viewed as a single business entity and, taken together, exceeded the threshold of 250 employees laid down in the SME recommendation.
- (51) Moreover, the competitor argued that the conversion of collateral and the deferral of payment constituted State aid. The conversion of a bank guarantee into a junior mortgage constituted State aid, as a bank guarantee normally involved no risk in the event of the company's becoming insolvent. With a junior mortgage, the claims of other creditors had priority and, in the event of insolvency, nothing could be recovered. The deferral of payment also constituted State aid according to the competitor since, despite the company's difficult economic situation, the creditor could have enforced its claim by making use of the bank guarantee. A private creditor would not have waived this possibility.
- (52) As regards the loan from the Thüringer Aufbaubank, the competitor argued that it constituted State aid and was not covered by the scheme since the scheme was designed for SMEs. Moreover, the requirements of the guidelines on rescue and restructuring aid were not met.
- (53) The competitor accuses TGI of using State aid to sell its products systematically at dumping prices, thereby significantly distorting competition. The market shares of competitors had decreased significantly and prices had fallen sharply.
- (54) As regards the compatibility of the aid measures with the rescue and restructuring guidelines, the competitor pointed to the absence of any restructuring plan. In addition, the guidelines required the abandonment of structurally loss-making activities. The competitor claimed that TGI should have abandoned production of activities in coffee pots, a declining market. Moreover, the competitor claimed that the 'first time, last time' principle, according to which restructuring aid can be awarded only once, had not been observed.
- (55) The competitor also pointed out that there were structural overcapacities in some of the product markets
- (56) In its reply to the decision initiating the procedure, Germany claimed that the Thüringer Aufbaubank loan was covered by the aid scheme under which it had allegedly been granted. The various conditions of the scheme had been met.
- (57) It argued that the aid recipient qualified as an SME. The other companies owned by Mr Geiß were no longer active in the market. At the time the aid was granted, the recipient also ranked as an SME since there were no synergies between the different companies. TGI and the other companies that were owned by the same shareholder did not form a business entity. Even if TGI had not qualified as an SME, a loan could have been granted from the Thuringia Consolidation Fund. In this case, notification would have been required.
- (58) As regards the restructuring plan, Germany pointed out that the original had had to be amended several times. The company had produced an amended plan adapted to its new situation in April 2001. In addition, the company was in negotiations with a private investor which were close to being concluded. Germany would submit the final plan at a later date.
- (59) In Germany's view, capacity reductions were required only if the SME was in a dominant position in a market suffering from overcapacity. Since this was not the case here, it did not consider a reduction of capacity to be required.
- (60) Germany claimed that the aid was limited to the minimum necessary. As regards the private-investor contribution, it argued that the guarantee provided for the loan by the main shareholder and managing director, Mr Geiß, should be taken into account. Moreover, there was a contribution from the employees. Germany rejected the accusation by the competitor that TGI had sold its products at dumping prices.
- (61) Germany argued that the loan from the Thüringer Aufbaubank had been granted under an approved aid scheme, the Thuringia Consolidation Fund. For reasons of legal certainty, the Commission's assessment had to be confined to deciding whether the conditions for granting the aid had been assessed appropriately and that there had been no manifestly incorrect application of the scheme. The Commission had not respected these principles, in particular with regard to the doubts concerning the SME status of the aid recipient.

- (62) The Commission notes that it had issued an information order so as to obtain further information on the loan granted from the Thuringia Consolidation Fund. On the basis of the information provided, it concluded that the conditions had not been met. It was therefore obliged to initiate the formal investigation procedure.
- (63) Were the Commission not to accept that the loan was indeed covered by the aid scheme, Germany argued in the alternative that the loan could be authorised under the rescue and restructuring guidelines. It pointed out that the Commission took a less restrictive line on restructuring aid to SMEs. According to Germany, TGI qualified as an SME in 1997, with 226 employees. The other companies owned by Mr Geiß were irrelevant to the SME status of TGI.
- (64) Germany referred to the expert report dating from November 2000 as well as to more recent data on the company's development which had been submitted to the Commission and showed a positive trend. Germany claimed that this material had not been taken into account by the Commission.
- (65) Germany also argued that the loan from the Thüringer Aufbaubank constituted not aid but compensation for the demolition of the old batch house by the *Land* of Thuringia. The use of this building was related to the operation of the fourth production line. Its demolition entailed additional costs of DEM 2 million for TGI since a new building and a connecting bridge had to be built. The loan from the Thuringia Consolidation Fund had been awarded to the company as compensation. According to Germany, the link between the provision of the loan and the demolition of the building was clear from the contract, which indicated that the loan was to be used for the financing of investments related to the restoration of the building for the fourth production line.
- (66) As regards the deferral of the payment of the remaining purchase price, Germany argued that the BvS acted like a private creditor. The deferral, it claimed, was necessary to enable the company to renew the production lines and thus to remain viable. In the event of insolvency, the entire claim would have been unenforceable. According to Germany, the deferral therefore did not constitute State aid within the meaning of Article 87(1) of the EC Treaty. Germany argued in the alternative that the deferral could be authorised on the basis of the guidelines on rescue and restructuring aid.
- (67) In its reply to the comments of the competitor, Germany expressed disappointment that the proceedings had been split. It asked the Commission to revoke its decision concerning the waiver, arguing that the Commission could revoke a decision, and was even obliged to do so, if a significant mistake had been made in the procedure.
- (68) Article 9 of Regulation No 659/1999 provides that the Commission may revoke a decision where it was based on incorrect information provided during the procedure which was a determining factor for the decision. Since this is not the case here, the Commission sees no reason to revoke the decision.
- (69) Germany claimed that the first negative decision prejudged the outcome of the second decision. Moreover, it claimed not to have the possibility to comment on the effect of all the measures that were part of the restructuring plan and thus that its right of defence was violated. Nor was the Commission able to assess the restructuring plan as a whole. Germany therefore claimed that the principle of sound administration had been violated.
- (70) Germany reiterated its position that the loan was effectively covered by the aid scheme under which it had allegedly been granted. In the alternative, it argued that the loan did not constitute aid but was a compensation payment. It also argued that the loan did not contain elements of State aid since it had been provided on market terms. This was supported by the fact that Mr Geiß had personally guaranteed the repayment of the loan.
- (71) Germany pointed out that TGI was an SME at the time the loan was granted. There were no synergies between the two companies since the product groups were different and business between the two companies was carried out on an arm's length basis. The two companies could not therefore be considered as one entity whose actual economic power was greater than that of an SME.
- (72) Germany argued in the alternative that the loan was compatible with the common market on the basis of the guidelines on rescue and restructuring aid. In this connection, it submitted the latest information on the restoration of the firm's viability and the restructuring plan. It submitted TGI's latest restructuring plan dating from April 2001, which contained an investment plan and an overview of the financing of the investments.
- (73) Germany also submitted an expert report which had been prepared for Case T-198/01 (concerning the

Commission's negative decision on the waiver) and showed, according to Germany, that there had been a sustained improvement in the company's economic performance and that its long-term viability had been restored.

- (74) By letter dated 15 March 2002, Germany claimed that TGI had found a new outside investor, [...]*, which would invest EUR [...]* in the company and take over [...]*% of the shares. The investor had made its contribution conditional on confirmation of the waiver of DEM 4 million, which had been the subject of a negative decision. Germany therefore asked the Commission to revoke its negative decision concerning the waiver in Case C 19/2000 and to include the waiver in the current proceedings.
- (75) Germany argued that the negative decision in Case 19/2000 and the opening of the current proceedings were based mainly on the absence of a contribution from a private investor. The new investor enabled Germany to present a new restructuring plan that met the conditions of viability and proportionality of the aid. The investments that had been delayed could now be carried out.
- (76) In its latest letter dated 13 June 2002, Germany reiterated primarily the arguments presented in previous letters in the course of these proceedings.
- (77) It stressed that TGI's competitor, Schott, would gain a monopoly in some market segments if TGI were forced out of the market. This fact ought to be taken into account in deciding whether the restructuring aid was compatible with the common market. Germany referred to the guidelines on aid for rescuing and restructuring firms in difficulty, which State that 'State aid ... may be warranted, for instance, ... by the desirability of maintaining a competitive market structure when the disappearance of firms could lead to a monopoly or tight oligopoly situation ...' ⁽⁷⁾.
- (78) Germany also argued that, even if the Commission took the view that the contribution from the new investor could not be taken into account in assessing the compatibility of the aid, the aid could be approved on the basis of the alternative plan for financing the restructuring. This plan had been sent to the Commission.
- (79) In Germany's view, this financing plan was plausible and realistic, as demonstrated by the fact that the firm had already carried out most of the restructuring. The plan also met the requirement for the aid to be proportional

since, in addition to the public assistance from the BvS and the *Land* of Thuringia, it contained a significant private contribution. Lastly, only half of the restructuring costs had been financed by the waiver of the purchase price and the loan from the Thüringer Aufbaubank, guaranteed by Mr Geiß. The rest had been financed by the company itself, supported by the waiver by the staff and management of their salary and payments.

- (80) Germany argued that the new investment by [...]* worth EUR [...]*, the guarantee by Mr Geiß for the Thüringer Aufbaubank loan worth DEM 2 million (EUR 1,022 million), the deferred repayment of loans from a private bank worth EUR [...]*, the deferral of staff salaries and Christmas bonuses worth EUR [...]* and the waiver of the Christmas bonuses for 1997 worth EUR [...]* should all be viewed as a private-investor contribution.
- (81) Germany therefore concluded that the conditions were met for the aid to be approved on the basis of the guidelines on rescue and restructuring contribution.

5. ASSESSMENT

- (82) The Commission notes that the separation of the proceedings and the negative decision in the first proceedings do not prejudice the outcome of the second set of proceedings. All the information necessary for a decision on the first measures was available and it is in accordance with the principle of sound administration to conclude a formal investigation as quickly as possible.
- (83) Financial assistance from public resources was granted to TGI. The Commission first has to determine whether these measures constitute State aid within the meaning of Article 87(1) of the EC Treaty.
- (84) If TGI received assistance from public resources that no private investor would have granted, this gives the company an advantage over its competitors and thus distorts competition. This in turn affects trade between Member States as the products in question are actively traded. The financial measures would therefore constitute State aid within the meaning of Article 87(1) of the EC Treaty and the Commission would have to analyse their compatibility with the common market.
- (85) For each measure in support of TGI financed from public resources, the Commission must therefore analyse whether it constitutes State aid and, if so, whether it is compatible with the common market.

⁽⁷⁾ OJ C 368, 23.12.1994, p. 12.

5.1. The recipient firm

- (86) Germany considers TGI to be the aid recipient. It moreover considers TGI to be an SME as defined in the Commission recommendation of 3 April 1996 concerning the definition of small and medium-sized enterprises ⁽⁸⁾, (hereinafter referred to as the SME recommendation).
- (87) In its decision initiating the formal investigation procedure, the Commission raised the question of whether the relevant undertaking might not be larger than just TGI. The main shareholder and managing director of TGI was at the same time the sole shareholder and managing director of two other companies, PFS and LS. Taken together, TGI, PFS and LS exceeded the threshold of 250 employees established by the SME recommendation.
- (88) Since the question of whether TGI qualifies as an SME is not relevant for the assessment of the compatibility of the measures concerned, this issue will not be pursued further in these proceedings.

5.2. Existence of aid within the meaning of Article 87(1) of the EC Treaty and compliance with approved aid schemes

5.2.1. Contributions from the THA/BvS in the context of asset deal 1 (contract of 28 September 1994)

- (89) The measures granted as part of asset deal 1 fell under the THA aid scheme E 15/92 ⁽⁹⁾. Since the closure of the company would have been a less costly option but the State none the less decided to privatise it with State support, this decision implied a burden for the State of DEM 33 500 000. Thus, the price of DEM 5 800 000 to be paid for the company must be considered to be a negative price. Since the undertaking had less than 1 000 workers, this financial assistance from the THA/BvS to TGI was covered by THA scheme E 15/92. It therefore constitutes existing aid, which does not need to be reassessed as part of these proceedings.

5.2.2. Contributions from the THA/BvS in the context of asset deal 2 (contract of 11 December 1995)

- (90) The measures granted under asset deal 2 fell within the scope of THA scheme N 768/94 ⁽¹⁰⁾. Since the closure of the company would have been a less costly option but the State none the less decided to privatise it with

State support, this decision implied a burden for the State of DEM 6 500 000. Since the undertaking had less than 250 workers, this financial assistance from the THA/BvS to TGI was covered by THA scheme N 768/94. It therefore constitutes existing aid, which does not need to be reassessed as part of these proceedings.

5.2.3. Investment loans from the KfW in the context of asset-deal 1

- (91) Three loans amounting to DEM 17 100 000 were granted by KfW allegedly under aid schemes previously authorised by the Commission.
- (92) A first loan of DEM 10 000 000 was granted under a KfW scheme for small businesses. A second loan of DEM 5 100 000 was granted under a KfW EU job-promotion scheme for small businesses. According to the information submitted by Germany, both loans were provided at market conditions with an interest rate above the reference interest rate. As the company was not in difficulties at the time the loans were granted, the Commission concludes that they do not constitute State aid.
- (93) A third loan of DEM 2 000 000 was provided under the ERP reconstruction programme, a regional aid scheme previously authorised by the Commission ⁽¹¹⁾. It complies with the conditions set out in the aid scheme under which it was said to be granted and is thus effectively covered by the scheme. It therefore constitutes existing aid, which does not need to be reassessed as part of these proceedings.

5.2.4. Investment grants and investment allowances

- (94) As part of asset deal 1, TGI received investment grants amounting to DEM 6 750 000 under the 23rd outline plan for the Joint Federal Government/Länder scheme for improving regional economic structures, a regional aid scheme authorised by the Commission ⁽¹²⁾. These grants comply with the terms of the aid scheme approved by the Commission under which they were allegedly granted. They are therefore regarded as existing aid.

⁽⁸⁾ OJ L 107, 30.4.1996, p. 4.

⁽⁹⁾ THA scheme E 15/92, SG (92) D/17613, 8.12.1992.

⁽¹⁰⁾ THA scheme N 768/94, SG (95) D/1062, 1.2.1995.

⁽¹¹⁾ N 562/c/94 SG (94) D/17293, 1.12.1994.

⁽¹²⁾ 23rd outline plan for the Joint Federal Government/Länder scheme for improving regional economic structures: measures under this scheme qualify as regional investment aid under Article 87(1) of the EC Treaty and were approved by the Commission under the exemption laid down in Article 87(3)(a) of the EC Treaty (N 157/94, SG (94) D/11038, 1.8.1994).

(95) Under the two asset deals, investment allowances amounting to DEM 1 575 000 were granted to TGI. Moreover, outside the asset deals, TGI received investment allowances amounting to DEM 876 000 in 1996 and DEM 748 000 in 1997. All payments were made under the Investment Allowance Law (*Investitionszulagengesetz*), a regional aid scheme authorised by the Commission ⁽¹³⁾. On the basis of the information submitted, the Commission concludes that the investment allowances meet the conditions of the aid scheme under which they were allegedly granted and are thus effectively covered by the scheme. They are therefore regarded as existing aid.

(96) Existing aid does not need to be reassessed as part of these proceedings, but it should be taken into account for the calculation of the proportionality of the aid.

5.2.5. Waiver of DEM 4 000 000 of the purchase price

(97) The waiver of DEM 4 000 000 of the purchase price was the subject of the investigation procedure in Case 19/2000. A negative final decision was adopted on 12 June 2001 ⁽¹⁴⁾. The waiver will therefore not be assessed in these proceedings.

(98) Germany had claimed that the waiver of the price did not constitute State aid within the meaning of Article 87(1) of the EC Treaty but corresponded to the behaviour of a private creditor. It argued that it was more profitable from an economic point of view for the BvS to waive the price than to insist on payment of the full price.

(99) However, the Commission took the view that the waiver constituted State aid and was incompatible with the common market. The aid recipient lodged an appeal against this decision with the Court of First Instance of the European Communities.

5.2.6. Conversion of securities for DEM 1 800 000 of the purchase price and deferral of payment

(100) As part of the concerted action, the BvS agreed to convert the bank guarantee worth DEM 1 800 000 under asset deal 1 into a junior mortgage. Payment of the remaining purchase price was also deferred and is now scheduled for 2003 onwards. The Commission initiated the formal investigation procedure because it

suspected that these measures conferred advantages on the firm which a private creditor would probably not have granted to a firm in difficulty, with the result that they constituted State aid.

(101) The Commission maintains that the BvS is a government body. Its task, like that of its predecessor, the Treuhandanstalt, is to privatise State-owned firms in eastern Germany. The BvS is part of the federal government structure and is answerable to it. Measures taken by the BvS are thus attributable to the State.

(102) The security in the form of a junior mortgage is of lower value than the bank guarantee. A bank guarantee involves low risk. In the event of insolvency, the entire purchase price of DEM 1,8 million could have been recovered. The mortgage is of junior rank compared with the senior claims of the banks. As Stated by Germany in a letter dated 29 October 1999, which was submitted in Case C 19/2000, the economic value of this mortgage is very low. Given its junior rank after the banks, it has to be expected that in the event of insolvency only a small percentage of the claim could be recovered. This assessment was confirmed in the letter dated 9 October 2001. The conversion of securities therefore confers an advantage on TGI that a private creditor would not have granted. It thus constitutes State aid and has to be assessed as ad hoc aid.

(103) As regards the deferral of the payment, Germany claims that it corresponds to the behaviour of a private creditor and therefore does not constitute State aid. According to the established case-law of the Court of Justice of the European Communities, in order to determine whether a measure by a public-sector body constitutes State aid it is necessary to determine whether the recipient undertaking receives an economic advantage which it would not have obtained under normal market conditions ⁽¹⁵⁾.

(104) The remaining purchase price amounting to DEM 1,8 million was originally due for payment at the end of 1999. In October 2000 the BvS agreed to a deferral of the payment. Payment is now scheduled for 2003 onwards (in three instalments of DEM 600 000 each at the end of 2003, 2004 and 2005).

(105) Germany argues that the deferral of the payment was necessary in order to restore the viability of the company. Otherwise the company would have gone bankrupt. When the deferral was granted, the purchase price of DEM 1,8 million was secured by a junior mortgage. As pointed out above, the mortgage was of low economic value and in the event of insolvency only a small share of the DEM 1,8 million would have been recovered.

⁽¹³⁾ *Investitionszulagengesetz* (Investment Allowance Law) (N 494/A/95, SG (95), D/17154, 27.12.1995): Measures under this Law qualify as regional investment aid under Article 87(1) of the EC Treaty and were approved by the Commission under the exemption laid down in Article 87(3)(a) of the EC Treaty.

⁽¹⁴⁾ OJ L 62, 5.3.2002, p. 30.

⁽¹⁵⁾ Case C-342/96 *Spain v Commission* [1999] ECR I-2459, at 41.

(106) The Commission considers that the deferral was consistent with the behaviour of a private creditor. This is supported by the fact that some private banks agreed to a deferral of their claims. The deferral therefore does not constitute State aid and does not fall within the scope of Article 87 of the EC Treaty. This does not contradict the Commission's conclusion in its final decision in Case C 19/2000, to the effect that the waiver of DEM 4 million of the purchase price constituted State aid. A waiver and a deferral of payment are not comparable.

5.2.7. Loan of DEM 2 000 000 granted by the Thüringer Aufbaubank under the Thuringia Consolidation Fund (February 1998)

(107) According to Germany, this loan was granted under the Thuringia Consolidation Fund for firms in difficulty, an aid scheme which had been authorised by the Commission ⁽¹⁶⁾. The Commission had serious doubts as to whether the loan was effectively covered by the aid scheme. It therefore initiated the formal investigation procedure.

(108) In its decision initiating the procedure, the Commission questioned whether the company ranked as an SME. However, the scheme was designed primarily for SMEs. In the case of a large undertaking, an individual notification would have been necessary.

(109) For the rest, the conditions of the scheme are the same as those set out in the guidelines on rescue and restructuring aid. As will be pointed out below, these conditions are not met. The loan is therefore not covered by the aid scheme, under which it was said to have been granted. It therefore constitutes new aid and has to be assessed as ad hoc aid.

(110) Were the Commission not to accept that the loan was covered by the aid scheme, Germany argued that it did not constitute aid. First, it claims that it was granted on market conditions. According to the information available, the loan was granted at an interest rate of 8,2 %. It is secured by a mortgage related to the real estate of the fourth production line and by a directly enforceable guarantee by Mr Geiß, the owner of the company.

(111) The Commission notes that the Thüringer Aufbaubank is the development bank of the *Land* of Thuringia. It is a public-sector body and is controlled by the *Land* of Thuringia, which provides a 100 % guarantee for its activities. The measures must accordingly be attributed to the State. The Commission also notes that the loan

was granted in accordance with an approved aid scheme for firms in difficulty.

(112) The loan was granted by the Thüringer Aufbaubank in December 1998, when the company was in serious financial difficulties. The Commission considers that no private investor would have granted a loan on these terms to the company and that the loan thus constitutes State aid.

(113) Germany argues in the alternative that the loan from the Thüringer Aufbaubank does not constitute State aid because it is a compensation payment by the *Land* of Thuringia for the demolition of the old batch house. The use of this building was related to the operation of the fourth production line. Germany claims that because of the demolition the company had to extend another building and build a connecting bridge. This generated costs amounting to DEM 2 million.

(114) No expert report or evidence has been provided to show that the company was faced with additional costs of DEM 2 million because of the demolition of the building. Germany and the company claim that the relationship between the loan and the damage caused to TGI can be deduced from the fact that the loan contract states that the loan should be used for the financing of the investments related to the renovation of the fourth production line. This does not, however, prove that the loan constitutes a compensation payment.

(115) If the company incurred additional costs of DEM 2 million and if these costs were to be compensated, it should in any event have received a grant of DEM 2 million and not a loan. This shows that Germany's argument is unfounded.

(116) The Commission therefore concludes that the DEM 2 million loan from the Thüringer Aufbaubank constitutes State aid and must be assessed as ad hoc aid.

5.3. Exemption under Article 87(3)(c) of the EC Treaty

(117) The Thüringer Aufbaubank loan of DEM 2 million and the conversion of securities must be assessed as ad hoc aid by the Commission. Article 87(2) and (3) of the EC Treaty lays down exemptions to the general principle of the incompatibility of State aid established in Article 87(1).

(118) The exemptions in Article 87(2) do not apply in this case because the aid measure does not have a social character and is not granted to individual consumers, it does not make good the damage caused by natural

⁽¹⁶⁾ NN 74/95, SG (96) D/1946, 6.2.1996.

disasters or exceptional occurrences, and is not granted to the economy of certain areas of the Federal Republic of Germany affected by its division.

(119) Further exemptions are laid down in Article 87(3)(a) and (c) of the EC Treaty. As the primary objective of the aid is not regional development but the restoration of the long-term viability of an undertaking in difficulty, only the exemptions laid down in Article 87(3)(c) apply. Article 87(3)(c) provides for the authorisation of State aid granted to promote the development of certain economic sectors where such aid does not adversely affect trading conditions to an extent contrary to the common interest. For its assessment of rescue and restructuring aid the Commission has issued special guidelines. It considers that none of the other sets of Community guidelines, such as those relating to aid for research and development, environmental protection, small and medium-sized enterprises or employment and training, nor any other basis for compatibility apply in this case.

(120) Since, according to the information available, the aid was granted before 30 April 2000, the 1994 Community guidelines on aid for rescuing and restructuring firms in difficulty ⁽¹⁷⁾, are applicable ⁽¹⁸⁾.

(121) According to point 2.1 of the rescue and restructuring guidelines, the financial weakness of firms that receive help for restructuring is generally due to poor past performance and dim future prospects. The typical symptoms are deteriorating profitability or increasing size of losses, diminishing turnover, growing inventories, excess capacity, declining cash flow, increasing debt, rising interest charges and low net asset value.

(122) On the basis of the information provided, the Commission concludes that the company was in difficulty at the time the aid was granted. It was incurring continuous losses and generating insufficient cash flow to carry out necessary investments. Moreover, its equity capital had been reduced significantly.

(123) Germany argued that the aid should be approved on the ground that TGI's competitor, Schott, would have a monopoly position in some market segments and strengthen its dominant position in others if TGI were to be forced out of the market. However, the fact that the disappearance of a firm will strengthen a competitor's market position or dominant position cannot be the decisive criterion for approving restructuring aid if the relevant conditions are not met.

Restoration of viability

(124) The granting of restructuring aid requires a feasible, coherent and far-reaching restructuring plan capable of restoring the long-term viability of the firm within a reasonable time span and on the basis of realistic assumptions.

(125) Germany submitted a restructuring plan covering the period from 1998 to 2000. It also submitted a forecast of the company's turnover and results for the same period. The company's viability was to be restored by 1999.

(126) The restructuring plan relied on the assumption that there would be a new outside investor contributing DEM 3 850 000. This amount was to cover a substantial part of the investment costs specified in the restructuring plan. However, this private investor could not be found within a reasonable time span. The financing of the measures was therefore not assured.

(127) In the absence of this outside contribution, the restructuring plan was not realistic and not capable of restoring the long-term viability of the company. Although, according to the restructuring plan, viability was supposed to have been restored by 1999, the company was still making losses.

(128) Germany argued that the Commission did not take into account an expert report from November 2000 which contained a favourable assessment of the company's economic situation. The report pointed to a positive development of the company's profit situation in the years from 1997 to 2002. However, it also stated that a precondition for this development was the carrying out of investments amounting to DEM 11,5 million. In 2000 investments amounting to only DEM 1 million were carried out. The liquidity situation of the company is serious. Besides finding the resources for investments amounting to DEM 11,5 million, TGI also has to pay back loans of DEM [...] million. According to the estimations of the expert, the company will not be able to carry out the financing with its own resources. To ensure the viability of the company, further State aid or the waiver of existing claims were said to be necessary.

⁽¹⁷⁾ OJ C 368, 23.12.1994, p. 12.

⁽¹⁸⁾ Point 7.5 of the 1999 Guidelines states that 'the Commission will examine the compatibility with the common market of any rescue and restructuring aid granted without its authorisation ... on the basis of the guidelines in force at the time the aid is granted ...' (OJ C 288, 9.10.1999, p. 2).

- (129) Contrary to what Germany claimed, the expert report does not show that the company had recovered but States that it was still in serious difficulties and that its long-term viability was not secured.
- (130) An *ex post* assessment shows that the original restructuring plan was implemented only in part. By the end of 2000, the renovation of the four production lines, which was necessary to restore the long-term viability of the company, had not yet been completed. In 2001 the first, third and fourth production lines were renovated. The second production line has been shut down temporarily since mid-2000.
- (131) Another expert report prepared for Case T-198/01 was submitted in the course of the investigation procedure. According to Germany, it points to the positive development of the company in economic and employment terms. However, it is based on significantly less investment than in the original investment plan. Moreover, in October 2001 the company still had to pay back debts amounting to around DEM [...]*, not including the purchase price of DEM 4 million, the waiver of which was the subject of a negative decision by the Commission. The report also Stated that the liquidity situation would still be very difficult in 2001 and 2002.
- (132) Germany submitted an alternative plan for financing the restructuring measures which dated from April 2001 and took account of the fact that no private investor had yet been found. This plan postpones the renovation of the second production line. It also relies on the deferral of staff salary payments and the medium-term deferral of loan payments, in order to allow the financing of the most important investments. Moreover, the total investment is lower than in the original restructuring plan. Germany argued that this alternative plan was capable of restoring the firm's long-term viability.
- (133) In its latest letter, however, Germany explained that the deferral of the salaries and Christmas bonuses, the deferral of repayments on the bank loans and the waiver of the Christmas bonuses included in the alternative financing plan were necessary for the firm to survive until a contract was concluded with a new investor. In order to guarantee the long-term viability of the firm, the waiver of DEM 4 million of the purchase price and the contribution from a new investor were necessary to give TGI a sound financial basis and sufficient capital. The Commission therefore concludes that the alternative financing plan was manifestly not capable of restoring the firm's long-term viability.
- (134) The Commission notes that, according to the latest information submitted, the negotiations with the [...]* group of investors were not conclusive and that this group of investors will not invest in the company.
- (135) By letter dated 15 March 2002, Germany claimed that a new private investor had been found and that the negotiations with this new investor had been concluded. A binding contract had apparently been signed between the new investor and the two owners of the company, Mr and Mrs Geiß. The new investor would increase the own capital of the company by EUR [...]* to EUR [...]* and would then hold [...]* of the stakes ([...]* %). In addition, the new investor would provide TGI with EUR [...]*, which would be placed in the capital reserves.
- (136) As a new investor had been found, Germany claimed that the argument of the restructuring plan's not being viable was not valid anymore. According to Germany, the aid could therefore be authorised. Germany claims that it cannot be argued that there is no temporal link. The original restructuring plan, which, according to Germany, was coherent from the outset and was carried out in part only because of the absence of an investor, could now be carried out in amended form.
- (137) It must be noted that the aid was granted in February 1998 and paid out in November 1998. Under the rescue and restructuring guidelines, the restructuring plan must restore the long-term viability and health of the firm within a reasonable time span and consequently restructuring aid must be linked to a viable restructuring programme submitted in all relevant detail to the Commission. The plan must restore the firm to competitiveness within a reasonable period. The restructuring plan should normally be established before the granting of the aid.
- (138) The original restructuring plan submitted was never realistic. If Germany now submits an adjusted restructuring plan containing the contribution of a new private investor, this constitutes a new restructuring plan and a new restructuring period. There is no link between aid measures granted in 1998 and a restructuring plan with a new investor submitted more than three years later. Since, in the legal proceedings relating to the decision in Case C 19/2000, TGI asserted its serious liquidity problems, it is clear that the loan from the Thüringer Aufbaubank has already been used. Germany's arguments can therefore not be accepted.

(139) The Commission also notes that the commitment of the new private investor is not unconditional but depends on the confirmation of the waiver of the purchase price, which was the subject of a negative decision by the Commission. This is explicitly stated in the information submitted by Germany. Germany writes that the investor has made its commitment conditional on the Commission's approving the waiver by the BvS. The confirmation of the waiver is the basis for the investment.

(140) However, the waiver was considered by the Commission in its decision of 12 June 2001 to constitute unlawful and incompatible aid. The Commission regards its decision as lawful and sees no reason to revoke it. The fact that implementation of the article on recovery was suspended by order of the President of the Court of First Instance on 4 April 2002 does not deprive the decision of the presumption of legality enjoyed by all Community legal instruments. The planned contribution from a new private investor cannot therefore be taken into account.

(141) Accordingly, the Commission cannot conclude that a restructuring plan existed which was capable of restoring the long-term viability and health of the firm within a reasonable timescale and on the basis of realistic assumptions. The viability criterion is therefore not met.

No undue distortions of competition

(142) The restructuring plan must contain measures for offsetting as far as possible adverse effects on competitors; otherwise the aid involved would be contrary to the common interest and not eligible for exemption pursuant to Article 87(3)(c) of the EC Treaty.

(143) Where, on an objective assessment of the demand and supply situation, there is a structural excess of production capacity in the relevant market in the Community served by the aid recipient, the restructuring plan must make a contribution, proportionate to the amount of aid received, to the restructuring of the relevant sector by irreversibly reducing or closing capacity.

(144) Germany stated that TGI was not expected to increase or decrease its production capacity in the future.

(145) In its comments on the decision initiating the procedure, a competitor of TGI argued that there was structural overcapacity in some of the product markets in which TGI operated. However, as shown in recitals

40 and 41, according to the information available to the Commission, the overall market does not seem to be in overcapacity. Moreover, TGI took over only four of IGW's twelve production lines, with the result that a reduction in capacity did take place.

Proportionality to restructuring costs and benefits

(146) The amount and intensity of the aid must be limited to the strict minimum needed to enable restructuring to be undertaken and must be related to the benefits anticipated from the Community's viewpoint. Therefore, the investor is normally expected to make a significant contribution to the restructuring plan from its own resources or external financing. Moreover, the way in which the aid is granted must be such as to avoid providing the company with surplus cash which would be used for aggressive, market-distorting activities not linked to the restructuring process.

(147) Germany argued that the waiving of the staff's Christmas bonus in 1997 constituted part of the investor's contribution. While it can be seen as a significant commitment on the part of the staff to the restructuring of the company, it cannot be taken into account within the investor's contribution since the investor bears no risk in this respect. The same applies to the deferral of salaries and Christmas bonuses, which Germany identifies in its latest letter as a contribution from a private investor. Moreover, these payments were merely deferred. They therefore represent no more than a temporary reduction in costs for the firm.

(148) Germany also considered the salary reduction for the managing director (who is the main shareholder of the company), worth DEM [...]*, to form part of the investor's contribution. However, this measure constitutes a cost reduction for the firm and cannot be viewed as a contribution by the owner to the financing of the restructuring. This is supported by the fact that the measure was not included in the restructuring plan. Since the managing director, as the owner, also controls the firm, he can himself decide the level of his salary and thus the amount of any reduction, with the result that a reduction of this kind does not correspond to a verifiable contribution. The reduction in the managing director's salary can therefore not be regarded as part of the investor's own contribution.

(149) Germany argued that the deferral of payments on a loan from a private bank (Commerzbank) ranked as a contribution from an investor. However, this deferral reduces the costs for the firm only temporarily. It cannot be viewed as part of the investor's contribution.

(150) Germany also considered cash flow amounting to DEM [...]* as the investor's contribution. The Commission cannot accept that this internal financial measure forms

part of the investor's contribution because it was largely made possible directly and indirectly through aid measures. Although the cash flow might reduce the need for financing for the restructuring of the company, the Commission cannot take it into account as an element of the investor's contribution. Moreover, Germany did not provide information on when this cash flow was generated or if it still had to be generated in the future.

(151) Germany claimed that the directly enforceable guarantee that Mr Geiß, the owner of the company, provided for the Thüringer Aufbaubank loan of DEM 2 million was part of the private investor's contribution. However, the loan is granted from public resources and so cannot be considered to be a private-investor contribution. Moreover, it is secured by a mortgage of DEM 2 million on the plot of the fourth production line. Mr Geiß has therefore not assumed the entire risk and the value of his guarantee must be considered to be far lower than Stated by Germany.

(152) Even if the Commission recognises Mr Geiß's guarantee as part of the investor's own contribution, that contribution is still 10 % below the restructuring costs. In accordance with the Commission's customary practice, this is not sufficient. For these reasons, the announced contribution from a new private investor is not unconditional and cannot be taken into account.

(153) The Commission therefore concludes that there is no significant private-investor contribution within the meaning of the rescue and restructuring guidelines. The condition of the proportionality of the aid is not met.

Full implementation of the restructuring plan

(154) The company must fully implement the restructuring plan. The restructuring plan submitted to the Commission shows a gap in the financing as no new outside investor could be found. Since a contribution from an investor is essential for the implementation of the restructuring plan, in particular for carrying out the indispensable investment, the restructuring plan was implemented only in part.

6. CONCLUSIONS

(155) The Commission notes that the conversion of securities constitutes State aid. It also finds that the loan provided by the Thüringer Aufbaubank under the Thuringia Consolidation Fund is not covered by the scheme under which it was allegedly granted and that it constitutes State aid. It finds moreover that Germany unlawfully implemented the two aid measures in breach of Article 88(3) of the EC Treaty.

(156) The measures do not meet the criteria laid down in the guidelines on aid for rescuing and restructuring firms in difficulty and therefore cannot be considered compatible with the common market pursuant to Article 87(3)(c) of the EC Treaty. The restructuring plan submitted is not realistic as regards restoring the viability of the company and there is no private investor contribution. The Commission therefore asks Germany to recover the aid from the recipient,

HAS ADOPTED THIS DECISION:

Article 1

The State aid implemented by Germany for Technische Glaswerke Ilmenau GmbH in the form of a conversion of securities for DEM 1 800 000 (EUR 914 109) of the purchase price and a loan from the Thüringer Aufbaubank worth DEM 2 000 000 (EUR 1 015 677) is incompatible with the common market.

Article 2

1. Germany shall take all necessary measures to recover from the recipient the aid referred to in Article 1 and unlawfully made available to the recipient.

2. Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of the decision. The aid to be recovered shall include interest from the date on which it was at the disposal of the recipient until the date of its recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant equivalent of regional aid.

Article 3

Germany shall inform the Commission, within two months of notification of this Decision, of the measures taken to comply with it.

Article 4

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 2 October 2002.

For the Commission

Mario MONTI

Member of the Commission