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⁽¹⁾ Text with EEA relevance

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Acts whose titles are printed in light type are those relating to day-to-day management of agricultural matters, and are generally valid for a limited period.

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IV

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

COMMISSION DECISION

of 6 November 2008

on State aid C 19/05 (ex N 203/05) granted by Poland to Stocznia Szczecińska

(notified under document C(2008) 6770)

(Only the Polish text is authentic)

(Text with EEA relevance)

(2010/3/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

Having called on interested parties to submit their comments ⁽¹⁾ pursuant to the provisions cited above,

Whereas:

1. PROCEDURE

(1) Pursuant to the provisions of Annex IV, point 3 of the Accession Treaty governing the interim mechanism procedure, Poland, by letter of 27 April 2004, registered on 28 April 2004, notified restructuring measures in favour of Stocznia Szczecińska Nowa Sp. z o.o. (New Szczecin Shipyard Ltd, hereinafter SSN). The case was registered under the number PL 31/2004.

(2) By letter of 19 May 2004 the Commission asked Poland to submit certain missing documents. These were provided on 16 June 2004. The Commission requested further information by letters of 12 August 2004, 18 November 2004 and 4 March 2005, to which Poland replied by letters of 24 September 2004, registered on that day, of 28 January 2005, registered on 2 February 2005, of 30 March 2005, registered on

1 April 2005 and of 18 April 2005, registered on 20 April 2005 respectively. Meetings with the Polish authorities took place on the following dates: 9 November 2004, 17 November 2004 and 3 March 2005.

(3) By letter of 22 April 2005, registered on the same day, Poland accepted that the Commission would also treat the notification of case PL 31/2004 of 27 April 2004 as a notification under Article 88(2) of the EC Treaty with regard to any measures which were found to constitute new aid. The case was allocated the new number N 203/05.

(4) On 1 June 2005 the Commission adopted the decision to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the restructuring aid for SSN notified by the Polish authorities. The Commission published this decision in the Official Journal ⁽²⁾ and invited Poland and interested parties to submit comments.

(5) By letter of 24 June 2005 the Polish authorities indicated that the decision contained confidential information and asked for that information to be deleted from the public version of the decision. The Commission replied by letter of 15 July 2005. Poland asked for an extension of the deadline for submission of comments on the decision opening the procedure by letters of 30 June 2005, registered on 1 July 2005, 26 July, registered on 27 July 2005, and 30 August 2005, registered on 1 September 2005. The Commission replied by

⁽¹⁾ OJ C 23, 1.2.2007, p. 20.

⁽²⁾ OJ C 222, 2.9.2005, p. 7.

letters of 12 July, 2 August and 9 September 2005 respectively. By letter of 4 October 2005, registered on 7 October 2005, the Polish authorities submitted their comments on the decision to initiate the formal investigation procedure. In this letter Poland also submitted a restructuring plan for 2002-2004, dated December 2002 and modified in October 2003 (hereinafter 2003 restructuring plan). By letter of 10 October 2005, registered on the same day, a legal representative of SSN stated that its position and comments had been incorporated in the submission of the Polish authorities.

- (6) Comments were submitted by the following third parties: Związek Pracodawców Forum Okrętowe (Association of Polish Maritime Industries) in a letter of 6 October 2005, registered on the same day, Towimor SA in a letter of 6 October 2005, registered on the same day, H. Cegielski — Poznań SA in a letter of 6 October 2005, registered on the same day, Spliethoff's Bevrachtungskantoor BV in a letter of 6 October 2005, registered on the same day, Peter Dohle Schiffahrts-KG in a letter of 5 October 2005, registered on 6 October 2005, Odjefjell ASA, in a letter of 6 October 2005, registered on 11 October 2005, the trade unions of SSN ('Solidarność', 'Solidarność 80' and 'Stoczniowiec') in a letter of 7 October 2005, registered on 10 October 2005, the Mayor of Szczecin in a letter of 5 October, registered on 11 October 2005, Lubmor Sp. z o.o. in a letter of 6 October 2005, registered on 11 October 2005, and Business Club Szczecin in a letter of 12 October 2005, registered on the same day. The Commission forwarded these comments to Poland by letter of 27 October 2005. The Polish authorities replied by letter of 21 November 2005.
- (7) The Commission sought the assistance of an external consultant for the evaluation of the 2003 restructuring plan. The consultant submitted his report to the Commission in March 2006.
- (8) By letter of 13 January 2006 the Commission asked the Polish authorities to provide further information on the SSN restructuring process. Poland replied by letter of 20 February 2006, registered on the same day. On 22 February 2006, a meeting took place between the Polish authorities, representatives of the yard and Commission staff. Following the meeting, the Commission asked Poland for additional information by letters of 8 March 2006, 30 March 2006, 12 April 2006 and 28 April 2006. The Polish authorities replied by letters of 13 March 2006, registered on the same day, 29 March 2006, registered on 30 March 2006, 6 April 2006, registered on 10 April 2006, 19 April 2006, registered on 20 April 2006, and 26 May 2006, registered on 30 May 2006. By letter of 23 June 2006, registered on 26 June 2006, the yard's consultant

submitted a draft restructuring plan entitled 'Development plan for Stocznia Szczecińska Nowa Sp. z o.o. for 2006-2011' to the Commission for consultation purposes.

- (9) On 12 July 2006 a meeting took place between the Polish authorities, the yard's representatives and Commission staff. The Polish authorities submitted information concerning the SSN restructuring process in a letter of 13 July 2006, registered on 17 July 2006. By letter of 17 July 2006 the Commission asked the Polish authorities to submit additional information. The Polish authorities replied by letter of 1 September 2006, registered on the same day. On 4 September 2006 Poland submitted a modified restructuring plan for SSN entitled 'Development plan for Stocznia Szczecińska Nowa Sp. z o.o. for 2006-2011' (hereinafter 2006 restructuring plan).
- (10) In letters of 26 September 2006, registered on 27 September 2006, and 21 November 2006, registered on 27 November 2006, the Polish authorities submitted additional information concerning the case.
- (11) On 7 December 2006 a meeting took place between Commission Member Neelie Kroes and Polish Minister of the Economy Piotr Wozniak. Mr Wozniak stated that Poland was determined to relaunch the privatisation process for SSN by means of an open and transparent procedure, which was to be finalised by June 2007. Poland confirmed this statement by letter of 27 December 2006, registered on 4 January 2007, referring to the decision of the Polish Council of Ministers of 19 December 2006, which adopted a document entitled 'Information on the state of the ship-building industry'. Poland asked the Commission to enter into talks on the issue of compensatory measures. Commission staff, together with the external consultant, visited the yard on 18 December 2006 in order to establish the facts and obtain the data needed to evaluate compensatory measures. The external consultant submitted his report evaluating the current capacity of the yard on 16 January 2007.
- (12) The Commission replied to a letter of 27 December 2006 by letter of 29 January 2007, in which, among other things, it asked Poland to submit a proposal for compensatory measures for SSN by the end of February 2007.
- (13) By letter of 28 February 2007, registered on the same day, Poland submitted some explanations concerning the privatisation of SSN and a proposal for compensatory measures. The Polish authorities proposed closing one of the yard's three slipways from March 2010.

- (14) On this basis, a technical meeting took place on 15 March 2007 between Commission staff, the Polish authorities and representatives of the yard, mainly concerning compensatory measures but also to discuss the on-going privatisation process. The Commission and the Polish authorities agreed that the Commission would discuss technical issues directly with SSN in order to gather all the data it needed for its assessment of Poland's proposal for compensatory measures.
- (15) Following the meeting, the Commission requested a range of data from SSN by letters of 29 March 2007, 27 April 2007 and 30 May 2007. The yard replied by letters of 18 April 2007, registered on 27 April 2007, 8 May 2007, registered on 10 May 2007, and 4 June 2007, registered on 5 June 2007. On 8 June a meeting took place between Commission staff, the Polish authorities and representatives of the yard. SSN provided additional information by letter of 15 June 2007, registered on the same day.
- (16) By letter of 31 July 2007 the Commission informed Poland that it provisionally considered the closure of the Wulkan 1 slipway to be a sufficient compensatory measure under certain conditions. In their reply of 24 August 2007, registered on 28 August 2007, the Polish authorities confirmed their intention of implementing the capacity reductions specified in the Commission's letter.
- (17) The Polish authorities provided information concerning the privatisation and restructuring of SSN in letters of 5 January 2007, registered on the same day, and 9 January 2007, registered on 11 January 2007. The Commission replied by letter of 29 January 2007. In a letter of 28 February 2007, registered on the same day, the Polish authorities undertook to choose an investor for the yard and sign a privatisation agreement by the end of June 2007.
- (18) The Commission requested further clarifications concerning the privatisation of SSN by letters of 29 May 2007, 28 June 2007 and 30 July 2007. Poland provided information in this respect by letter of 1 June 2007, registered on 4 June 2007, which contained a list of enterprises to which an invitation to submit offers for the purchase of SSN had been sent. Further information was submitted by letters of 25 June 2007, registered on the same day, and 11 July 2007, registered on the same day.
- (19) By letter of 1 August 2007, registered on 6 August 2007, the Polish authorities submitted SSN's first draft Information Memorandum. By letter of 13 August 2007 the Commission sent its comments on the Information Memorandum. By letter of 21 August 2007, registered on 27 August 2007, the Polish authorities informed the Commission that the financial situation of the yard had deteriorated significantly and that the public owners of the yard therefore planned to support it with capital injections. Poland also announced that the Information Memorandum would be updated accordingly.
- (20) The Commission requested clarifications by letter of 4 September 2007. The Polish authorities replied by letters of 7 September 2007, registered on 10 September 2007, and 11 September 2007, in which Poland submitted the new version of the Information Memorandum and informed the Commission that invitations to submit offers had been sent to 221 potential investors.
- (21) The Commission asked for additional information by letter of 12 September 2007. The Commission gave its comments on the Information Memorandum and asked for clarifications by letters of 14 September 2007 and 3 October 2007. The Polish authorities replied by letter of 12 October 2007, registered on 16 October 2007, stating that six potential investors had requested a copy of the yard's Information Memorandum. By letter of 23 October 2007, registered on the same day, the Polish authorities submitted an updated privatisation schedule, which assumed that negotiations with potential investors would start in January 2008.
- (22) By letter of 30 November 2007 the Commission requested that a draft restructuring plan drawn up by the new owner of the yard should be submitted by the end of February 2008. Poland provided further information on the privatisation process by letters of 11 December 2007, registered on 13 December 2007, and 19 December 2007, registered on 20 December 2007. By letter of 21 December 2007, registered on the same day, Poland informed the Commission that on 20 December 2007 Amber Sp. z o.o. (hereinafter 'Amber', a wholly owned subsidiary of a Polish steel trader, Złomrex) was the only bidder to have submitted a binding offer to purchase shares in SSN.
- (23) On 10 January 2008 a meeting took place between the Polish authorities and the Commission. Following the meeting, the Commission asked the Polish authorities to submit additional information concerning the privatisation process by letters of 17 January 2008, 30 January 2008, 28 February 2008, 18 March 2008 and 2 April 2008. The Polish authorities answered the Commission's requests by letters of 23 January 2008, registered on 24 January 2008, 25 January 2008, registered on 28 January 2008, and 30 January 2008, registered on 31 January 2008. By letter of 8 February 2008, registered on the same day, Poland submitted a copy of Amber's binding offer.

- (24) By letter of 14 February 2008, registered on 19 February 2008, Poland informed the Commission that it would not be possible to complete privatisation of the yard by the deadline of the end of February 2008 and that the Polish authorities undertook to complete the privatisation process and agree on the restructuring plan by the summer of 2008.
- (25) By letter of 29 February 2008, registered on 3 March 2008, the Polish authorities submitted two documents by Amber: 'Additional explanations, outline of the restructuring programme and declared commitments concerning the purchase of SSN submitted by Amber' of 29 February 2008 and 'First version of the restructuring plan for SSN with business plan for SSN for 2008-2012, taking into account the information obtained in the course of the due diligence process carried out in the shipyard'.
- (26) By letter of 28 March 2008, registered on the same day, the Polish authorities stated that the exclusivity period granted to Amber for negotiations had been extended to 15 April 2008. Following an invitation from the Polish authorities in a letter of 4 April 2008, registered on 7 April 2008, a meeting took place on 10 April 2008 between the Polish authorities, representatives of SSN, Amber and Commission staff.
- (27) By e-mail of 9 April 2008, registered on 24 April 2008, Amber's consultant submitted preliminary financial projections for the yard. Amber also submitted information at the meeting of 10 April 2008, and that information was registered on 18 April 2008.
- (28) Poland submitted information on the progress of the negotiations with Amber by letters of 7 April 2008, registered on 18 April 2008, 23 April 2008, registered on the same day, 25 April 2008, registered on the same day, 28 April 2008, registered on 29 April 2008 and 29 April 2008, registered on 5 May 2008. The Commission requested information by letter of 30 April 2008. On 8 May 2008 a meeting took place between the Polish authorities and the Commission.
- (29) The Commission sent comments on the progress of the privatisation process by letters of 21 April 2008 and 30 April 2008.
- (30) Finally, by letter of 12 May 2008, registered on the same day, Poland informed the Commission that Amber had withdrawn from the privatisation process.
- (31) Poland also informed the Commission that the Polish authorities were taking action to relaunch the privatisation process with a view to signing privatisation agreements by the end of November 2008. Starting on 3 June 2008, Poland submitted daily reports to the Commission on the actions taken by interested parties in the relaunched privatisation process. The Commission met the Polish authorities on 13 June 2008.
- (32) On 20 June 2008, at the request of the Polish authorities, Commission staff met the Polish authorities with the Norwegian company Ulstein and on 24 June 2008 it met the Polish authorities with the Polish company Mostostal Chojnice. These companies were introduced to the Commission as potential buyers of SSN. By letter of 26 June 2008, registered on the same day, Poland submitted a draft restructuring plan for SSN drawn up by Mostostal Chojnice. Additional information was submitted by letter of 7 July 2008, registered on 8 July 2008.
- (33) By letter of 14 July 2008 Poland undertook to present a complete restructuring plan to the Commission by 12 September 2008.
- (34) On 16 July 2008 the Commission provisionally set out an assessment and conclusions in a draft decision to conclude the formal investigation procedure, which found that the State aid granted to SSN was incompatible with the common market and had to be recovered. However, in the light of a letter from Poland of 14 July 2008 the Commission decided to postpone adoption of this decision so that it could assess whether the new restructuring plan to be submitted by the Polish authorities by 12 September 2008 would significantly improve the situation and make it possible to consider the aid compatible with the common market.
- (35) Thereafter Poland informed the Commission on a weekly basis about the progress of the privatisation procedure (letters of 28 July, 4 August, 12 August, 21 August, 25 August, 1 September, 8 September, 16 September and 23 September 2008, registered on the same dates).
- (36) By letter of 18 July 2008, registered on 21 July 2008, Poland asked for a round of consultations with Commission staff on the draft restructuring plan so that it could draw up a final version of the plan that took account of the Commission staff's comments. The Commission agreed to the consultation schedule by letter of 31 July 2008.
- (37) However, it was not until 3 September 2008 that the Commission informally received a draft restructuring plan for SSN. Following this submission, on 4 September 2008 a first meeting took place between the Polish authorities and Commission staff in the presence of Mostostal. On 8 September the Commission received a revised draft restructuring plan and on 10 September 2008 another meeting was organised with the Polish authorities, Mostostal and the potential co-investor Ulstein.
- (38) By letter of 12 September 2008, registered on the same day, Poland submitted the final restructuring plan for SSN drawn up by Mostostal in cooperation with the Norwegian shipyard Ulstein.

- (39) By letter of 16 September 2008, registered on 17 September 2008, Poland submitted a draft of the privatisation agreement between Mostostal and the public owners of SSN, namely the Industrial Development Agency and the Polish Shipyards Corporation.
- (40) By letter of 22 September 2008, registered on the same day, Ulstein informed the Commission that it was withdrawing from the privatisation process and would not be participating in the restructuring of SSN.
- (41) By letter of 22 September 2008, registered on 25 September 2008, Mostostal informed the Commission that in view of Ulstein's decision Mostostal would be prepared to implement the full restructuring plan for SSN on its own. On 30 September 2008 a meeting took place between the Polish authorities, the Commission and Mostostal.
- (42) By letter of 27 October 2008 the Commission told Poland the framework conditions for the implementation of this Decision. By letter of 3 November 2008, registered on 4 November 2008, Poland undertook to respect these conditions in full. The Commission accepted this commitment by letter of 6 November 2008.
- (43) By letter of 14 June 2007 the Commission asked the Polish authorities to provide information concerning the State aid received by SSN after the initiation of the formal investigation procedure. The Polish authorities replied by letter of 11 July 2007, registered on the same day. The Commission asked for further explanations by letter of 13 November 2007. Poland replied by letter of 9 January 2008, registered on the same day. Poland submitted additional information concerning State aid granted to the yard by letter of 9 January 2008, registered on 10 January 2008. Poland informed the Commission about additional measures granted to SSN by letters of 6 December 2007, registered on the same day, 9 January 2008, registered on 10 January 2008, 12 February 2008, registered on 13 February 2008, 26 June 2008, registered on 27 June 2008 and 12 September 2008, registered on the same day.

2. DESCRIPTION

2.1. RELEVANT UNDERTAKING

- (44) The beneficiary is situated in the Zachodniopomorskie (Western Pomerania) region, in north-western Poland. The Commission notes that, under the State aid rules, companies located in this region are eligible to receive help from the Structural Funds under the Convergence objective ⁽¹⁾ and from the Cohesion fund ⁽²⁾. In particular, companies in this region are potentially eligible to receive

help from the Regional Operational Programme for the Zachodniopomorskie region under the priority axes for support for small and medium-sized enterprises, innovation and technology transfer measures (aiming for job-creation in the long term) and for social infrastructure and educational infrastructure, focusing on vocational and lifelong training. Companies in this region are also eligible for the Innovative Economy Operational Programme.

- (45) SSN was created on 25 June 2002 to take over the shipbuilding activities of Stocznia Szczecińska Porta Holding SA (hereinafter SSPH) and its main shipbuilding subsidiary Stocznia Szczecińska (hereinafter SS), which were declared bankrupt on 29 July 2002. SSN was established as an empty shell, free of the debts of SSPH and SS relating to their former activity.
- (46) The new shipyard was taken over by the State-owned Agencja Rozwoju Przemysłu SA (Industrial Development Agency SA, hereinafter ARP) and the State Treasury with a view to completing current production and resuming shipbuilding activities while carrying out the necessary restructuring. Formally, the company which took over the former shipbuilding activity was a subsidiary of SSPH created in 1989, Allround Ship Services Sp. z o.o. (hereinafter ASS). In fact, as far back as 2001 the fully State-owned SSPH, which was facing a difficult financial situation, decided to concentrate shipbuilding activity in ASS, which was considered to be more open to restructuring than SS. In January 2002 ASS, originally a small subsidiary active in painting works, concluded a framework agreement with SSPH for the construction of hulls and leased production assets from SSPH for this purpose. Some weeks before SSPH filed for bankruptcy, it sold ASS to ARP for PLN 1. ASS was then renamed Stocznia Szczecińska Nowa (SSN — the beneficiary of the aid).
- (47) At that time SSN did not take over the assets of SSPH and SS, but leased them instead from the receiver in bankruptcy until July 2004. On 20 July 2004 SSN signed agreements with the receivers of SSPH and SS under which it acquired these assets. SSN did not take over the debts of SSPH or SS, and so those debts stayed with those two companies and were dealt with under the bankruptcy procedure. SSN took over some ongoing works by concluding new contracts with the shipowners.

⁽¹⁾ Article 5(1) and (3) of Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999 (OJ L 210, 31.7.2006, p. 25).

⁽²⁾ Commission Decision 2006/596/EC of 4 August 2006 drawing up the list of Member States eligible for funding from the Cohesion Fund for the period 2007-2013 (OJ L 243, 6.9.2006, p. 47).

- (48) ASS took over the employees of SSPH and SS, but the yard gradually reduced its workforce from 8 071 in 2001 to 5 322 at the end of 2006. In 2007 there were 4 700 employees on average.

- (49) The volume of production increased from 158 000 CGT in 2003 to 213 000 CGT in 2005 but in 2006 it dropped to 167 000 CGT. The order book as of August 2007 included 30 ships of a total value of EUR 1 134 million. SSN ranks 32nd in the world and 6th in Europe in terms of the size of its order book.
- (50) Its main customers are located in Germany, the Netherlands, Russia and Italy. Its main competitors in Europe are Spanish, German and Croatian shipyards.
- (51) Currently 80 % of SSN is owned by Korporacja Polskie Stocznie SA (Polish Shipyards Corporation SA, hereinafter KPS) and 18 % is owned by ARP. 2 % of the shares are owned by the State Treasury. ARP is a limited company established by law and wholly owned by the State Treasury. ARP conducts activities entrusted to it by law, including participating in ownership-restructuring processes in State-owned enterprises, managing State Treasury assets and shares on behalf of State institutions and providing loans and guarantees for the restructuring of public enterprises. KPS is 100 % owned by ARP and was created to provide financing for shipbuilding companies in Poland.
- (52) SSN is active in the production of ships, including container ships, chemical tankers, ro-ro ships and multi-purpose vessels. 1 % of the company's business is in producing metal structures and various shipbuilding-related services.
- (53) SSN's main production facilities are three slipways: Wulkan Nowy, Odra Nowa and Wulkan 1.
- (54) Immediately after its creation in 2002, SSN started to carry out restructuring activities. It drew up the 2003 restructuring plan, which was first approved by its shareholders on 19 December 2002 and later modified in October 2003. The following factors were identified as the main reasons for the bankruptcy of the former shipbuilder in Szczecin: technological problems, design errors, low productivity, high costs and external factors such as the high exchange rate of the Polish zloty and Asian competition. Because of these problems the financial markets became reluctant to finance the shipbuilding, and this led to delays in deliveries and hence an accumulation of penalties and debts.
- (55) The aim of the restructuring strategy was to achieve enduring profitability by focusing on the container ship market and becoming an important producer of chemical tankers, ro-ro and con-ro vessels and special-purpose vessels. The restructuring plan also included the possibility of finding a strategic investor. It was necessary to alter the original restructuring plan in 2003 because of the financial difficulties of the cooperating companies, employees and activities closely associated with SSN.
- (56) The financial situation of SSN gradually deteriorated significantly.

Table 1

SSN's production

(PLN million)

	2002	2003	2004	2005	2006	30.9.2007
Turnover	424,88	1 114,44	1 303,46	1 416,04	1 199,38	655,87
Operating result	- 6,16	- 39,64	- 119,80	- 11,44	- 194,24	- 134,36
Equity	65,01	62,01	112,83	247,96	149,43	81,96

Source: 2006 Information Memorandum, submitted by the Polish authorities on 12 October 2007, and 'Business plan for SSN for 2008-2012 taking into account the information obtained in the course of the due diligence process carried out in the shipyard', submitted by letter of 29 February 2008.

- (57) The external factors contributing to the difficult financial situation included the depreciation of the dollar (the currency of the yard's revenues) and the appreciation of the zloty (the currency of the costs), rising steel prices and difficulty in obtaining ship financing following the bankruptcy of SSPH. As regards internal reasons for the yard's difficulties, it has been recognised that the facilities were in poor condition and required significant upgrading. From 2006 the yard faced serious workforce problems: a high rate of absenteeism, rotation of employees and the outflow of qualified workers to other shipyards, in particular in Germany and Norway, where the wages offered were significantly higher.
- 2.2. DECISION TO INITIATE THE PROCEDURE UNDER ARTICLE 88(2) OF THE EC TREATY
- (58) In its decision to initiate the formal investigation procedure, the Commission initially found that some of the measures notified to it constituted new aid under point 3 of Annex IV to the Accession Treaty because they were not granted at the time of accession. The Commission listed these measures in part B of the Annex to that decision.

- (59) The Commission also decided that a number of measures, listed in part A of the Annex to the decision to initiate the formal investigation procedure, were granted to SSN prior to 1 May 2004 and were not applicable after accession within the meaning of point 3 of Annex IV to the Accession Treaty, and would not therefore be examined under the procedure laid down in Article 88(2) of the EC Treaty. Those measures are not therefore covered by the present Decision. None the less, they have to be taken into account when assessing the compatibility with the common market of the measures granted after accession.
- (60) In essence, with regard to the measures listed in part B of the Annex to the decision to initiate the formal investigation procedure, the Commission argued that a legally binding decision on these measures had not been taken prior to accession, although it recognised that some preliminary steps towards such a decision had been taken.
- (61) The first of these measures is a capital injection by ARP. The 2003 restructuring plan provided for a capital injection of PLN 241 752 900 but only a part of this capital injection (PLN 180 million) was implemented before accession. ARP was, however, unable to implement the entire capital increase of PLN 241 752 900 for budgetary reasons. According to Poland, the decision to implement the remaining capital increase (PLN 61 752 652) was taken on 21 December 2004.
- (62) The second and third aid measures are performance guarantees provided by ARP (each corresponding to aid of PLN 1 935 000). These guarantees relate to ships contracted in 2002. The guarantees for the subsequent ships were to be issued as soon as the previous ships were delivered. Thus the guarantees for ships 7 and 8 were supposed to be granted when ships 4 and 5 were delivered (in 2005).
- (63) The last set of measures which, according to the information available, were not granted before accession, are measures granted to SSN by the City of Szczecin in the form of write-offs and deferrals of payment of real estate tax. In total these measures represent PLN 12,5 million. These measures, according to the information provided by the Polish authorities⁽¹⁾, have not been granted to the yard to this day.
- (64) The Commission decided to initiate the formal investigation because of the following doubts as to the compatibility of the restructuring aid with the common market.
- (65) Firstly, the Commission had doubts concerning the eligibility of SSN to receive restructuring aid. It appeared that the company had been created to take over the activities of its bankrupt predecessor, without, however, taking over the debts of the latter. The Commission therefore considered that SSN was a new company within the meaning of the applicable Community guidelines.
- (66) Secondly, the Commission had doubts as to whether the restructuring activities (already carried out and ongoing) would lead to the long-term viability of SSN. The restructuring undertaken by the yard mainly concerned reducing debt and improving liquidity in order to permit production to continue. The alleged costs of genuine restructuring activities included the costs of purchasing the means of production from the receiver in bankruptcy of SSPH and SS. The Commission noted that even at the end of the restructuring period the planned level of productivity would remain relatively low compared with that of competing European shipyards.
- (67) Thirdly, based on the information available, the Commission had doubts as to whether appropriate compensatory measures had been adopted, as in fact no genuine reduction of production capacity had been implemented at the yard.
- (68) Fourthly, the Commission had doubts as to whether some of the alleged restructuring costs, such as the costs of purchasing production assets, should be considered eligible as genuinely related to the restructuring.
- (69) Finally, the Commission had doubts as to whether the beneficiary's own contribution to the restructuring plan, either from its own resources or from external financing on market terms, was significant. In particular, the Commission doubted whether the use of cumulated profit constituted an own contribution. In addition, the Commission noted that 78 % of the alleged own contribution was made up of advance payments from shipowners, guaranteed by KUK, the Polish export credit agency. Considering that SSN was a company in financial difficulties, the Commission had doubts as to whether the guarantee premiums charged appropriately reflected the risk involved, whether the collateral required by KUK was sufficient, and, therefore, whether the proposed own contribution was free of State aid.

2.3. COMMENTS FROM INTERESTED PARTIES

2.3.1. COMMENTS FROM POLAND

- (70) Following the Commission decision to initiate the formal investigation procedure, the Polish authorities submitted their comments on the decision. The beneficiary did not present any separate arguments but endorsed the submission of the Polish Government.

⁽¹⁾ Letter of 9 January 2008.

- (71) The Polish authorities raised several issues. The main contested issue was whether certain aid measures were put into effect before the accession of Poland to the European Union, i.e. before 1 May 2004, and were not applicable after accession. Such measures cannot be examined by the Commission; only measures that were not granted before accession are assessed by the Commission as notified aid or as unlawful aid pursuant to the procedure laid down in Article 88(2) of the EC Treaty.
- (72) The Polish authorities contested the Commission's finding that the measures presented in part B of the Annex to the decision to initiate the formal investigation procedure constituted new aid. The Polish authorities argued that all the measures included in that table were granted before Poland's accession and therefore no new aid was planned or granted to SSN.

Capital injection (part B of the Annex to the decision to initiate the formal investigation procedure, measure 61)

- (73) Firstly, the Polish authorities argued that SSN had had legitimate expectations that the aid envisaged in the 2003 restructuring plan was compatible with State aid law. The Polish authorities referred in particular to two documents: 'Situation of the Polish shipbuilding industry, recommended actions and support for this sector' (adopted by the Council of Ministers on 16 July 2002) and 'Mid-term strategy of guarantees from the State Treasury up to 2010' (adopted by the Council of Ministers on 10 June 2003). The Polish authorities argued that these and similar actions by the central, regional and municipal authorities had been part of a widespread programme to save the shipbuilding industry.
- (74) Secondly, the Polish authorities claimed that the Commission, by requiring the adoption of a 'legally binding act', was applying the criteria of EC law to events and national law prior to accession. Poland asserted that Polish State aid legislation had applied prior to accession and that this legislation 'did not provide for a formal decision granting the aid addressed to the beneficiary at any point of the procedure.' All the Polish legislation required was approval of the restructuring plan and the aid measures contained therein by the President of the Office for Competition and Consumer Protection, which had indeed been given. The Polish authorities argued that 'it is uncontested that each measure contained in the finally approved restructuring plan was agreed between SSN and the relevant aid-granting authority'. Furthermore, Poland submitted that the provisions of EC law were not applicable to events which took place before Poland's accession and that the *Fleuren* case⁽¹⁾, to which the Commission referred in its decision to initiate the formal investigation, differed fundamentally from the present case.

- (75) Thirdly, it was argued that the approval of the restructuring plan by the Supervisory Board of SSN should be considered an aid-granting event. In response to the Commission's doubts as to whether the Supervisory Board was the entity entitled to adopt decisions with financial repercussions binding on shareholders, Poland submitted that the Supervisory Board represented the interests of the shareholders because it was appointed by them. The members of the Supervisory Board acted on instructions from the shareholders (ARP and the State Treasury) and their acts constituted a commitment of the ARP and the State Treasury to grant the aid.

- (76) Fourthly, Poland argued that the approval of the 2003 restructuring plan by the ARP team for the shipbuilding industry had reinforced the legitimate expectations of the yard because the members of this team were all representatives of ARP on the Supervisory Board. Poland also confirmed that the real decisions were taken by the Supervisory Board and the ARP shareholders' meeting.

- (77) Finally, the Polish authorities claimed that the aid had been granted before accession because the exposure of the State had been specified in the 2003 restructuring plan and was therefore known before accession.

Guarantees (part B of the Annex to the decision to initiate the formal investigation procedure, measures 62 and 63)

- (78) The Polish authorities referred to the rollover system, under which a new guarantee is extended when a previous guarantee expires, and argued that this system, and thus all guarantees covered by it, had been approved by the Supervisory Board as part of the 2003 restructuring plan. They cited the criteria for assessing whether a guarantee was applicable after accession and considered these criteria to be decisive in determining whether the aid was granted.
- (79) The Polish authorities did not react to the Commission's argument that ARP had not taken the same procedural steps in the case of the two contested guarantees as it had done in the case of guarantees granted previously. The Polish authorities did not dispute the Commission's understanding that the shipbuilding contracts concluded in 2002 contained a clause permitting the buyer to terminate the contract unilaterally if the yard did not provide a performance guarantee within a certain time-frame.

Write-off and deferral of taxes (part B of the Annex to the decision to initiate the formal investigation procedure, measures 64-68)

- (80) Poland argued that the State's precise economic exposure for these measures had been known before accession. It confirmed that the granting authority could not issue final decisions on deferral and write-off *ex ante*.

⁽¹⁾ Judgment of the Court of First Instance in Case T-109/01 *Fleuren Compost v Commission* [2004] ECR II-127.

Eligibility

- (81) In reply to the Commission's doubts as to whether the shipyard, as a company created following the bankruptcy of the previous company which operated shipbuilding activities in Szczecin, was eligible for restructuring aid, Poland submitted that the beneficiary of the aid had existed under a different name (ASS) before the bankruptcy of the previous entity, and had been involved in shipbuilding.

Other aspects of the decision

- (82) The Polish authorities also provided comments concerning other aspects of the Commission decision. In particular, Poland submitted that the restructuring of SSN had had an impact on many areas of its activity and was aimed at substantially improving the efficiency of the yard. The yard had adopted a more focused strategy, implemented employment restructuring, improved productivity, introduced a more effective management system and improved its financial situation. It was expecting profits in 2005.
- (83) Poland also submitted that adequate compensatory measures had been implemented by the yard as SSN had acquired only part of both the land and the structures previously owned by SSPH, and these were directly linked to the yard's shipbuilding capacity.
- (84) The Polish authorities argued that the proposed own contribution was sufficient. In particular, the future profits with which the yard intended to finance part of the restructuring costs could not be considered State resources and therefore constituted an own contribution. The Polish authorities claimed that the advance payments guaranteed by the Polish export credits insurance agency KUKI, which financed the yard's operation, should also be considered an own contribution. Poland described the conditions under which KUKI issued these guarantees (the premiums and the type of collateral required) and underlined that KUKI had not had to make any payments to shipowners under the guarantees provided.
- (85) The Polish authorities noted that the adoption of restructuring measures had improved the yard's financial standing and as a result it had been able to demonstrate its viability.

2.3.2. COMMENTS FROM OTHER INTERESTED PARTIES

- (86) The Polish shipbuilding employers' association Forum Okrętowe explained the reasons for the yard's difficulties and stated that in its opinion the yard had survived only thanks to successful implementation of its restructuring plan and State aid received for restructuring.

- (87) The yard's supplier of deck cranes and anchor and mooring equipment, Towimor SA, stated that the yard had restored its shipbuilding capacities and survived the crises of 2002-2004 only because ARP had taken the lead in the restructuring process. The company emphasised that the restructuring plan was being successfully implemented and the improvements achieved were of a long-term nature.
- (88) Lubmor Sp. z o.o., a supplier of interior equipment for vessels, stressed the importance of SSN's existence for itself and for other companies cooperating with the yard.
- (89) Another supplier, H. Cegielski, which mainly produces marine engines, emphasised that the successful restructuring of SSN had saved the whole shipbuilding sector in 2002-2004 and the yard's systematically improving financial results indicated that the restructuring measures were leading to long-term improvements.
- (90) Spliethoff's Bevrachtungskantoor BV, a customer of SSN, highlighted the yard's extensive know-how in various segments of shipbuilding and the quality of the vessels that it had built. The shipowner pointed out that SSN had constructed eight multipurpose vessels for it with high technical requirements and quality standards. The shipowner expressed the hope that the Commission would approve the aid granted to the yard. Other customers of the yard, Peter Dohle Schifffahrts-KG and Odfjell, expressed similar opinions.
- (91) The trade union Solidarność emphasised the importance of the shipyard for employment and the economic situation of the whole region. It expressed the hope that the Commission would immediately end the investigation and approve the aid received by the yard.
- (92) The Mayor of Szczecin underlined the importance of the yard's existence for the region and noted that despite certain delays the restructuring that had been implemented had produced the expected results and the yard was able to compete on the market in the long term.
- (93) Business Club Szczecin, an association of employers for the development of Szczecin and Western Pomerania, expressed its support for the restructuring of SSN. It described the difficulties facing the region following the bankruptcy of SSPH in 2002 and stated that the Polish authorities' support for the yard had made it possible to overcome the crisis.

2.4. DEVELOPMENTS FOLLOWING THE COMMISSION DECISION TO START THE FORMAL INVESTIGATION PROCEDURE

- (94) The Commission investigation and the relevant events are summarised below.

- (95) In reply to the Commission's decision to initiate the formal investigation procedure, in the autumn of 2005 the Polish authorities submitted two lines of argument: on the one hand they questioned the Commission's competence to act in respect of the measures identified as new aid in the Commission's decision, and on the other they argued that even if these measures constituted new aid, they were compatible with the common market as restructuring aid.
- (96) In support of its argument that the aid was compatible, Poland submitted the 2003 restructuring plan to the Commission. The Commission studied the 2003 restructuring plan and sought the assistance of an external consultant. The Commission concluded that the 2003 restructuring plan did not fulfil any of the conditions for the approval of restructuring aid laid down in the applicable guidelines.
- (97) In December 2005 the Commission learned from public sources⁽¹⁾ that KPS, a capital group under public ownership, had been created with the aim of integrating the three major Polish shipyards in Gdynia, Gdansk and Szczecin under one umbrella (hereinafter the consolidation plan). The main role of KPS was to provide financing for the shipyards' production. Poland had not informed the Commission about the consolidation plan at any stage of the procedure, either before or after the decision to initiate the formal investigation procedure.
- (98) At the Commission's request, at the beginning of 2006 the Polish authorities explained that the consolidation plan had indeed been considered previously but had been abandoned and a new strategy for restructuring the Polish shipbuilding sector would be adopted shortly. Poland clarified that the role of KPS was to provide operational financing for the Polish shipyards, mainly in the form of short-term loans.
- (99) At a meeting between the Polish authorities and Commission staff on 22 February 2006, the Commission informed Poland that, on the basis of the information at its disposal, it was unable to conclude that the 2003 restructuring plan was sufficient to restore the yard to long-term viability. The Commission stressed that the 2003 restructuring plan was a start-up plan, which mainly addressed the financial measures necessary to resume operation after the bankruptcy of SSPH, rather than a restructuring plan which guaranteed the restoration of long-term viability. In particular, the investments envisaged were insufficient in view of the poor condition of the yard's equipment and installations. The Polish authorities and the yard maintained that the yard had already restored viability. Nevertheless, Poland acknowledged that the yard really did need substantial modernisation investment of at least PLN 200 million and would therefore be sold to a private investor in 2008-2009. At the meeting, the Polish authorities confirmed that a new restructuring plan or a revised version of the 2003 restructuring plan would be submitted to the Commission.
- (100) Following the meeting the Polish authorities undertook⁽²⁾ to submit an amended restructuring plan for SSN to the Commission by 22 May 2006.
- (101) On 26 June 2006 the Commission received a first draft restructuring plan entitled 'Development plan for Stocznia Szczecińska Nowa Sp. z o.o. for' 2006-2011 drawn up with the assistance of the consultancy firm Deloitte Advisory.
- (102) The Commission expressed strong concerns with regard to this draft during an on-site visit on 13 June 2006 and in writing on 17 July 2006, pointing out that the first draft restructuring plan did not appear to be sufficiently far-reaching to ensure that the yard would recover long-term viability. The Commission underlined that restructuring needed to be financed in significant part from own resources free of State aid, which was not envisaged in the draft plan submitted, and that meaningful compensatory measures needed to be implemented. Noting the continuing reliance on guarantees provided by KUKI, a government agency, the Commission warned the yard and the Polish authorities that these guarantees constituted State aid. The Commission urged Poland to revise the draft restructuring plan and submit a complete version of the plan by the end of August 2006.
- (103) Despite these warnings, the 2006 restructuring plan eventually submitted by Poland in September 2006, two months late, did not differ substantially from the first draft. The main criticisms of the 2006 restructuring plan are described below.
- (104) In September 2006 Poland informed the Commission that on 31 August 2006 the General Assembly of SSN had decided to increase the yard's capital by PLN 95 million and to prepare by 15 October 2006 offers for potential investors interested in acquiring the newly issued shares. By 31 December 2006 only two companies had expressed an interest in acquiring shares in SSN: a Polish steel-trading company, Złomrex, and ISD Polska, a subsidiary of the Ukrainian steel producer Donbas.

⁽¹⁾ Minutes of the Council of Ministers of 25 January 2005 and 5 October 2005 published on its website.

⁽²⁾ Letter of 13 March 2006.

- (105) At a meeting on 7 December 2006 (and in writing by letter of 29 January 2007), the Commission explained to the Polish authorities that the 2006 restructuring plan did not fulfil any of the conditions for approval of restructuring aid under the applicable guidelines. At the meeting the Polish authorities undertook to privatise the yard in order to improve the prospects of restoring viability and secure a sufficient own contribution to the restructuring. The Polish authorities then confirmed the undertaking to privatise the yard by 30 June 2007 in a letter of 5 January 2007. While the privatisation documents were being drawn up, Poland asked the Commission to indicate what compensatory measures it considered necessary for SSN so that potential investors could be informed accordingly.
- (106) Following an agreement between Commissioner Neelie Kroes and Minister Piotr Wozniak of December 2006, the Commission engaged in an intensive debate with the Polish authorities and SSN with a view to determining the compensatory measures necessary. Poland submitted a proposal for compensatory measures in SSN and undertook to close slipway Wulkan 1 once the ship-building contracts already signed had been implemented, i.e. in March 2010.
- (107) The Commission requested a range of data from SSN. Eventually, Commission staff informed Poland by letter of 31 July 2007 that they provisionally considered the closure of the Wulkan 1 slipway to be a sufficient compensatory measure, provided that the facility was irreversibly disabled for the purposes of ship assembly and launching and that the closure was implemented by 1 June 2009, or earlier if construction of the 587-IV/09, the last of the vessels scheduled for assembly on that slipway, was completed earlier. Furthermore, in 2009 the Wulkan 1 slipway could only be used for assembly of the 587-IV/09. The basis for this conclusion of the Commission is described below. The Polish authorities confirmed their intention of implementing the capacity reductions as described in the Commission's letter.
- (108) In February 2007 the yard's management sent invitations to purchase a majority stake in SSN to 57 potential investors. At that time the yard had already been negotiating for several months with Zlomrex, but in the end no decision was taken.
- (109) A new privatisation effort commenced in autumn 2007. The Commission was consulted on a draft Information Memorandum in August and September 2007. In September the privatisation consultant of KPS and ARP sent invitations to submit offers to 221 potential investors.
- (110) Six potential investors expressed an interest in acquiring shares in the yard and requested a copy of its Information Memorandum. The deadline for the submission of offers by potential investors had been postponed several times.
- (111) Noting delays in the privatisation process, the Commission urged Poland by letter of 3 October 2007 to complete it without delay. By letter of 23 October 2007 Poland informed the Commission that the privatisation would not be completed as planned by the end of 2007. Instead Poland undertook to commence negotiations with selected investors as of January 2008. The Commission reiterated its concern about the delays by letter of 30 November 2007 and specified that it expected the new owner of SSN to submit the first draft of a new restructuring plan by the end of February 2008. This request was then repeated by the Commission on numerous occasions. The Commission repeatedly insisted on strict adherence to the privatisation schedule.
- (112) After completing a due diligence process, on 20 December 2007 Amber, the only potential investor interested in acquiring SSN, submitted a conditional binding offer, which was assessed by the privatisation consultant of KPS and ARP.
- (113) As of 20 March 2008 Amber was granted exclusive negotiating rights, which were then extended several times and finally expired on 12 May 2008.
- (114) On 29 February 2008 Poland forwarded to the Commission a first draft restructuring plan for SSN drawn up by Amber⁽¹⁾. Amber submitted updated financial projections by e-mail of 9 April 2008. The Commission provided oral comments on this draft at a meeting in Warsaw on 10 April 2008 between Commission staff, the Polish authorities, the yard and Amber, and sent written comments in a letter of 21 April 2008.
- (115) At a meeting with the Polish authorities on 12 May 2008, Amber announced that it was withdrawing from the SSN privatisation process. Poland informed the Commission about this development on the same day. In its explanation to the State Treasury, Amber explained that the principal reason for its withdrawal was the fact that after an in-depth due diligence investigation of the yard's situation it had concluded that the yard would not become profitable even after implementation of the restructuring measures, including significant investment. Since Amber was the only bidder, its withdrawal meant that the privatisation process launched in 2007 had come to an end.
- ⁽¹⁾ 'First version of the SSN restructuring plan with business plan for SSN for 2008-2012 taking into account the information obtained in the course of the due diligence process carried out in the shipyard' and 'Additional explanations, outline of the restructuring programme and declared commitments concerning the purchase of SSN submitted by Amber' of 29 February 2008.

- (116) On 26 May 2008 Poland informed the Commission that the privatisation process had been relaunched. In subsequent daily reports, Poland informed the Commission about the action taken by the Polish authorities to find a buyer for SSN. Poland sent the Commission several letters in which potential investors asked to be informed about the continuing privatisation process and to be sent the Information Memorandum when it was available.
- (117) At a meeting of 13 June 2008 the Polish authorities informed the Commission that several companies intended to submit restructuring plans to the Commission by 26 June 2008. The Commission subsequently met, at the request of the Polish authorities and in their presence, two potential investors who had expressed an interest in purchasing SSN: the Norwegian company Ulstein and the Polish company Mostostal Chojnice. At these meetings both companies presented their restructuring strategies to the Commission.
- (118) Poland subsequently submitted to the Commission a draft restructuring plan drawn up by Mostostal Chojnice, dated June 2008 and entitled 'Draft restructuring programme for SSN for 2008-2018, work in progress' (hereinafter June 2008 Restructuring Plan). On 7 July Poland informed the Commission that Mostostal and Ulstein had signed a letter of intent for possible cooperation should Mostostal become the owner of SSN. In connection with this letter of intent, Poland submitted to the Commission an updated restructuring plan drawn up by Mostostal.
- (119) By letter of 14 July 2008 Poland informed the Commission that the SSN privatisation process was continuing and requested additional time for the potential investors to finalise the restructuring plan. Poland undertook to submit a complete restructuring plan for SSN to the Commission by 12 September 2008 at the latest.
- (120) The Commission agreed to the proposed deadline for the full restructuring plan.
- (121) On 12 September 2008 Poland submitted a final restructuring plan for the yard entitled 'Restructuring programme for Stocznia Szczecińska Nowa for 2008-2012' (hereinafter restructuring plan of 12 September 2008).
- (122) On 22 September Ulstein informed the Commission that it was withdrawing from the privatisation process. In this situation, the Commission considers that the plan of September 2008 based on cooperation between Ulstein and Mostostal is no longer valid. Nevertheless, this plan will be described and assessed below, in particular since Mostostal announced in its letter of 22 September that it would implement the plan alone.
- (123) At a meeting on 30 September 2008, Mostostal informed the Commission that it still intended to cooperate with Ulstein on the restructuring of SSN. Mostostal presented a draft agreement with Ulstein — not signed or even initialled — on the basis of which the two companies were to set up a preferential supplier-customer relationship. Ulstein was to subcontract to the Szczecin shipyard the production of hulls, and later complete off-shore vessels, for the Ulstein group on market terms. Again on market terms, Ulstein was also to share its know-how and experience in the shipbuilding sector with Mostostal. The new draft cooperation agreement did not envisage any financial contribution by Ulstein to the restructuring plan of 12 September 2008.
- #### 2.5. RESTRUCTURING PLAN OF SEPTEMBER 2006
- (124) The amended restructuring plan covered the period 2006-2011. It had been drawn up in cooperation with the consultancy firm Deloitte and its objective was to complete the restructuring that had started in 2002 on the basis of a plan submitted to the Commission in October 2005, which had been deemed insufficient to restore the undertaking's viability. Under the amended restructuring plan, the yard was to recover long-term viability in 2009.
- #### Change in strategy
- (125) One of the core pillars of the new restructuring plan was the reorientation of SSN to the production of high-tech vessels. This reorientation was based on the following considerations: higher added value, growing price competition in lower technology segments, the technical incapacity of SSN to produce very large container vessels for which demand was currently growing and the existing know-how of SSN, in particular with regard to highly specialised duplex stainless steel chemical tankers.
- (126) While the current order book (for delivery in 2008-2009) was composed mainly of container vessels (70 %), the yard was already producing higher-end chemical tankers and con-ro ships (30 %). The plan assumed that by 2010 the yard would expand its product range in three market segments, namely chemical tankers, ro-ro (including con-ro and ro-pax) and high-tech multipurpose ships.
- #### Industrial and operational restructuring
- (127) Implementation of the new strategy was to be accompanied by marketing and sales campaigns as well as organisational and technological changes in the yard. The total cost of the planned investments and initiatives was estimated at PLN 203,9 million. The investments and initiatives were to be implemented in the period 2006-2009.

(128) To address the problem of high absenteeism and the outflow of qualified workers, the plan included pay increases. These would mean that average pay in 2011 would be 28 % higher than average pay in 2006.

(129) The plan provided for a further reduction of the workforce to 4 298 employees by 2011, bringing the workforce down by approximately 20 % from its 2006 level (5 322) and 53 % in total from its 2001 level (8 071). Nevertheless, it was not clear from the plan whether this reduction involved redundancies or transfers to subsidiaries.

(130) Other measures designed to motivate the skilled workforce were formulated in a very general manner: a new human resources policy would be developed, the optimum employment level would be identified, the current evaluation system would be reviewed and an incentive plan would be developed. Similar projects were planned for middle management.

(131) The plan contained measures relating to financial policy optimisation, such as the plan to introduce contractual provisions lowering the risk of exposure to fluctuations in materials prices and exchange rates (natural hedging) and the plan to negotiate with banks to obtain forward contracts. There was no evidence of successful negotiation of forward contracts with private banks.

Target figures at the end of restructuring and financial forecasts

(132) At the end of the restructuring period in 2011, the yard's production was expected to reach 211 682 CGT compared to 213 044 CGT in 2005.

(133) The reduction of the workforce would result in an increase of productivity from 34 CGT/employee in 2003 to 49,3 CGT/employee in 2011. In terms of man hours/CGT, productivity in 2003 had been 47. Target productivity for 2011 was 34 man hours/CGT.

(134) The plan forecast that the return on capital employed (ROCE), not taking pay increases into account, would be 19 % p.a. on average in 2007-2011, which, it was claimed, was the level of return expected by a private investor. The forecast taking pay increases into account was 1,45 % p.a.

(135) The plan also included a sensitivity analysis in respect of changes in the assumed exchange rates, labour costs and steel prices. The plan analysed the following factors: appreciation of the zloty by 5 % and 10 % over the restructuring period 2006-2011 (the underlying

assumption being PLN 3,26/USD), annual pay increases of 7,5 % (the underlying assumption being 5 % per annum) and steel price increases of 20 %.

Financing of ongoing operations

(136) The plan assumed that the existing model of financing operations from shipowners' advance payments guaranteed by KUKI, State Treasury guarantees and State loans would be replaced with shipowners' advance payments guaranteed by KUKI and commercial loans.

(137) The plan referred to financing in the form of additional State Treasury guarantees on loans of USD 35 million for 2006 and 2007 and USD 25 million for 2008 and 2009. It also envisaged replacing KUKI guarantees with guarantees obtained on the market and obtaining commercial loans. The 2006 restructuring plan identified only one successful guarantee contract. The plan envisaged continuing to use KUKI guarantees with an average annual limit of USD 200 million.

Costs of restructuring

(138) The plan assumed restructuring costs of PLN 374,7 million and operational costs during the restructuring period of PLN 11 120 million. Both these figures were for the period 2002-2009. The cost of planned initiatives and investments was estimated at PLN 203,9 million. The financial restructuring was declared to be finished, apart from a write-off of PLN 20,7 million.

Own contribution, other sources of financing

(139) The restructuring was to be financed from external funds in the amount of PLN 190 million, including PLN 95 million from an increase in the share capital of the yard through the issue of new shares to be taken over by a private investor. A resolution on increasing share capital had been adopted by an extraordinary shareholders' meeting. In September 2006, a subscription for new shares worth PLN 95 million would mean acquisition of a 21 % share in SSN, the remainder staying with the State.

(140) The remaining PLN 95 million was supposed to come from a long-term investment loan, also from a private source. According to the financial forecast, the capital increase as well as the long-term investment loan were supposed to be implemented over the period 2006-2009.

(141) In addition, the plan counted as an own contribution PLN 165,9 million of trade credit, which was not further described.

- (142) The plan stated that additional payments from shipowners of PLN 628,7 million after the renegotiation of contracts should be considered an own contribution.
- (143) The plan counted on financing ongoing operations from commercial loans and shipowners' advance payments not guaranteed by KUKI, the total value of which throughout the restructuring period 2002-2009 was projected to be PLN 3 200 million.
- (144) The plan assumed that the future cash flow of PLN 399 million would be used in part (PLN 14,5 million) for investments and in part for operational activity. However, the plan explicitly recognised that this did not constitute own funds within the meaning of the applicable Community guidelines.
- (148) For the shipbuilding business, Mostostal based its plan on a partnership with the Norwegian shipbuilder Ulstein. On 7 July 2008 the two companies signed a letter of intent agreeing to negotiate over a possible cooperation agreement. The cooperation was to consist principally in Ulstein using part of SSN's capacity.
- (149) For the steel construction business, Mostostal intended to use the production facilities in Szczecin shipyard to expand its own production, and to exploit the access to maritime transport. The plan was optimistic about the development of the Polish market for steel structures, expecting in particular large-scale investment in infrastructure in Poland. As to the shipbuilding business, the plan envisaged the construction of ro-pax type vessels and multipurpose vessels, arguing that in these segments prices were on 'an upward trend independently of the evolution of the shipbuilding markets'.

Compensatory measures

- (145) According to the restructuring plan, compensatory measures had been implemented by SSN in the form of a reduction of capacity resulting from the fact that SSN had not taken over a significant proportion of the assets and workforce of SSPH after its bankruptcy. In 2001, i.e. before the bankruptcy of SSPH, that company had allegedly had a maximum annual production capacity of 345 600 CGT, having had maximum production capacity of 322 000 CGT in 1995-1999 (average annual production in this period being 244 000 CGT). The restructuring plan stated that the current capacity of SSN was 255 720 CGT. Thus, according to the plan, the capacity reduction amounted to almost 100 000 CGT.
- (150) The plan envisaged asset restructuring consisting in the hiving off of about 30 % of the current production surface to other than core activities, including leasing to a third party. One slipway, Wulkan 1, was to be taken out of shipbuilding production and used for steel construction for purposes other than shipbuilding. This was presented in the plan as a compensatory measure.
- (151) The plan envisaged investment of PLN 264 million in 2008-2012 and additional investment of PLN 90 million in 2013-2018. The plan listed the investments and estimated savings in terms of man hours and operating costs. However, it also mentioned that on 12 June 2008 the yard had concluded an agreement with an external consultant to prepare a plan for the modernisation of the yard, including identification of the necessary investments.

2.6. RESTRUCTURING PLAN OF JUNE 2008

- (146) Mostostal is a company established in Poland, 100 % owned by the KEM group. The company produces steel structures of various types (bridges, cranes, buildings etc). Previously a State-owned company, it was privatised in 1992, and since 2003 has belonged to the family-owned industrial group KEM. KEM is active in processing and trading steel scrap and wholesale trading in metallurgical products, such as the ones produced by Mostostal. KEM's turnover in 2007 was PLN 700 million (EUR 207 million), of which PLN 100 million (EUR 30 million) was generated by Mostostal.
- (147) The core business strategy was diversification of the yard into two principal activities: steel construction and shipbuilding. This was to alleviate the yard's vulnerability to fluctuations on the shipbuilding market. The product restructuring was to take place in two phases. In the first phase, up to the beginning of 2009, the yard would complete its existing order book of ships and commence work on steel construction. In the second phase, the steel construction business would expand, with the ultimate goal of using 50 % of production capacity, with the other 50 % to be used for shipbuilding.
- (152) The restructuring plan envisaged increasing the workforce by 14 % to 5 010 employees in 2012.
- (153) It assumed that shipbuilding would be financed from advance payments from shipowners of 80-90 % of the sale price.
- (154) According to the plan, the success of the restructuring depended on the yard receiving additional State aid. It envisaged several capital injections and a debt-for-equity swap to be granted by the State Treasury or subordinate public bodies, worth a total of PLN 588 million. This included the capital injection of PLN 145 million by ARP decided upon in June 2008. In addition, the plan envisaged obtaining a loan of USD 32 million (PLN 68 million) from ARP. Finally, the plan envisaged further advance payment guarantees from KUKI of a nominal value of PLN 431 million.

- (155) The investor had stated that it was willing to inject capital of PLN 149,5 million to finance part of the investment programme for 2008-2012. The remaining part of the investment programme for this period was to be financed from the yard's cash flow.
- (156) Finally, the plan presented financial projections for the restructuring period 2008-2012, showing a return to profitability as of 2010. The plan listed, in a general manner and unsupported by evidence, a series of assumptions on the basis of which the financial projections had been elaborated, but did not contain the financial model used to arrive at the estimates. The return on equity to be achieved in 2012 would be, according to the plan, in the region of 26 %, but the plan recognised that this apparently high profitability was the result of equity remaining low because of accumulated losses from previous years. A more realistic scenario, not taking accumulated losses into account, was that the return on equity should reach 7,6 % in 2011 and 9,8 % in 2012, which, according to the plan, would mean borderline profitability for the envisaged investment.
- (157) The projected balance sheet showed that the value of fixed assets should increase from about PLN 100 million in 2008 to PLN 200 million in 2012.

2.7. RESTRUCTURING PLAN OF 12 SEPTEMBER 2008

- (158) The restructuring plan of 12 September 2008 was based on assumptions similar to those of the plan of June 2008. Diversification of activities remained the most important strategic idea and the success of the restructuring was to be achieved through cooperation between Mostostal and Ulstein, combining their experience in the steel construction and shipbuilding sectors. Compared to the June version, the revised restructuring plan was more developed as regards some restructuring measures and practical implementation of the assumed diversification of activities; this is reflected in the planned organisational and corporate restructuring (see Table 2 below).
- (159) The plan assumed that the existing yard, renamed 'SSN Nowa', would complete production of the loss-making vessels in the current order book and would then be wound up. The assets of the yard would be sold to three new companies: SSN Mostostal (wholly owned by Mostostal), SSN Ulstein (wholly owned by Ulstein) and SSN Wspólna (owned by Mostostal and Ulstein, each holding 50 % of the shares). Furthermore, the current design office would become a separate company called SSN Biuro Projektowe. The plan envisaged that in 2010 Mostostal would set up another new company, SSN Odra, which would continue the shipyard's current shipbuilding and produce ro-pax, ro-ro, and con-ro vessels and chemical tankers.

Table 2

Corporate restructuring of SSN envisaged in the restructuring plan of 12 September 2008

	Ownership	Activity	Capital injections (PLN million)	Turnover (PLN million)	Workforce	Investment programme (PLN million)
SSN Nowa	100 % Mostostal	Shipbuilding — current order book	434 (State aid)	In 2009: 680 In 2010: 1 000 Later: 0	4 011 in 2009, target — 0	None
SSN Mostostal	100 % Mostostal	Steel construction	80	148 (10 %)	297 in 2009, target — 352	59
SSN Ulstein	100 % Ulstein	Shipbuilding — offshore vessels	67,3	155 (11 %)	150	10
SSN Wspólna	50 % Mostostal, 50 % Ulstein	Steel prefabrication	95	370-400 (28 %)	1 062 in 2009, target — 663	34,5
SSN Biuro Projektowe	50 % Mostostal, 50 % Ulstein	Design	0,2	9 (0,6 %)	150	0,5
SSN Odra	100 % Mostostal	Shipbuilding — ro-pax, ro-ro, chemical tankers	0,2	600-700 (49 %)	835 in 2010, target — 500	None
Total			434 by the State and 242,7 by investors	1 412	1 815	104

- (160) The plan assumed that SSN Nowa and SSN Odra, the companies which were supposed to continue the current shipbuilding activity of the yard, would have no assets and would subcontract steel prefabrication to SSN Wspólna and use the capacity of SSN Mostostal or SSN Ulstein for the assembly and outfitting of vessels. The plan did not describe how this sharing of capacities would be managed in practice or on what terms the capacity would be made available to SSN Nowa and later to SSN Odra.

Market strategy

- (161) The two companies SSN Ulstein and SSN Mostostal were to enter new markets of which SSN had had no experience; nevertheless, the plan did not provide analyses of these markets.
- (162) The plan explained that Ulstein currently subcontracted the production of hulls but intended to control the earlier stages of production too and thus, by acquiring capacity in Szczecin, achieve vertical integration of the production process. SSN Ulstein allowed for a reasonable learning curve and planned to build hulls at first and then semi-equipped and fully-equipped offshore vessels. The plan did not provide details concerning the planned volume of production, assumed prices of hulls/vessels, costs, profitability, etc.
- (163) The reasons for Mostostal investing in the Szczecin shipyard remained the same as in the restructuring plan of June 2008. The investor's aim was to expand its capacity in the production of steel structures and to obtain direct access to water transport, which would decrease its transport costs by allowing the transport of bigger fully assembled structures. The planned volume of production, assumed prices, costs, margins, etc. were not described.
- (164) The plan did not envisage restructuring SSN Nowa, assuming that it would be wound up after completion of the loss-making vessels in the current order book. The plan contained a market analysis of the shipbuilding sector, which, however, to a large extent referred to market segments in which the yard did not plan to be active in the future.
- (165) The plan did not contain a business plan for SSN Odra. As regards the strategy of SSN Odra, the plan assumed that that company would obtain profitable contracts from the State-owned Polska Żegluga Morska (Polish Steamship Company) for the production of ro-pax passenger vessels. In addition, SSN Odra might consider production of a military version of these vessels, but no further information on this subject was presented.
- (166) Finally, SSN Wspólna was mainly to provide services to the other companies. The plan estimated that the steel processing capacity of SSN Wspólna would be 74 thousand tonnes. SSN Ulstein would need 15-20 thousand tonnes and SSN Mostostal 12-15 thousand

tonnes. The plan envisaged that approximately 30 thousand tonnes of steel would be allocated to shipbuilding activity other than that of SSN Ulstein. In addition the plan suggested that the remaining capacity of SSN Wspólna (9-17 thousand tonnes of steel, i.e. 12-23 % of capacity) would be used for subcontracting for other companies, but it did not describe the target market, demand or what profitability could be achieved.

- (167) In addition to organisational restructuring, the plan envisaged restructuring assets, financial restructuring and a significant reduction of the workforce.
- (168) The plan envisaged total investment of PLN 104 million in SSN Ulstein, SSN Mostostal and SSN Wspólna. In addition, SSN Nowa would invest PLN [...] (*) million in relocating some production assets in order to free up land, the sale of which was to generate cash for the restructuring.
- (169) As regards the planned closure of one slipway, the plan of 12 September (like the June plan) stated that slipway Wulkan 1 would be used not for shipbuilding but for the production of steel structures by SSN Mostostal.
- (170) In terms of employment, the plan envisaged a reduction of almost 60 %, down to 1 815 employees.
- (171) The financial projections showed that SSN Ulstein would start activity in 2009 and start to make a profit in 2010. SSN Mostostal and SSN Wspólna were supposed to start operating in 2009 and begin making a profit at once. SSN Odra would start shipbuilding production in 2010 and, according to the financial projections, make profits immediately.
- (172) The projected return on sales in the case of SSN Ulstein was 6 %, which the plan considered sufficient. For SSN Odra the return on sales in the first year of production would be 11 % (this would follow from two highly profitable contracts coinciding in that year) and would drop to 7-8 % in the following years. SSN Mostostal assumed a return on sales of 6-9 % in 2009-2011 and 11 % in 2012. The return on sales for SSN Wspólna and SSN Biuro Projektowe would be marginal: 0,4 % in the whole period for SSN Wspólna and 1,6 % for SSN Biuro Projektowe. According to the plan this low return on sales for these two companies would be the result of low margins and was justified because these were service companies working for the companies producing end products, to a large extent using materials provided by the principals.

(*) Parts of this text have been deleted in order not to divulge confidential information; they are indicated by a series of dots between square brackets.

- (173) SSN Nowa was to complete production of the loss-making vessels in the yard's current order book, which meant that it would continue to make losses over the whole period until it was wound up. Implementation of the plan therefore depended on additional State aid of PLN 430 million being granted to cover the future losses of SSN Nowa. Compared to the June plan, which envisaged a capital injection by the State of PLN 588 million and a loan of PLN 68 million, the required amount of State aid seemed to be less. However, the Commission noted that in the meantime a debt for equity swap by public bodies (ARP and KPS) in the amount of PLN 130 million had been implemented in August 2008.

2.8. COMPENSATORY MEASURES

- (174) Following an agreement of December 2006 between the Polish authorities and the Commission, the Commission began intensive talks with the Polish authorities and SSN to determine the necessary compensatory measures.
- (175) In cooperation with its external consultant and the yard, the Commission defined the following methodology for evaluating the capacity reduction proposed by Poland as a compensatory measure.
- (176) For the compensatory measures to be meaningful, the capacity reduction needed to be sufficient to ensure that the future capacity of the yard after restructuring would be lower than its current capacity.
- (177) The Commission first assessed the current technical capacity of the yard, assuming that the assembly of vessels on the slipways constituted one of the bottlenecks in the yard's production process, which could not easily be overcome by outsourcing. Under the methodology used by the Commission, which was not contested by the Polish authorities or the yard, capacity is calculated using the duration of assembly on a slipway and a typical range of vessels (since vessels vary in CGT value but might take the same time to assemble).
- (178) Calculation of current capacity took into account the time actually needed to assemble a (certain type of) ship on a slipway. This time had to reflect all the current deficiencies in the production process, e.g. low productivity, bottlenecks, obsolete assets, inefficient production flow and problems with the workforce. Only the effects of the financial constraints resulting from the yard's difficult financial situation could be factored out of the assembly time. Irregular access or no access to working capital can seriously disrupt the production process. Since this is an external factor, inherent to all companies in financial difficulties and not linked to the inefficiency of the company itself, the Commission accepted that the actual performance of the yard could be adjusted by assuming smooth access to working capital.
- (179) The estimate of future capacity took into account the time probably needed to assemble a (certain type of) ship on the slipway, on the assumption that the yard's productivity was comparable to a benchmark set by other competing European shipyards. In other words, the effects of the necessary modernisation of facilities and optimisation of working conditions (organisation, finances, supplies, workforce) had to be taken into account.
- (180) This modernisation was unavoidable if the yard wished to restore its long-term viability. The associated increase in productivity would allow the yard both to reduce input and to produce faster. As various aspects of production improved, capacity, in the sense of ability to produce a certain volume, would increase. It was therefore important to note that the closure of some facilities, such as the proposed closure of one slipway in the Szczecin shipyard, might be offset by an increase in the capacity of the remaining part of the dock. If the compensatory measures were to remain meaningful, the capacity reduction had to be such that the capacity of the yard at the end of restructuring, i.e. after investment and productivity improvement, was lower than its current capacity. Only in this way could the two goals be reconciled of achieving long-term viability, which entailed increasing productivity, and minimising as much as possible the adverse effects on trade.
- (181) To ensure consistency in the calculation of both current capacity and future capacity, the same product mix should be used, i.e. the same types of vessels. Alternatively, one might use as a proxy an 'average vessel' (i.e. average CGT value, considering the order book of the yard).
- (182) On the basis of information submitted by SSN, its current capacity when operating with financial constraints was estimated at between 177 thousand CGT and 202 thousand CGT, depending on whether the yard's production was to include chemical tankers or not. The capacity of the yard without financial constraints was 208 thousand CGT (9,15 vessels) if its production was to include chemical tankers and 238 thousand CGT (10,7 vessels) if it was not to include chemical tankers.

(183) The yard stated that the investment envisaged in the 2006 restructuring plan would have no impact on assembly time but would rather translate into cost reduction. It also explained that while some of the investments could potentially reduce assembly time, this effect would be offset by an important change in the production method, consisting in earlier outfitting. The yard also explained that to significantly shorten assembly time it would be necessary to invest in the slipways themselves. The yard quantified this investment at EUR 200 million, an amount which is clearly beyond the yard's reach.

(184) Therefore future capacity if no facilities were closed would be identical to current capacity with the scenario of no financial constraints, i.e. 208 thousand CGT if production was to include chemical tankers and 238 thousand CGT without chemical tankers.

(185) After the closure of the smallest slipway (Wulkan 1), the capacity of the yard would be between 149 thousand CGT (6,25 vessels) for the least CGT-intensive range (with chemical tankers) and 178 thousand CGT (7,8 vessels) for the most CGT intensive range (without chemical tankers).

(186) On the basis of these figures, the Commission found that the capacity reduction after closure of the small slipway would be between 25 % and 46 %, depending on what product mix was assumed. On this basis and taking into account that the closure of a further slipway would mean a capacity reduction of at least 59 %, the Commission provisionally concluded that the closure of the smallest slipway, Wulkan 1, proposed by Poland would be a sufficient compensatory measure.

2.9. AID MEASURES

(187) The Commission initiated the formal investigation procedure concerning the aid measures described in part B of the annex to the decision. This included a capital injection and two performance guarantees to be granted by ARP and several deferrals and write-offs of real estate tax by the City of Szczecin. The nominal value of these measures was PLN 126 524 652.

(188) Poland informed the Commission that the two performance guarantees listed as measures 62 and 63 in part B of the annex to the decision to initiate the formal investigation procedure were not granted⁽¹⁾. Poland also informed the Commission that the write-

offs of real estate tax listed as measures 64 and 68 in part B of the annex to the decision to initiate the formal investigation procedure had been postponed⁽²⁾.

(189) Table 3 below shows the measures granted between 1 May 2004, the date of Poland's accession to the EU, and 30 June 2007. Poland notified these measures by letter of 11 July 2007. Their nominal value is PLN 259 560 990. Measure 1 corresponds to measure 61 in part B of the annex to the decision to initiate the formal investigation procedure.

(190) Table 3 includes loans from KPS used to finance the working capital needs of the yard. In letters of 11 July 2007 and 9 January 2008 Poland claimed that these loans did not constitute State aid because the interest charged corresponded to the risk assessment of the particular project for which the loan was sought.

(191) For these loans granted in 2005-2007, KPS charged an interest rate of just over 6 %. The reference rate for Poland in the period when the KPS loans were provided to the yard ranged from 5,56 % to 6,24 %. In addition, KPS charged a one-off fee of between 0,1 % and 0,4 %. According to the Polish authorities, KPS required collateral in the form of acceptance of enforcement, an agreement on cession of receivables, an unconditional payment order, a non-denominated bond or asset pledges⁽³⁾.

(192) KPS was created in 2004 as a full subsidiary of ARP with the function of a risk capital fund for ARP. Its primary role was to serve as a vehicle for the consolidation of the three major shipyards in Poland, but this project was abandoned in 2006. According to the information provided by Poland in 2006⁽⁴⁾, KPS was to be financed by a capital injection from ARP, a contribution in kind (shares in third companies) provided by ARP and a revolving bank loan guaranteed by ARP, which was specifically designed to support the financing of shipyards. According to the information available on the Government's website, KPS was also to support shipbuilding operations in Poland through the issue of bonds fully guaranteed by ARP. Indeed, the document 'A strategy for the shipbuilding sector (maritime construction shipyards) in Poland 2006-2010'⁽⁵⁾ confirms that KPS was to generate resources from an issue of debt instruments worth approximately USD 100 million, secured on the assets earmarked for the restructuring of the shipbuilding industry in the form of funds transferred by the State Treasury to ARP.

⁽²⁾ Letter of 9 January 2008.

⁽³⁾ Letter of 9 January 2008, p. 15.

⁽⁴⁾ Letter of 17 February 2006.

⁽⁵⁾ A strategy for the shipbuilding sector (maritime construction shipyards) in Poland 2006-2010, adopted in August 2006, p. 30.

⁽¹⁾ Letter of 11 July 2007.

- (193) Table 4 shows the support provided by ARP and KPS between 30 June 2007 and 15 February 2008 and notified to the Commission after 11 July 2007, by letters of 6 December 2007 and 12 February 2008. It also shows additional loans from ARP and KPS about which the Commission learned from the SSN Information Memorandum of June 2008 ⁽¹⁾, the restructuring plan of Mostostal submitted in June 2008 ⁽²⁾ and the restructuring plan submitted in September 2008. The nominal value of these measures is PLN 417 531 254.
- (194) Table 5 shows unenforced public-law liabilities in the form of real estate tax arrears of PLN 12 402 000 for the period from July 2003 to December 2004. This measure corresponds to measures 64-68 in part B of the Annex to the decision to initiate the formal investigation procedure.
- (195) Considering the precarious financial situation of the yard, the Commission cannot rule out the possibility that further State aid of a similar nature has been granted to SSN.
- (196) Finally, SSN benefited from production guarantees from KUKÉ (hereinafter 'advance payment guarantees' or 'KUKÉ guarantees'). Practically all the yard's ship production from 1 May 2004 was financed thanks to these guarantees. In the period between 1 May 2004 and 30 May 2008 SSN received 96 guarantees of a total value of PLN 1 928 869 694 ⁽³⁾. In its submission of 11 July 2007 Poland informed the Commission that KUKÉ would continue to grant guarantees to SSN in the period up to the end of 2008. According to the restructuring plan submitted on 12 September 2008, another ten KUKÉ guarantees had been granted to SSN for a total amount of PLN 429 578 282 on 26 June.
- (197) It is a common feature of the industry that shipyards typically do not have sufficient working capital for the construction of ships and rely on external financing, whether through borrowing (so-called production loans) or advance payments from shipowners, from which production is financed. Shipowners typically pay 80 % of the price upfront in instalments, coinciding with certain decisive stages in construction, with the remaining 20 % being paid on delivery. The participation of shipowners in the financing of construction is therefore crucial. The role of the KUKÉ advance payment guarantees provided to SSN was to secure the advance payments from shipowners against the risk of failure on the part of the yard to deliver the ship.
- (198) According to the information provided by Poland, the KUKÉ guarantees were granted to SSN as follows. First, a contract was signed with the shipowner, and was typically conditional upon the yard showing within a certain period of time that the production financing would be guaranteed by KUKÉ. KUKÉ issued a decision to the effect that it would ensure financing of the whole ship by guaranteeing the advance payments. In subsequent individual agreements KUKÉ activated the guarantee for each individual advance payment (typically four). The overall exposure of KUKÉ to possible failure of the yard to deliver is usually 80 % of the full purchase price corresponding to the total advance payments paid by the shipowner prior to delivery. This overall exposure is known when KUKÉ issues the decision securing the advance payments made by the shipowner. The guarantee expires on delivery of the ship.
- (199) KUKÉ's operations as a Polish export credit agency are varied ⁽⁴⁾, and can essentially be divided into the commercial part of the business and the business conducted on behalf of, and guaranteed by, the State Treasury. The latter business is carried out through a separate bank account, 'Interes Narodowy'. The guarantees extended to SSN fall within the business guaranteed by the State Treasury.
- (200) According to the information provided by Poland, KUKÉ advance payment guarantees were granted to SSN against a guarantee premium which varied according to the value of the guarantee. The charge was 2 % per annum for guarantees not exceeding PLN 35 million and 1 % per annum for guarantees exceeding PLN 35 million. As collateral KUKÉ required the transfer of ownership of the ship, the ship under construction or the materials.
- (201) It follows from Tables 3-5 and the above information that since 1 May 2004 SSN has benefited from measures of a total nominal value of PLN 3 047 943 120,5 (approximately EUR 896 million).

⁽¹⁾ Annex 1 to letter of 6 June 2008.

⁽²⁾ Letter of 26 June 2008.

⁽³⁾ The list of these guarantees was provided by Poland in Annex 11 to the restructuring plan of Mostostal submitted on 26 June 2008.

⁽⁴⁾ See, also, Commission Decision of 18 July 2007 in case N 105/07, Guarantee scheme for export contracts, summary notice (OJ C 214, 13.9.2007, p. 3).

Table 4

Additional State aid granted to SSN from 30 June 2007 to 12 September 2008, data provided by the Polish authorities

No	Granting body	Aid instrument	Legal basis	Date of granting	Nominal value of aid (in PLN)
1	2	3	4	5	6
7.	KPS	Capital injection	Agreement	7.8.2007	9 999 954,69
8.	KPS	Capital injection		7.8.2007	33 999 919,80
9.	ARP	Capital injection	Agreement between SSN and ARP on State aid in the form of a capital injection	19.9.2008	86 000 151,93
10.	ARP	Loan	Act of 30.8.1996 on commercialisation and privatisation (Dz. U. 02.171.1397 as amended)	5.12.2007	49 000 000,00
11.	ARP	Loan	Agreement OPP/3/08	6.2.2008	41 000 000,00
12.	KPS	Loan	Agreement 1.11.2007	23.11.2007	9 000 000,00
13.	KPS	Loan	Agreement 1.3.2008	5.3.2008	20 000 000,00
14.	ARP	Loan	Agreement OPP/5/08	30.9.2009	32 250 000,00
15.	KPS	Loan		12.8.2007	4 709 380,37
16.	ARP	Debt for equity swap	Rep. A. No 6603/2008, 8014/2008	20.6.2008	110 999 077,11
17.	KPS	Debt for equity swap	Rep. A. No 6603/2008, 8014/2008	20.6.2008	20 572 770,24
Total					417 531 254,1

Table 5

Public-law liabilities not enforced after 1 May 2004

No	Granting body	Aid instrument	Liability	Amount outstanding (in PLN)
12.	City of Szczecin	Deferral	Real estate tax debt accrued between July 2003 and December 2004	12 402 000,00

3. ASSESSMENT

3.1. COMPETENCE OF THE COMMISSION

- (202) Point 3 of Annex IV to the Accession Treaty sets out the so-called interim mechanism procedure. It constitutes a legal framework for the assessment of aid schemes and individual aid measures put into effect in a new Member State before the date of its accession to the EU and still applicable after accession.
- (203) Aid measures that were put into effect before accession and are not applicable after accession cannot be examined by the Commission, either under the interim mechanism procedure or under the procedure laid down in Article 88(2) of the EC Treaty.
- (204) On the other hand, measures that were not put into effect until after accession will be assessed by the Commission as notified aid or as unlawful aid pursuant to the procedure laid down in Article 88(2) of the EC Treaty.
- (205) In order to establish the date on which a certain measure was put into effect, the relevant criterion is the legally binding act by which the competent national authority undertakes to grant the aid ⁽¹⁾. Whether an administrative act is legally binding is a matter of national law. However, the Commission must, especially in borderline cases, be able to review these administrative acts and to assess on the basis of their form and content whether they could have given rise to legitimate expectations on the part of the beneficiaries enforceable before a Polish court of law. This capacity to review national administrative acts is indispensable for the exercise of the Commission's exclusive competence to approve derogations from the general prohibition of State aid with regard to measures put into effect in Poland after 1 May 2004.
- (206) A measure is applicable after accession if it was put into effect before accession but can still give rise, after accession, to the granting of additional aid or to an increase in the amount of aid already granted, i.e. if the precise economic exposure of the State is not known on the date on which the measure was put into effect and still not known on the date of accession.
- (207) In its decision to initiate the formal investigation procedure, the Commission concluded, on the basis of the information provided by Poland, that a series of measures notified to the Commission in fact constituted

new aid, to be granted after 1 May 2004, the day of Poland's accession to the EU. Specifically, the Commission considered that a capital injection, two performance guarantees and a real estate tax liability write-off and deferral constituted new aid.

- (208) Firstly, Poland informed the Commission that the two contested performance guarantees (measures 62 and 63 in part B of the Annex to the decision to initiate the formal investigation procedure) had not in the end been granted at all. They are therefore not covered by this Decision.
- (209) Secondly, Poland confirmed that the real estate tax debt to the City of Szczecin accrued in the period between July 2003 and December 2004 (measures 64-68 in part B of the Annex to the decision to initiate the formal investigation procedure) had not been enforced or written off so far. This means that the liability was carried forward and not enforced well beyond the date of accession. It is established case-law ⁽²⁾ that continuous non-enforcement of public-law debts can constitute State aid, as will be discussed in more detail below. Such non-enforcement clearly falls within the competence of the Commission under Article 88 of the EC Treaty in so far as it concerns the period after accession. These measures are therefore covered by this Decision.
- (210) Thirdly, with regard to the capital injection from ARP (measure 61 in part B of the Annex to the decision to initiate the formal investigation procedure), the comments provided by Poland and third parties on the decision to initiate the formal investigation procedure have not convinced the Commission that this measure does not constitute new aid. This measure is therefore covered by this Decision.
- (211) The Commission explains below the reasons why it cannot accept the arguments submitted by Poland and the interested parties.
- (212) With regard to Poland's argument that the capital injection should be seen in the context of the Polish Government's far-reaching rescue programme for the shipbuilding industry in Poland, the Commission considers that such a general government programme cannot give rise to a legitimate claim on the part of SSN that one of its shareholders, ARP, must implement the full capital injection. Indeed, for budgetary reasons ARP was originally unable to implement the capital injection declared in the 2003 restructuring plan in full.

⁽¹⁾ Judgment of the Court of First Instance in Case T-109/01 *Fleuren Compost v Commission*, cited above, paragraph 74.

⁽²⁾ Opinion of Advocate-General Jacobs in Case C-256/97 *DM Transport* [1999] ECR I-3915; Case C-480/98 *Spain v Commission* ('*Magefesa*') [2000] ECR I-8717.

- (213) With regard to Poland's argument that the Commission is applying the criteria of EC law to events and national law prior to accession, the competence of the Commission to act in respect of measures granted before accession is defined by the Act of Accession, which is binding upon the Communities and Poland. The Commission has interpreted the concept 'put into effect before accession' by analogy with the concept of the granting of aid ⁽¹⁾.
- (214) Poland argues that only approval of the restructuring plan and the aid measures contained therein by the President of the Office for Competition and Consumer Protection was required under national law. The Commission does not consider that this approval can in itself be qualified as 'putting the measure into effect before accession'. The national competition office checked the compatibility of the aid with national State aid legislation but, just as when the Commission reviews State aid under Article 88 of the EC Treaty, its approval did not create legitimate expectations under national law that the aid was actually going to be granted.
- (215) Poland also considers it an undisputed fact that the capital injection provided for in the 2003 restructuring plan was agreed between SSN and ARP. As the Commission stated in its decision to initiate the formal investigation procedure, the aid is considered to be put into effect if the competent authority adopts an act which, under national law, can give rise to legitimate expectations, enforceable before a national court, that the aid will be granted. Naturally, to exercise its competence under the Act of Accession and the EC Treaty, the Commission has to be able to verify whether this is the case. Neither Poland nor the interested third parties have provided any evidence that SSN would be able to claim legitimate expectations before the national court on the grounds that a total capital injection of PLN 241 million was included in the 2003 restructuring plan agreed with ARP. In fact, two resolutions of the extraordinary shareholders' meeting were necessary to implement this capital injection: the resolutions of 29 April 2004 (PLN 180 million) ⁽²⁾ and 24 December 2004 (PLN 61 million).
- (216) Article 87(1) of the EC Treaty provides that any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods and affects trade between Member States is incompatible with the common market.
- (217) The Commission finds that all the measures described in Part 2.7 above were granted by the State or through State resources and, as they were granted to one particular undertaking, were selective.
- (218) SSN is one of the biggest shipyards in Europe. In recent years container vessels have represented over 60 % of the yard's order book. SSN therefore competes actively with shipyards in Germany and Denmark. The continual subsidising of SSN, which allowed it to conclude contracts without fully evaluating or offsetting the risks involved, had a negative impact on other European shipyards with the capacity to produce container vessels.
- (219) The Commission notes that SSN also operates in other cargo ship segments by offering products such as multi-purpose vessels, chemical tankers and ro-ro ships (including ro-pax and con-ro) and competes in these segments with other European shipyards. For example product and chemical tankers constituted about 8 % of the order book of European shipyards at the end of 2006. In particular, German and Romanian shipyards are active in these segments.
- (220) On the basis of the foregoing, the Commission concludes that the State aid granted to SSN affected trade between Member States.
- (221) Lastly, the Commission needs to determine whether the measures granted to SSN conferred an undue advantage and thereby distorted or threatened to distort competition. The Commission notes that the Polish authorities contested the classification of loans from KPS and guarantees from KUKE as State aid, claiming that the measures passed the market investor test. Poland did not contest the classification as State aid of the other measures covered by this Decision.
- (222) The Commission will explain below why the consistent failure to enforce public-law debts does not pass the market economy creditor test. The Commission will then assess in detail the measures contested by Poland. Finally, the Commission will consider the circumstances under which the measures covered by this Decision were granted and their impact on competition.

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

3.2.1. EXISTENCE OF STATE AID

- (216) Article 87(1) of the EC Treaty provides that any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to

⁽¹⁾ Judgment of the Court of First Instance in Case T-109/01 *Fleuren Compost v Commission*, paragraph 74.

⁽²⁾ This measure was included in part A of the Annex to the decision to initiate the formal investigation procedure as a measure put into effect before accession.

(a) **Non-enforcement of public-law liabilities**

- (223) It is established case-law⁽¹⁾ that consistent non-enforcement of public-law debts can constitute State aid, as will be discussed in more detail below. Such non-enforcement clearly falls within the competence of the Commission under Article 88 of the EC Treaty in so far as it concerns the period after accession. The Commission considers that no market economy creditor would agree to such a prolonged deferral of payment of its claims. Furthermore, Poland has not provided any evidence that the relevant tax authority has taken any steps to enforce its public law claims on SSN, in particular through enforcement proceedings or under bankruptcy law. Finally, this non-enforcement conflicts with the Polish authorities' assertion that SSN has been regularly paying its public-law liabilities since 1 May 2004 and has not benefited from deferrals and repayment schedules in respect of these liabilities.

(b) **Measures contested by Poland as passing the market economy investor test**

KPS loans

- (224) With regard to the assistance from KPS in the form of working capital loans, the Commission cannot accept Poland's argument that these loans were free of State aid. The Commission notes that the interest rate charged by KPS was more or less at the level of the reference rate. It also notes that SSN had been in a very precarious financial situation for several years. SSN was not able to obtain any other external financing of its production with State support, in the form of either KPS participation or guarantees. Its working capital was financed from advance payments fully covered by KUKI guarantees, or from KPS loans. It can therefore not be considered that the interest rate charged by KPS fully reflected the risk borne by KPS. It is true that KPS requested collateral but the value of this collateral is questionable; it should be recalled that KUKI required similar collateral and, in view of the liabilities/assets ratio of SSN, it is unlikely that KPS was able to obtain first-rank claims on the yard's assets as collateral. In any event Poland has not provided detailed information enabling the Commission to assess the real value of the required collateral.
- (225) Furthermore, the Commission does not see any difference between the loans granted by KPS and the loans granted by ARP, the owner of KPS. It is difficult to agree with the Polish authorities' argument that the loans granted by ARP constitute State aid, whereas the loans granted by

its subsidiary, KPS, are compatible with the market economy investor principle.

- (226) The Commission cannot accept Poland's argument that the loans provided by KPS in a consortium with Bank Handlowy SA and Bank Pekao SA (measures 3 and 4 in Table 3, recital 201) were granted on market terms and that because KPS and the banks participated in the consortium and provided financing 'on analogous terms', the contribution of KPS did not contain State aid.
- (227) The Commission notes that when the consortium provided the loans, SSN was a company in difficulty. Without State support the yard could not obtain any financing on the market in the form of either a guarantee or participation in the financing, as in the measures in question. Since no external financing was provided other than that from the consortium with KPS, it seems that the banks were willing to provide financing to the yard only because of the involvement of KPS in the transaction.
- (228) Furthermore the Commission notes that the rate of interest charged by KPS on the loans to SSN was similar to the reference rate for Poland at the time when the loans were granted. According to the Commission notice on the method for setting the reference and discount rates⁽²⁾ the reference rate announced by the Commission is a floor rate which may be increased in situations involving a particular risk (for example, an undertaking in difficulty, or where the security normally required by banks is not provided). In this case the interest rate was not increased to take account of the precarious situation of SSN.
- (229) Finally, the Commission notes that KPS was established as a government-controlled fund with a public policy objective and its financing was fully provided or guaranteed by the State through ARP. According to the document 'A strategy for the shipbuilding sector (maritime construction shipyards) in Poland 2006-2010', KPS 'was founded to organise the financing of shipyard production until the shipyards are taken over by private investors'. The strategy, the objectives of which are not only economic, but also social and macro-economic⁽³⁾, gives KPS, along with ARP, the State Treasury and other relevant public bodies, a variety of powers. The financial links of KPS to ARP and the State Treasury are clear and KPS acts rather like a vehicle for the transfer of assets earmarked in the State budget to shipyards in Poland, including SSN.

⁽¹⁾ Opinion of Advocate-General Jacobs, Case C-256/97, *DM Transport* [1999] ECR I-3915, Case C-480/98, *Spain v Commission* ('*Magefesa*') [2000] ECR I-8717.

⁽²⁾ OJ C 273, 9.9.1997, p. 3.

⁽³⁾ A strategy for the shipbuilding sector (maritime construction shipyards) in Poland 2006-2010, adopted in August 2006, p. 7.

- (230) In view of these factors, the Commission concludes that KPS did not act as a market economy investor when it granted working capital loans to SSN.

KUKE guarantees

- (231) In its comments following the adoption of the decision to initiate the formal investigation procedure, Poland submitted that the advance payment guarantees extended by KUKE to SSN did not constitute State aid. The Commission cannot accept this assertion.

- (232) Firstly, the Commission recalls that the KUKE advance payment guarantees are guaranteed by the State Treasury and handled in a separate bank account under the name of 'Interes Narodowy'. If this account does not contain sufficient funds, KUKE can either draw loans from the State Treasury or benefit from State Treasury loan guarantees.

- (233) Secondly, the Commission recalls its decision of 18 July 2007 in case N 105/2007⁽¹⁾, in which it approved as free of State aid the scheme under which KUKE operates its programme of export insurance guaranteed by the State Treasury. This scheme currently covers the type of production guarantees that SSN has been receiving for years. The Commission notes that the scheme explicitly excludes⁽²⁾ companies in financial difficulty within the meaning of the Guidelines on State aid for rescuing and restructuring firms in difficulty. The main feature of the scheme is that the guarantee premiums are determined on the basis of a risk assessment. For example the guarantee premium for a company belonging to the highest risk category corresponds to [...] % p.a. for guarantees of under two years and [...] % p.a. for guarantees of over two years. The base premium is [...] % p.a. By comparison, the guarantees to SSN were provided by KUKE for a premium of 2 % p.a. if the guarantee did not exceed PLN 35 million and for a premium of 1 % p.a. if the guarantee exceeded this amount.

- (234) It is clear that SSN is not eligible for guarantees covered by the scheme described above which was approved by the Commission as free of aid. Hence the guarantees granted to SSN are not free of aid.

- (235) In addition it is obvious that the guarantee premium charged to SSN is well below the base premium used for guarantees to healthy companies and several times lower than the premium charged to high-risk companies which are still eligible under the scheme described above. The Commission concludes that the guarantee premium paid by SSN does not correspond to a market premium and therefore these guarantees constitute State aid.

- (236) Thirdly, pursuant to the Commission notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees⁽³⁾, for an individual State guarantee not to constitute State aid, the borrower must not be in financial difficulty. This is clearly not the case here. Pursuant to the same notice, when the borrower is in financial difficulty the aid element of the guarantee might be as high as the amount covered by that guarantee.

- (237) Finally, the Commission notes that SSN has relied exclusively on guarantees from KUKE and the State Treasury and has not managed to obtain any guarantees on the market. This supports the Commission's conclusion that the advance payment guarantees from KUKE constitute State aid.

- (238) In the light of the above, the Commission concludes that KUKE did not act as a market economy operator when it extended guarantees to SSN.

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

- (239) The Commission finds that, thanks to its full reliance on State backing, SSN engaged in anti-competitive practices such as pricing below production costs and did not suffer the consequences that such practices normally entail, namely exit from the market.

- (240) Furthermore, the Commission notes that the main, persistent problem of SSN was that it concluded contracts which proved to be loss-making because of the continued strengthening of the zloty against the dollar, which is the prevailing currency in the shipbuilding business, and rising world prices for steel plates. These external factors were identified as major threats to the operation of the yard as far back as the restructuring plan of 2002, then again in the new restructuring plan of 2006 and finally during the privatisation attempt in 2008.

- (241) Although the yard's management was aware of these dangers, the yard continued to conclude contracts without taking measures to mitigate these risks, or only taking measures with limited impact. This business practice continued in the period of unprecedented boom in the shipbuilding market between 2004 and 2008, when shipbuilding prices rose to unprecedented levels. As a result of this practice, the yard managed to maintain operation and employment, but at the cost of vast losses on its regular shipbuilding production. According to the due diligence carried out by Amber in the first half of 2008, and as confirmed by Poland, the current order book with deliveries in 2008 and 2009 is also burdened with significant losses due to loss-making contracts concluded without any risk-mitigating measures or with clearly insufficient measures.

⁽¹⁾ Decision in case N 105/07.

⁽²⁾ Article 3(1)(1) of Resolution 111/2006 of the Export Insurance Policy Committee of 20 December 2006.

⁽³⁾ OJ C 71, 11.3.2001, p. 14.

(242) On this basis the Commission concludes that all the measures granted to SSN were such as to distort or threaten to distort competition on the shipbuilding market.

(243) In conclusion, the Commission considers that all the measures granted to SSN are State aid within the meaning of Article 87(1) of the EC Treaty.

3.2.2. OPPORTUNITY FOR POLAND AND INTERESTED THIRD PARTIES TO SUBMIT COMMENTS

(244) With its decision of 1 June 2005, the Commission initiated the formal investigation procedure with regard to a series of measures, to be granted on various legal bases by both the local authority and the State-owned company ARP, comprising debt restructuring, a capital injection and performance guarantees.

(245) The Commission also stated that Poland's argument that advance payments from shipowners should be considered an own contribution could not be accepted. In this connection, the Commission expressed doubts as to whether the advance payment guarantees provided by KUKI did not constitute State aid and announced that it would investigate the nature of these guarantees.

(246) The Polish authorities submitted their comments and, whereas they contested the competence of the Commission to assess the compatibility of some of the measures concerned, they did not contest the Commission's conclusion that if these measures were granted after the accession of Poland to the EU they would constitute new aid within the meaning of Article 87(1) of the EC Treaty. The exception was the nature of guarantees provided by KUKI, alleged to be free of State aid. Later Poland argued also that loans from KPS did not constitute State aid. The Commission has addressed these arguments of Poland above.

(247) In the course of the Commission's investigation, the strategy of the Polish Government as the majority owner of SSN has significantly changed several times, as the above description of events shows. The strategy of consolidating the shipbuilding sector was replaced by a strategy of partial privatisation of the yard, which was later replaced by a strategy of full privatisation. Currently this last strategy is jeopardised by the apparent lack of market interest in purchasing the yard.

(248) As described above, the Commission has been in regular contact with the Polish authorities as the owner of SSN, and with SSN itself. The Commission has regularly indicated to both Poland and the yard that all the

measures granted to the yard from State resources in all probability constitute State aid within the meaning of Article 87(1) of the EC Treaty in view of the precarious financial situation of the yard and the virtual absence of any external financing free of State aid. The Commission has also warned that this State aid has been granted in breach of Article 88(3) and is apparently not compatible with the common market on any grounds. The Commission also pointed out repeatedly that the KUKI guarantees provided to SSN constitute State aid.

(249) Finally, during its investigation the Commission gathered details on the operations of KPS and the nature of the working capital loans granted to the yard by KPS. The Commission indicated to Poland that these loans in all probability constituted State aid within the meaning of Article 87(1) of the EC Treaty.

3.3. COMPATIBILITY OF THE AID: EXEMPTION UNDER ARTICLE 87(3) OF THE EC TREATY

(250) The primary objective of the measures is to assist a company in financial difficulty and keep it afloat. In such cases, the exemption under Article 87(3)(c) of the EC Treaty, which allows the authorisation of State aid granted to facilitate the development of certain economic activities where such aid does not adversely affect trading conditions to an extent contrary to the common interest, may be applied if the relevant conditions are fulfilled.

(251) Rescue and restructuring aid to ailing companies is currently regulated by the Community Guidelines on State aid for rescuing and restructuring firms in difficulty⁽¹⁾ (hereinafter Guidelines), which replaced the previous text adopted in 1999⁽²⁾ (hereinafter 1999 Guidelines).

(252) The transitional provisions in the Guidelines stipulate that notifications registered prior to 10 October 2004 will be examined in the light of the criteria in force at the time of notification (point 103). In the present case, some of the measures were notified to the Commission under the 'interim mechanism' provided for in point 3 of Annex IV to the Accession Treaty on 29 April 2004, when the 1999 Guidelines were in force. However, the Guidelines stipulate that they will apply for the assessment of any rescue or restructuring aid granted without the authorisation of the Commission (unlawful aid) if some or all of the aid is granted after 1 October 2004 (point 104, first subparagraph). The Commission finds that almost all the measures described in Table 3 and Table 4 were granted unlawfully after this date and that the 2004 Guidelines therefore apply.

⁽¹⁾ OJ C 244, 1.10.2004, p. 2.

⁽²⁾ OJ C 288, 9.10.1999, p. 2.

- (253) The Guidelines apply to firms in all sectors, with the exceptions listed in point 18 of the Guidelines. Point 12 of the Framework on State aid to shipbuilding⁽¹⁾, which is the legal framework for the assessment of State aid to this sector, refers to the Guidelines as the relevant legal basis for the assessment of rescue and restructuring aid.

Rescue aid

- (254) The Guidelines provide for the possibility of granting rescue aid as temporary assistance for companies in financial difficulty to allow them time to prepare a restructuring plan or a liquidation plan, or to address an acute liquidity crisis that can be solved within the period covered by the rescue aid.
- (255) The Commission notes that the State aid granted to SSN does not meet the requirement that it be temporary, as all the support measures covered periods well beyond the prescribed six months, or the requirement that it be reversible, as the aid included irreversible measures such as capital injections, comparable to grants.
- (256) The Commission therefore concludes that the measures covered by this Decision are not compatible with the common market as rescue aid.

Restructuring aid

- (257) According to the definition contained in point 17 of the Guidelines, restructuring aid is based on a feasible, coherent and far-reaching plan to restore the firm's long-term viability within a reasonable time-frame. Restructuring usually involves the following elements: restructuring all aspects of the company's operation and reorganising and rationalising the company's activities; this includes withdrawing from loss-making activities and financial restructuring. However, restructuring operations benefiting from State aid cannot be confined to making good past losses without tackling the reasons for those losses, i.e. without undertaking genuine restructuring. The Guidelines require that the restructuring aid be limited to the strict minimum necessary and a significant part of the restructuring therefore needs to be financed from resources that are free of State aid. In order to ensure that the adverse effects of the aid and the distortion of competition are minimised, compensatory measures must be taken.
- (258) Considering the very distortive nature of restructuring aid, the Commission considers that aid to firms in difficulty may contribute to the development of

economic activities without adversely affecting trade to an extent contrary to the Community interest only if all the conditions set out in the Guidelines are met.

- (259) The Commission will analyse below whether these conditions have been met.

- (260) In order to assess the compatibility of the measures constituting new aid, and in particular the capacity of the restructuring process to restore the company's viability and whether the aid is limited to the minimum necessary, the Commission needs to consider the restructuring plan and aid as a whole, including 'past aid', i.e. aid put into effect before accession and not applicable thereafter.

3.3.1. ELIGIBILITY OF THE COMPANY

- (261) The Guidelines consider an undertaking to be a firm in difficulty, and therefore eligible for rescue and restructuring aid, if it is unable, either through its own resources or by raising funds from its shareholders or through external borrowing, to stem losses which, without outside intervention by the public authorities, will almost certainly condemn it to going out of business in the short or medium term. The Guidelines also list some typical signs that a firm is in difficulty, such as increasing losses or diminishing turnover.
- (262) Point 12 of the 1999 Guidelines stipulates that a newly created firm is not eligible for restructuring aid, even if its initial financial position is insecure. This is the case, for instance, where a new firm emerges from the liquidation of a previous firm or merely takes over such firm's assets. The Guidelines specify that a firm will in principle be considered to be newly created for the first three years following the start of operations in the relevant field of activity.
- (263) The Polish authorities claim that SSN is just another name for ASS, which existed and cooperated with SSPH and SS prior to their bankruptcy.
- (264) However, all the circumstances suggest that SSN did not take over the debts of SSPH or SS and that those debts stayed with those two companies and were dealt with under the bankruptcy procedure. Poland has stated that SSPH's supplier-related debts in the amount of PLN 15 million had been taken over by SSN, but has not provided any further details or any documentation.

⁽¹⁾ OJ C 317, 30.12.2003, p. 12.

(265) Thus SSN started its operations free of the debts of its predecessors. The Polish authorities have not provided any evidence that SSN took over any debts. Furthermore, considering the size of the yard's business, the liability of PLN 15 million which was allegedly taken over would not justify the assertion that there was economic continuity between SSPH/SS and SSN. In addition, the Commission notes that the ongoing contracts were taken over during the production cycle, when liabilities were offset by receivables, and therefore did not represent any additional inherited burden. Moreover, SSN in fact concluded new contracts for those ships (¹).

(266) Secondly, while the Commission notes that ASS was active in the shipbuilding business together with SS before the bankruptcy of SSPH (framework agreement and lease agreement of January 2002), the Commission also notes that the sheer size of SSN after June 2002 as compared to that of ASS before June 2002 undermines the assertion that there was economic continuity between these two entities. The profit and loss account shows that turnover increased from PLN 88 million in 2001 to PLN 425 million in 2002 and PLN 1 100 million in 2003.

(267) The Commission therefore concludes that it cannot accept the assertion of the Polish authorities that SSN was simply a continuation of ASS, which had existed long before the bankruptcy of SSPH. In economic terms, there is a clear split between the activities of these two entities, which is illustrated primarily by the fact that no liabilities were taken over. SSN was therefore a new company, which was not eligible for restructuring aid.

(268) Under point 12 of the Guidelines a firm is considered to be newly created for the first three years following the start of its operations. The situation under consideration is a specific one in which a new firm emerged from the liquidation of a previous firm. Under Point 12 of the Guidelines this scenario is one which disqualifies a firm from eligibility for rescue and restructuring aid. In the present case, the Commission considers that the filing for bankruptcy of SSPH and SS in July 2002 is decisive in this respect. It is this bankruptcy that marked the rupture between the old economic entity and the new economic entity, which was protected from the liabilities of the old economic entity. The Commission therefore concludes that SSN was not eligible for rescue and restructuring aid in the three years starting from July 2002, when it started its new operations, free of old liabilities.

(269) Point 12 of the Guidelines recognises that a firm initially considered to be newly created will become eligible for rescue or restructuring aid on expiry of the three year period following its start-up, provided that it qualifies as a firm in difficulty within the meaning of the Guidelines.

The Commission observes that the conditions for SSN being eligible under the Guidelines were met after the three year period had elapsed. In particular, SSN steadily made losses and was saved several times from bankruptcy only by State intervention. It therefore qualified from July 2005 as a firm in difficulty within the meaning of point 11 of the Guidelines.

3.3.2. RESTORATION OF VIABILITY

(270) Under point 34 of the Guidelines, the grant of the aid must be conditional on implementation of the restructuring plan, which must enable the company to restore its viability within a reasonable time-scale. Restoration of viability means that the company, after completing its restructuring, is able to cover all its costs and to generate a sufficient return on capital to enable it to compete on its own merits. The duration of the restructuring must be as short as possible.

(271) The Commission first notes that in the course of this investigation it reviewed two restructuring plans, that of 2002 and that of 2006, which were prepared by the yard's management and approved by the State. The Commission concluded with regard to both plans that Poland had failed to demonstrate that they were sufficient to restore the yard's long-term viability. Since the 2006 restructuring plan replaced the 2002 restructuring plan, the Commission will explain below the grounds for its conclusion concerning the 2006 restructuring plan.

Restructuring plan of September 2006

(272) The planned strategy of focusing on niche markets in which the yard assumed that it had a competitive advantage and where it considered that the general competitive and market environment was favourable did indeed seem appropriate for SSN. Nevertheless, the fact that almost 70 % of the vessels on the yard's order book for the following years were container ships did not indicate that there had been a major change in the orientation of the yard. There were no other indications, such as major research and development projects or marketing activities, to support the conclusion that the yard would be able to implement this strategy in the short term. The Commission was therefore not convinced that this market strategy was realistically achievable.

(273) The planned level of investment, amounting to PLN 200 million, was clearly insufficient, given that the yard's facilities were in poor condition and had significantly depreciated. While the book value of the assets in 2006 was PLN 130 million, projected depreciation in 2006-2009 amounted to PLN 85 million. This indicated that a large part of the investment would immediately be offset by depreciation and genuine modernisation would be limited.

(¹) Letter of 4 October 2005 containing Poland's comments on the decision to initiate the formal investigation procedure.

- (274) The Commission's opinion that the scope of the planned investments was not sufficient was reinforced by the fact that the 2006 restructuring plan assumed that in 2011 SSN's productivity would reach the level of average EU productivity in 2000 (whereas its productivity at the time was comparable to the EU average in 1992), and the Commission deemed this insufficient to enable the yard to compete on the market without long-term State support.
- (275) The Commission doubted whether the planned pay increases of about 5 % per annum would be sufficient to motivate workers to remain at the yard, while a high level of absenteeism and a shortage of qualified workers — as these had been leaving to earn better pay in other European yards — were (and still are) one of the yard's major problems.
- (276) The plan forecast that the return on capital employed (ROCE), not taking pay increases into account, would be on average 19 % per annum in 2007-2011, which was allegedly the level of return expected by a private investor. However, taking the unavoidable pay increases into account, the ROCE in the same period would be about 1,45 % per annum, which was well below the level acceptable to any private investor.
- (277) In general, the Commission noted that, apart from the physical investments, which the yard identified, detailed, quantified, ranked by priority and scheduled, the planned measures were formulated vaguely and in general terms, mostly in form of recommendations for follow-up analyses. The Commission was therefore unable to assess the impact of these measures and hence was not convinced that they were reasonable and far-reaching enough to tackle the structural problems of the yard.
- (278) On the basis of the foregoing, the Commission considered that the planned industrial and organisational restructuring would not be sufficient to restore the long-term viability of the yard. The plan did not go far enough and the target results for 2011 were not satisfactory. The yard clearly lacked additional capital that could be used to upgrade and improve efficiency. The Commission doubted whether the yard could raise the capital necessary for far-reaching restructuring on the market.
- (279) These doubts were confirmed by actual developments in the SSN privatisation process. As described above, as the majority owner of SSN, ARP attempted three times to find a private investor ready to take over the yard. None of the privatisation attempts (the partial privatisation in 2006 or the two attempts to sell a majority share in the yard in 2007) succeeded. The Commission notes that the privatisation attempts took place at a time when the shipbuilding market was characterised by an unprecedented boom and therefore offered optimal conditions for the sale of the yard. The negative outcome of the privatisation process can only be interpreted as a lack of confidence on the part of market players in the ability of the yard to restore its long-term viability. The withdrawal of Amber from the privatisation process after an in-depth due diligence only illustrates this further ⁽¹⁾.
- (280) The Commission has noted the renewed efforts of the Polish authorities to find a private investor for SSN following the withdrawal of Amber. However, up to the date of this Decision nothing has happened to convince the Commission that the renewed privatisation effort can reach a positive conclusion in the near future and in accordance with the Guidelines.
- ### Restructuring plan of June 2008
- (281) In particular, the Commission has assessed the restructuring plan of June 2008 drawn up by Mostostal, also bearing in mind Mostostal's presentation of the plan at the meeting of 24 June 2008. The Commission notes that in many respects this restructuring plan was only an outline serving as a basis for further analytical work to be undertaken by the investor. Nevertheless, in certain respects it contained serious deficiencies which lead the Commission to conclude that it failed to demonstrate that the yard would return to viability within a reasonable time-frame.
- (282) In particular the Commission considers that the credibility of the business strategy with regard to the shipbuilding sector was not demonstrated. The plan did not offer any detail beyond a simple statement that the yard would continue to build ships. It contained no analysis of the yard's ability to build ro-pax and multipurpose vessels (e.g. design capacities, skills) or its ability to conclude contracts for such ships in the short to medium term (e.g. contacts with clients, or with other yards on the possibilities of subcontracting work), no market forecasts for these segments showing whether the expected demand justified this business strategy and no forecast as to the profitability of these segments.
- (1) Amber indicated that its analysis showed that the yard would not become profitable after the restructuring which Amber envisaged implementing.

- (283) The Commission notes that Mostostal recognised its lack of experience in the shipbuilding sector and that its actual intention was to find a strategic partner to manage the shipbuilding activity of the yard. Although the Commission was informed that Mostostal was indeed in talks with some potential cooperation partners, no such cooperation was established before the restructuring plan submitted to the Commission was drawn up. The letter of intent with Ulstein merely showed that the parties would negotiate on whether and what cooperation was possible. It may be concluded from the revised restructuring plan submitted on 7 July 2008, combined with the letter of intent, that Ulstein was looking at the possibility of exploiting SSN's production facilities, but not as an owner but as part of a contractual relationship. None of these documents indicated that Ulstein would enter into a partnership with Mostostal to restructure and run SSN's shipbuilding operations. This raises serious doubts regarding the assumed results of the restructuring and the financial projections, at least in so far as shipbuilding, and therefore effectively the business diversification concept itself, is concerned.
- (284) The investment programme included in the plan and drawn up by the management of the yard did not demonstrate that the proposed investments were necessary to restore the yard's viability. On the other hand, the Commission notes that about 60 % of the envisaged investments would serve merely to maintain the value of the yard's fixed assets at today's level. More importantly, the revised restructuring plan submitted on 7 July 2008 acknowledged that an external consultant was working on an investment programme for the shipbuilding operations, which shows that the investment programme envisaged by Mostostal cannot be considered a credible basis for Mostostal's financial projections or, therefore, for restoring long-term viability. The Commission therefore considers that it has not been shown that the proposed investment programme was sufficiently far-reaching to restore viability.
- (285) The Commission also notes that some important restructuring measures (organisational restructuring, management of supplies and stocks, employment restructuring) were described fairly generally and the plan was more of an outline serving as a basis for further analytical work to be undertaken by the investor. While the fact that the plan identified certain areas in need of restructuring is assessed positively, the level of generality does not enable the Commission to assess whether the restructuring measures adequately addressed the yard's problems and under what assumptions and within what time horizon they could be implemented.
- (286) As to the financial projections, the plan did not explain in detail how various restructuring measures, including investments and various cost-cutting measures and related productivity improvements would affect the financial projections. There was also no analysis testing the sensitivity of these projections to various risk factors such as the evolution of the market, prices, material costs, foreign exchange rates and pay. In the absence of a detailed description and justification of the assumptions underlying the financial projections, the Commission considers that the credibility of these projections and the robustness of the restructuring plan have not been shown. This is particularly important considering that the investor itself stated that the financial projections showed that the profitability of the investment was borderline.
- (287) The Commission finally notes that the investor made successful implementation of the restructuring plan conditional upon additional State aid. Even with this additional State aid and the investor's intervention, the return on equity at the end of the restructuring period would still be relatively low, considering that alternative investment opportunities, such as government bonds, involve a similar return and less risk, as the investor itself acknowledges.
- (288) The Commission therefore considers that the ability of the yard to restore viability on the basis of the restructuring plan of June 2008 drawn up by Mostostal has not been shown.
- Restructuring plan of September 2008**
- (289) The Commission notes that although the restructuring plan submitted in September 2008 is more developed than that of June 2008, most of the Commission's doubts as to the robustness and credibility of the plan still apply.
- (290) The plan does not contain a complete market analysis for all the planned activities of the successors of SSN. Only a limited market description is presented for the planned activity of SSN Ulstein and SSN Nowa, and this description does not state the projected demand for or profitability of this activity. No business plan as such is presented for SSN Odra and the restructuring plan only indicates that the company might build certain types of vessels, without providing sufficient justification.
- (291) The Commission notes that SSN Odra, which is supposed to continue the shipbuilding activity of SSN, would be fully owned by Mostostal, which has no experience in the shipbuilding sector. Ulstein, whose involvement in the restructuring project was supposed to bring in the necessary know-how and experience in the shipbuilding sector, does not intend to have any financial involvement in SSN Odra.

- (292) As regards SSN Wspólna, the Commission notes that under the plan approximately 40 % of its capacity is to be used either by a company which is to be wound up (SSN Nowa) or by a company which has no business plan (SSN Odra). In addition, it is assumed that the remaining capacity of SSN Wspólna (9-17 thousand tonnes of steel, i.e. 12-23 % of its capacity) will be used for subcontracting for other companies, but the target market, demand and the level of profitability that can be achieved have not been analysed.
- (293) Therefore the Commission considers that the restructuring plan of 12 September still fails to demonstrate the credibility of the business strategy, in particular with regard to the shipbuilding sector.
- (294) As regards the planned restructuring of assets, the Commission notes that the plan does not present any analysis of the yard's investment needs or justification of the investment programme. The Commission considers that the planned investment of PLN [...] million for the relocation of some production assets in order to free up land is a replacement investment rather than a genuine modernisation of assets.
- (295) Therefore the costs of the planned modernisation amount to only PLN 104 million and the modernisation investment would be made in SSN Mostostal, SSN Ulstein and SSN Wspólna. SSN Odra, which is supposed to generate almost 50 % of the revenues of all the successor companies of SSN in the future, would not make any investments and would not have any fixed assets. The Commission notes that the plan submitted by Mostostal in June 2008 envisaged investments of PLN 264 million. As no justification is presented for such a cut in the investment programme (by 40 % as compared to the June plan) and there is no analysis of the companies' investment needs, the Commission considers that it has not been demonstrated that the planned investment programme is sufficient to restore the long-term viability of operations.
- (296) The expected results of the restructuring measures are not described and the plan does not explain when the implementation of these measures would produce results and have an impact on the companies' financial performance. Furthermore, the plan does not describe the assumptions of the financial projections with regard to the revenues and costs envisaged. These factors raise doubts as to the credibility of the projections. In addition the sensitivity analysis shows that SSN Mostostal, and in particular SSN Odra, would remain very vulnerable to changing market conditions. Depreciation of the US dollar by 10 % would cause a decrease in accumulated profit of 40 % for SSN Mostostal and 83 % for SSN Odra in the years 2009-2012 (the analysis for SSN Odra admittedly does not take account of the hedging policy). Furthermore, the plan assumes that a 10 % increase in steel prices will cause falls in accumulated profit of 40 % for SSN Mostostal and 50 % for SSN Odra. The Commission thus concludes that the plan has not demonstrated that after implementation of a sound hedging policy the sensitivity of the companies to fluctuations in exchange rates or steel prices would be at an acceptable level.
- (297) As regards the planned return on sales, as the plan does not describe on what basis the envisaged results on sales were estimated (in terms of operational costs, vessel prices, the profitability of the steel construction business, etc.), the Commission must conclude that it has not been demonstrated that the projected results are based on realistic assumptions. Furthermore, the projected return on sales for SSN Wspólna and SSN Biuro Projektowe is marginal, as is recognised in the restructuring plan. The Commission does not consider that such a low level of return would be sufficient to allow these companies to compete on the market without State support. Even though the plan claims that SSN Wspólna and SSN Biuro Projektowe are supposed to provide services for the other companies, which allegedly justifies the low projected return on sales, the Commission notes that they are supposed to be independent companies and their weak projected results raise doubts as to the long-term viability of the whole project.
- (298) The Commission therefore concludes that the credibility of the financial projections is doubtful and the projected results remain highly sensitive to changing market conditions. Consequently the Commission considers that the robustness of the plan has not been demonstrated.
- (299) On the basis of the foregoing, the Commission considers that the yard's ability to restore its viability on the basis of the restructuring plan of 12 September 2008 has not been shown. Furthermore, the Commission notes that Ulstein has withdrawn from the SSN privatisation process, which means that the restructuring plan of 12 September cannot be implemented under the conditions assumed in the plan. In any case the above assessment shows that even if Ulstein was involved in the project or if Mostostal intended to implement the restructuring plan of 12 September alone (as announced in its letter of 22 September 2008), this plan could not be considered sufficient.

- (300) The failure of the privatisation attempts means that the yard is not able to obtain on market terms sufficient capital to implement the 2006 restructuring plan, let alone to implement the necessary far-reaching restructuring strategy that would ensure the yard's long-term viability without the need for continuing State support. It also means that SSN is not able to obtain the managerial and market know-how necessary for its restructuring.
- (301) In the absence of a realistic and far-reaching restructuring plan, the Commission concludes that the aid granted to SSN and described in part 2.7 above is purely operating aid, and not restructuring aid that is compatible with the common market.

3.3.3. AID LIMITED TO MINIMUM

- (302) Under point 43 of the Guidelines, the amount of the aid must be limited to the strict minimum of the restructuring costs necessary to enable restructuring to be undertaken. The beneficiary is expected to make a significant contribution to financing the restructuring from its own resources or from external financing on market terms. Such a contribution is, on the one hand, a sign that the market believes in the feasibility of the return to viability and, on the other hand, a way of ensuring that the State aid is limited to the minimum. In the case of large enterprises, such as SSN, this contribution should be at least 50 % of the restructuring costs.
- (303) Firstly, it follows from the above description of SSN's situation that the yard has hardly been able to attract any external financing for its restructuring.

Restructuring plan of June 2006

- (304) As regards the own contribution, under the 2006 restructuring plan restructuring costs, including operating costs would be PLN 11 500 million, while the proposed own contribution would be PLN 3 600 million, i.e. 30 %. If the operating costs were excluded from the costs and financing, the restructuring costs would amount to PLN 374,7 million and the own contribution would be PLN 190 million.
- (305) The Commission had doubts as to whether the expectation of obtaining PLN 190 million on the market was realistic. There was no indication at the time that SSN could raise this capital on the market. The proposed contribution could not therefore be considered actual and real as the Guidelines require. Indeed, the several unsuccessful attempts by KPS and ARP, first to attract minority shareholders and then to sell 100 % of the yard's shares, have demonstrated that the market is not interested in investing in SSN.

- (306) As regards the financing of operations, the 2006 restructuring plan assumed that production would be financed through commercial loans and ship-owners' advance payments not guaranteed by KUKI, the total value of which throughout the restructuring period 2002-2009 was to be PLN 3 200 million, as compared to PLN 4 200 million financed thanks to KUKI guarantees. Again, there was no indication at that time that SSN would be able to obtain such financing on the market. The proposed contribution in the form of commercial loans and guarantees could not therefore be considered actual and real, as the Guidelines require. The Commission indeed notes that to this date the yard has been unable to obtain financing of its operations on the market without State support.

- (307) Moreover the 2006 restructuring plan submitted that additional payments of PLN 628,7 million from shipowners following the renegotiation of contracts should be considered an own contribution. Some contracts have in fact been renegotiated. The Commission points out that, according to the Guidelines, the own contribution should be a sign that markets believe in the feasibility of the return to viability. The fact that shipowners, when facing the risk of non-delivery of contracted vessels and in view of external factors (such as the increase in steel prices), are willing to increase the price of contracted vessels does not demonstrate that they believe in the yard's ability to become viable and able to compete in the long term. Moreover, the shipowners have not agreed to make additional payments to cover the costs of restructuring but only (and only to a certain extent) to cover the production costs of the contracted vessels. Therefore, the Commission cannot accept additional payments by shipowners as an own contribution within the meaning of the Guidelines.

Restructuring plan of June 2008

- (308) The June 2008 restructuring plan did not make any substantial improvement in this respect. While the investor undertook to inject PLN 149,5 million to be used to partially finance the investment programme, it also requested an additional capital injection from the State of PLN 588 million in total and a loan of PLN 68 million from ARP. The investor also requested additional guarantees from KUKI to finance the working capital.
- (309) The restructuring costs that could be identified on the basis of the limited information contained in the restructuring plan of June 2008 corresponded to at least the forecast amount needed to cover expected losses on existing shipbuilding contracts for 2008-2009 (PLN 588 million) and to the investment needs envisaged for the period 2008-2012 (PLN 264 million).

- (310) Most of these costs were to be covered by State aid. Effectively, the only envisaged own contribution from the investor was a capital injection of PLN 149,5 million, which corresponded to 17 % of the restructuring costs shown above. In line with established practice⁽¹⁾, the Commission considers that future cash flow cannot be considered an own contribution within the meaning of the Guidelines, because it does not represent an actual and real contribution of the company or its shareholders to the coverage of restructuring costs. In addition, the Commission has to take into account the whole restructuring period, which began in 2002. Considering the substantial State aid from which the yard benefited in this period, the own contribution is still further diluted in relation to total restructuring costs. It is therefore obvious that the own contribution did not remotely approach the threshold of 50 % of restructuring costs required by the Guidelines.

Restructuring plan of September 2008

- (311) The restructuring plan of 12 September 2008 also fails to improve on the planned level of the own contribution to restructuring costs.
- (312) The restructuring plan of 12 September provides more detailed information concerning the planned restructuring costs and sources of financing. The planned restructuring costs consist of investment costs (PLN 104 million), the costs of relocating production assets to another area of the yard (PLN 50 million), employment restructuring (PLN 53,4 million), coverage of future losses on existing contracts (PLN 840 million) and coverage of the yard's accumulated liabilities to ARP and KPS (PLN 197,5 million)⁽²⁾.
- (313) In total the restructuring costs amount to PLN 1,354 billion.
- (314) Furthermore, the plan treats the working capital requirements of PLN 227,6 million as part of the restructuring costs. The Commission considers working capital requirements to be part of the normal operation of a company, and not a restructuring cost, and therefore their financing should be assessed separately.
- (315) As regards the own contribution, the plan envisages the following categories: additional payments by shipowners after renegotiation of contracts (PLN 376 million), capital injections by investors (PLN 242 million), revenue from the sale of assets (PLN 118 million) and financing of working capital (a loan and a trade credit from Mostostal in the amount of PLN 170 million).
- (316) As to the financing of working capital requirements, the Commission considers that because of the long production cycles and the high value of the end

products in the shipbuilding sector, the financing of working capital is a specific problem. In shipbuilding, working capital is to a large extent obtained from external sources. Part of working capital is obtained from advance payments from shipowners, typically against a guarantee, which in Poland is most often provided by KUKI. Because the advance payments do not usually exceed 80 % of the purchase price, shipyards have recourse to bridging loans or trade credit from their suppliers. The Commission therefore considers that, owing to the specific situation in the shipbuilding sector, working capital requirements call for a structural solution and are not part of one-off restructuring costs. Thus, the Commission considers that in shipbuilding sector loans for working capital cannot be considered an own contribution because they serve to finance ongoing operations, not restructuring costs.

- (317) As explained above, the Commission considers that the additional payments by shipowners after renegotiation of contracts to increase the purchase price cannot be considered an own contribution within the meaning of the Guidelines.

Sale of assets

- (318) As regards the planned revenue from the sale of redundant assets of an estimated value of PLN 118 million, the Commission considers that it has not been demonstrated that this source of financing can be considered actual and real.
- (319) Firstly, according to the draft privatisation agreement between ARP and KPS (the current owners of SSN) and Mostostal, the abovementioned assets are supposed to be sold by Mostostal to an entity chosen by ARP and KPS for not less than PLN 118 million. This assumption gives grounds for concern, as it seems to amount to a State guarantee regarding the minimum proceeds from the sale of these assets to a buyer chosen by the State. The Commission therefore doubts that this potential sale is free of State aid.
- (320) Secondly, the valuation of the land was based on a comparison with sales of real estate in attractive areas in the Szczecin region, to be used for building apartments and providing services, and not as an industrial area. It can be seen from this valuation that the prices of land sold for industrial purposes can be as much as 10 times lower than the amounts assumed in the valuation. In addition, the valuation assumes that, prior to the sale, all existing buildings and installations would be demolished and the land cleaned and prepared. The valuation recognises that this preparation would represent a cost. No estimate of these costs has been provided and the restructuring plan does not include any information in this respect⁽³⁾.

⁽¹⁾ See point 43 of the Guidelines.

⁽²⁾ Part of these liabilities were swapped for equity in August 2008 (PLN 131,5 million; see recital 201) and part remains to be paid back (PLN 66 million).

⁽³⁾ In addition, the Commission notes that according to one of the annexes to the restructuring plan of 12 September 2008, which presents the general assumptions of the restructuring process, the value of this land was initially estimated at PLN [...] million.

(321) Thirdly, the Commission doubts whether the value of these assets has been properly reflected in SSN's balance sheet and consequently whether it was properly reflected in the price Mostostal would pay for SSN. The Commission notes that according to SSN's balance sheet the total value of the yard's fixed assets at the end of 2007 amounted to PLN [...] million. However, the plan envisages that the yard will sell its production assets to the new companies (SSN Ulstein, SSN Mostostal and SSN Wspólna) at their nominal value for PLN [...] million and sell the redundant assets to third parties at an estimated market value of PLN [...] million. This shows that either the book value of the assets is underestimated or the projected revenue from their sale is overestimated.

(322) Lastly, at the end of 2007 SSN's net asset value was PLN [...] million. Since then ARP and KPS have performed a debt-for-equity swap in the amount of PLN 131,5 million and a new capital injection of PLN 434 million is planned. On the other hand, the projected loss on existing contracts is PLN 465 million. On balance, it appears that, assuming all other factors remain unchanged, in acquiring SSN, Mostostal would be taking over assets of net value of PLN [...] million practically free of charge. All the revenues from the sale of assets are supposed to be used by the shipyard (i.e. SSN Nowa) for restructuring purposes (e.g. for employment restructuring) and as working capital for completion of the vessels in its current order book. The Commission thus concludes that it appears that additional State support is being granted to the yard in the context of its privatisation in the form of a transfer of assets at below their market value ⁽¹⁾. By reducing the sales price of the shares in return for the buyer's commitment to implement restructuring measures, the State indirectly finances such measures. Consequently, the Commission cannot accept that the sale of the assets, acquired by the investor at below their market value, can be considered an own contribution ⁽²⁾.

(323) For the above reasons the Commission considers that it has not been demonstrated that the planned revenue

from the sale of redundant assets in the amount of PLN 118 million can be considered an actual and real source of financing of the restructuring costs.

Capital injections by investors

(324) As regards the planned capital injections by private investors, the Commission considers that it has not been demonstrated that they can in their entirety be considered actual and real.

(325) Firstly, the restructuring plan envisages that the total financial contribution from Ulstein will be PLN 114,9 million. However, under the preliminary cooperation agreement between Mostostal and Ulstein, which was submitted to the Commission — unsigned — on 5 September, Ulstein undertook to increase the capital in SSN Ulstein by up to PLN 52,5 million (and not PLN 67,3 million, as envisaged in the plan), in SSN Wspólna by up to PLN 44,65 million (while the plan envisages the participation of Ulstein in the amount of PLN 47,5 million) and in SSN Biuro Projektowe by up to PLN 0,85 million (the plan envisages PLN 0,1 million). Thus the total contribution which Ulstein undertook to make in the agreement amounts to PLN 98 million, i.e. PLN 16,9 million less than envisaged in the restructuring plan.

(326) Secondly, although the restructuring plan assumes that investors will contribute their own capital to the yard, it also recognises the possibility that Ulstein may need to obtain financing on the market. No evidence has been submitted to show that Ulstein will be able to secure such financing, which cannot therefore be considered actual and real. Furthermore, at the meeting on 10 September 2008 representatives of Ulstein explained that Ulstein planned to provide capital totalling PLN 98 million (i.e. in line with the cooperation agreement described above), out of which only PLN 30 million would be a capital injection. The remaining part would have to be obtained on the market. Ulstein explained that if it was not able to obtain such financing on the market it would not inject capital ⁽³⁾. None of this is reflected in the plan, which states only that whether Ulstein finances the project from its own resources or from an external loan 'does not change the principles and results of the company's operational activity nor the level of investors' own contributions'.

⁽¹⁾ This is similar to the Automobile Craiova case (case No 46/07), in which the Commission concluded that under the Automobile Craiova privatisation process the Romanian authorities had imposed certain conditions upon the buyer (with regard to minimum employment and the level of investment in the undertaking sold) in exchange for a reduced sales price, which constituted State aid to the benefit of the undertaking sold.

⁽²⁾ The Commission notes that after completing the existing contracts and implementing the planned restructuring measures, SSN Nowa is supposed to be wound up and if there is any extra cash left it is supposed to be equally divided between Mostostal and the State. The Commission considers that this might at most lead to a reduction of the State aid granted under the privatisation process, but would not alter the fact that the transfer of the assets at below their market value had been 'polluted' with State aid and therefore their sale cannot serve as an own contribution free of State aid.

⁽³⁾ At the meeting on 10 September 2008 it became clear that the restructuring plan was drafted by Mostostal and not Ulstein. Ulstein had not even seen the draft sent to the Commission on 3 September 2008 and was surprised to hear that its capital commitment was supposed to be PLN 114 million.

(327) On the basis of the foregoing, the Commission concludes that it has not received sufficient assurances about the amount that Ulstein is willing to invest and about its willingness to invest from its own resources in the case of failure to obtain external financing. The Commission therefore concludes that of the planned capital increase of PLN 242 million, only PLN 157,2 million can be considered actual and real. Moreover, the withdrawal of Ulstein from the privatisation process, announced in its letter of 22 September, and the information that Mostostal might implement the restructuring plan of 12 September alone make the financing envisaged in the plan even more insecure.

(328) To conclude, even considering only the restructuring costs that the investor will have to incur (PLN 1,354 billion), the own contribution which is actual and real and free of State aid (PLN 157,1 million) is only 12 %. Moreover, the Commission has to take into account the whole restructuring period, starting from 2002. Considering the substantial State aid from which the yard has benefited in this period, the own contribution in relation to the total restructuring costs is even further diluted. It is therefore obvious that the own contribution does not even remotely approach the threshold of 50 % of restructuring costs required by the Guidelines.

(329) The Commission notes that following Ulstein's withdrawal from the privatisation and restructuring of SSN, Mostostal, in its submission of 25 September 2008, attached a letter from a leading Kazakhstan bank, BTA, concerning the bank's potential interest in the SSN project. In this letter, the bank stated that it would be ready to provide financing of USD 100 million for the SSN project and asked Mostostal to send it the restructuring plan once it was approved by the European Commission. The Commission notes that the letter is dated 26 June 2008 and cannot therefore refer to the restructuring plan of September 2008 but must rather refer to the June plan which is no longer valid. Therefore the Commission considers that such a letter cannot be proof of actual and real financing of the September 2008 plan. In any event, even if this financing was to be considered actual and real, and even analysing only the planned restructuring costs, the own contribution would amount to not more than 17 % of the restructuring costs ⁽¹⁾, i.e. significantly less than required by the Guidelines.

(330) On the basis of the foregoing, the Commission notes that in reality the yard has obtained practically no own contribution within the meaning of the Guidelines, and in any case that the own contribution is not significant. In addition, the restructuring plan submitted by Mostostal does not ensure a sufficient level of own contribution. As the own contribution should have the

effect of keeping the level of State aid to the minimum, in the absence of such an own contribution the Commission has to conclude that the requirement that the aid is limited to the minimum necessary is not met. On the contrary, Mostostal's restructuring plan is based on the assumption that additional State aid will be granted and itself states that its implementation depends on this additional State aid.

(331) On the basis of the foregoing the Commission concludes that the requirement that aid is limited to the minimum and accompanied by a real contribution free of State aid is not met.

3.3.4. AVOIDANCE OF UNDUE DISTORTION OF COMPETITION

(332) The Commission recalls its preliminary agreement with Poland on the closure of the Wulkan 1 slipway. However, in the light of further developments following this agreement, and in the light of the above conclusions on the first two conditions of the Guidelines, assessing whether the compensatory measures proposed by Poland were sufficient is not necessary at this stage.

3.3.5. CONCLUSION

(333) The Commission concludes that the notified State aid in favour of SSN cannot be declared compatible with the common market and must be recovered.

4. IMPLEMENTATION

(334) The aid element contained in the measures granted to SSN, presented in recitals 187-201 of this Decision, must be recovered. In general the aid element to be recovered, i.e. the advantage received by the beneficiary of the aid, is equal to the difference between the terms that would be obtainable for the beneficiary on the market and the terms on which the measure was granted.

(335) The reference and discount rates announced by the Commission are applied as a proxy for the market rate to measure the aid element, in particular when it is disbursed in several instalments, and to calculate the aid element resulting from interest subsidy schemes ⁽²⁾. In the case of companies in difficulty, such as SSN, the Commission considers that the reference rate should be increased by at least 400 basis points in order to reflect the high risk involved in the transaction and by an additional 200 basis points because of the lack of collateral or poor collateral offered by the beneficiary. As explained

⁽¹⁾ Assuming USD 1 = PLN 2,3.

⁽²⁾ Commission notice on the method for setting the reference and discount rates (OJ C 273, 9.9.1997, p. 3).

above, the value of the collateral provided by the yard is questionable in view of the company's liabilities/assets ratio. In the case of companies in difficulty, when the company cannot obtain any financing on the market, the aid element may amount to up to 100 % of the nominal value of the funds received ⁽¹⁾.

- (336) The Commission considers that in the period analysed, when SSN was receiving the aid described in recitals 187-201, it was in serious financial difficulty (as described in recitals 45-57) and was not able to acquire any financing on the market. The yard continued to make losses and in the period analysed it obtained virtually no financing from the market. In such circumstances a market economy operator would not be willing to provide the yard with any financing, given the high risk involved. Consequently, the Commission considers that no bank would have agreed to lend to the yard, even at high interest rates, and no bank would have agreed to provide a guarantee, even in exchange for a high guarantee premium.

Calculation of the aid element for particular categories of measures

Loans

- (337) Since SSN would not have received a loan or guarantee from the market, any loan or guarantee granted to the yard in the period analysed automatically constitutes aid. Thus any guarantees still in effect must be stopped immediately and any loans must be immediately reimbursed.
- (338) Reimbursement of any loans granted to the yard is not however sufficient to restore the initial situation since until the date of reimbursement the yard has had at its disposal financing that it would not normally have obtained from the market. In order to restore the initial situation, this advantage, of which the size can only be approximated by using the interest rate for a very risky loan, should therefore also be recovered. Therefore, for the period running from the date on which the loan was granted to the yard to the date on which the yard reimburses it, the Commission must order the recovery of the difference between the interest rate actually paid by SSN and an interest rate theoretically adequate for a loan presenting a very high risk. In order to determine the latter interest rate, the Commission notes that the Commission notice on the method for setting the reference and discount rates indicates that the risk premium may be more than 400 basis points above the reference rate 'if no private bank would have agreed to grant the relevant loan', which is

the situation in this case. In several decisions the Commission has found that a premium of 600 basis points above the reference rate was an adequate minimum to reflect a high-risk situation ⁽²⁾. The Commission considers that this constitutes the minimum for the loans in the present case.

Advance payment guarantees

- (339) As regards the guarantees, the Commission will use the same approach: for the period from the date on which the guarantee was granted until its the date of its termination, the Commission must order recovery of the grant aid equivalent contained in the guarantee.
- (340) As regards the guarantees, the Commission considers that, as explained in the Commission notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees ⁽³⁾, the grant aid equivalent is equal to either the interest subsidy achieved thanks to the guarantee (where the guarantee covers a loan granted with a lower-than-market interest rate) or to the risk factor on the guaranteed sum less the premiums paid by the beneficiary.
- (341) However, in the case of guarantees for advance payments, the Commission notes that advance payments guaranteed by KUKÉ are an aspect of a sale contract, not a loan contract, and no interest is charged on advance payments. Therefore the Commission considers that in order to calculate the aid element received by the beneficiary, a comparison should be considered between the premiums paid by the yard and those that would normally be charged on the market. The Commission considers that the premiums charged under the free-of-state-aid scheme under which KUKÉ operates its programme of export insurance guaranteed by the State Treasury, approved by the Commission decision of 18 July 2007, could serve as the reference premiums for the above calculation. Again, these premiums would need to be increased by at least 400 basis points in order to reflect the fact that the yard was not eligible to receive guarantees under the scheme. Providing guarantees to the yard thus entailed considerably higher risk.
- (342) As explained above, since the yard would not be able to acquire any guarantees on the market owing to its precarious financial situation, the KUKÉ guarantees must be terminated immediately in order to put an end to the distortion of competition caused by the aid.

⁽¹⁾ See, for example, Commission notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (2000/C 71/07) (OJ C 71, 11.3.2000, p. 14). Point 3.2 of the notice states that where, at the time the loan is granted, there is a strong probability that the borrower will default, e.g. because he is in financial difficulty, the value of the guarantee may be as high as the amount effectively covered by the guarantee.

⁽²⁾ Recital 68 of Commission Decision 2005/827/EC of 16 June 2004 on the measures implemented by Spain for Siderúrgica Añón SA (OJ L 311, 26.11.2005, p. 22); recital 42 of Commission Decision 2003/284/EC of 11 December 2002 on the State aid implemented by Spain for Sniace SA (OJ L 108, 30.4.2003, p. 35).

⁽³⁾ Ibidem.

Non-enforcement of debts

- (343) The continual non-enforcement of debts by public authorities also constitutes State aid and needs to be taken into account⁽¹⁾. This is similar to a revolving loan granted on preferential conditions and therefore the aid corresponds to the difference between the interest that would be charged by the market (for a company with a similar rating in a similar financial and economic situation and with similar collateral) and the interest charged by the granting body.
- (344) The Commission considers that, in view of the yard's continuing precarious financial situation, a market economy creditor would enforce his claims immediately when they fell due. Therefore, the fact that the Polish authorities did not undertake enforcement measures immediately constituted a grant of aid and thus the date of maturity of any liability not repaid would be the date on which the aid was made available. The aid element would be equal to the difference between the interest that would be charged on the market (for a company with a similar rating in a similar financial and economic situation and with similar collateral) and the interest charged by the authorities.
- (345) As any market economy operator would require immediate repayment of debts by the yard, not only must the aid element deriving from the insufficient interest be repaid but the accumulated liabilities must also be repaid immediately.

Capital injections

- (346) The Commission notes that capital injections by the State or State-controlled entities, such as ARP and KPS, into companies in difficulty, where no return can be expected at the time of injection, are considered non-refundable grants⁽²⁾. To undo the distortion of competition caused by the capital injection, the yard would have to repay the full amount of the capital injected.

Implementation of this Decision

- (347) In a letter of 3 November 2008, Poland undertook to implement this Decision by selling the yard's assets at market price through an open, transparent, unconditional and non-discriminatory tender procedure (conducted in accordance with the specific conditions first set out in the Commission's letter of 27 October 2008) and winding up SSN. All State aid recovery claims under this Decision must be registered by Poland without

delay in the SSN liquidation procedure. By letter of 6 November 2008 the Commission informed Poland that, provided these conditions were met, the sale of assets would not involve new aid to buyer(s) of the 'yards assets and the assets could be transferred to the buyer(s) free of any liability relating to the reimbursement of unlawful and incompatible State aid granted to the yard in the past, in accordance with the requirement that there be no economic continuity between the beneficiaries of the aid and the buyers' activity⁽³⁾. The Commission will closely monitor whether the conditions set out in the Commission's letter of 27 October 2008 and accepted by the Polish authorities are met in order to assess whether this Decision is correctly implemented.

- (348) These conditions, to which Poland has explicitly committed itself, are as follows.
- (349) The assets (without liabilities) will be privatised through an open, transparent, non-discriminatory and unconditional tender procedure. SSN, with any remaining assets and liabilities, will be wound up.
- (350) The assets must be sold at market price (to the highest bidder). The assets must be put up for sale separately or in a large number of small bundles, so defined as to maximise the proceeds of the sale. Such bundles must not consist of organised parts of an undertaking or business. However, this definition of the bundles is not intended to prevent potential buyers from presenting a joint bid for several assets/bundles.
- (351) The tender must be non-discriminatory, meaning that it must ensure that the sale is open to all categories of potential buyers, without any discrimination relating to the purpose of their investment.
- (352) No conditions (such as maintaining employment or activity, or taking over existing contracts) may be attached to the tender. The sole criterion for selecting the successful bid should be maximisation of revenue for the benefit of the yard's creditors.
- (353) The yard's creditors, public and private, including the yard's customers, should maintain the same ranking and rights regarding the proceeds from the sale of assets as they would have in a bankruptcy procedure.

⁽¹⁾ See, for example, Commission Decision of 23 October 2007 on State aid C 23/06 which Poland has implemented for the steel producer Technologie Buczek Group (not yet published).

⁽²⁾ See, for example, Commission Decision 2005/652/EC of 20 October 2004 on State aid C 38/03 implemented by Spain (further restructuring aid to the public Spanish shipyards) (OJ L 240, 16.9.2005, p. 45).

⁽³⁾ See Case C-277/00 *Germany v Commission* ('SMI') [2004] ECR I-3925 and Cases C-328/99 and C-399/00 *Italy and SMI 2 Multimedia Spa v Commission* [2003] ECR I-4035.

(354) No new State aid may be granted in the context of the sale, whether in the form of a write-off or State-financed repayment of public-law liabilities or private creditors, capital injections, loans, guarantees or other measures. Any new public liabilities accumulated during the period of time strictly necessary to complete the sale procedure should be claimed back from the liquidation assets.

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

(356) Poland has submitted that it needs to take legislative action to implement this Decision. The Commission recognises that a longer implementation period than normally prescribed is therefore warranted, in view also of the number of individual State aid measures concerned by this Decision and their different forms and durations. The Commission therefore asks Poland to implement this Decision within seven months of the date of notification of this Decision,

HAS ADOPTED THIS DECISION:

Article 1

The State aid described in recitals 187-201, which was unlawfully granted to SSN by Poland in breach of Article 88(3) of the EC Treaty, is incompatible with the common market.

Moreover, any advance payment guarantees granted to SSN by Poland in breach of Article 88(3) of the EC Treaty from 1 July 2007 up to the date of this Decision are incompatible with the common market.

Article 2

With regard to the loans obtained from various public bodies as described in recitals 187-201, Poland shall recover aid equal to the difference, for the period between the grant and the reimbursement of the loan, between the interest rate actually paid by SSN and the interest rate at which the beneficiary could have obtained the loan on the market. In addition, if any of the loans has not been reimbursed by the time of this Decision, it must be reimbursed immediately.

Article 3

With regard to the advance payment guarantees granted by KUKI as described in recitals 187-201, Poland shall recover aid equal to the difference, for the period between the granting and the expiry of the guarantee, between the guarantee premium paid by the beneficiary and the guarantee premium at which the beneficiary could have obtained the guarantee on the market. In addition, if any of these guarantees is active at the time of this Decision, it must be terminated immediately.

Article 4

Article 3 also applies, *mutatis mutandis*, to any advance payment guarantees granted to SSN by Poland in breach of Article 88(3) of the EC Treaty from 1 July 2007 up to the date of this Decision.

Article 5

With regard to the unenforced liabilities to various public bodies as described in recitals 187-201, Poland shall recover aid equal to the difference, for the period between the grant of the aid and the reimbursement of the public liability, between the interest rate actually paid by SSN and the interest rate at which the beneficiary could have obtained a postponement of the maturity of its liabilities from a market economy creditor. In addition, any outstanding public liabilities shall be repaid immediately.

Article 6

With regard to the capital injections from various public bodies as described in recitals 187-201, Poland shall recover aid equal to the full amount of the capital injected.

Article 7

1. Poland shall recover the aid from the beneficiary as laid down in Articles 2 to 6. The aid shall be recovered in accordance with the Guidelines explained in recitals 334-347.

2. The sums to be recovered shall bear interest from the date on which they were put at the disposal of SSN until their actual recovery.

3. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004⁽¹⁾ and Commission Regulation (EC) No 271/2008⁽²⁾, amending Regulation (EC) No 794/2004.

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

⁽¹⁾ OJ L 140, 30.4.2004, p. 1.

⁽²⁾ OJ L 82, 25.3.2008, p. 1.

Article 8

1. Recovery of the aid referred to in Article 1 shall be immediate and effective.
2. Poland shall ensure that this Decision is implemented within seven months of the date of notification of this Decision.

Article 9

1. Within two months of notification of this Decision, Poland shall submit the following information to the Commission:
 - (a) the total amount (principal and recovery interest) to be recovered from the beneficiary;
 - (b) a detailed description of the measures already taken and planned to comply with this Decision;
 - (c) documents demonstrating that the beneficiary has been ordered to repay the aid;
 - (d) evidence that all the advance payment guarantees still active have been terminated.

2. Poland shall keep the Commission informed of subsequent national measures taken to implement this Decision until recovery of the aid referred to in Article 1 has been completed.

When the Commission so requests Poland shall immediately submit information on the measures already taken and planned to comply with this Decision.

It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiary.

This Decision is addressed to Poland.

Done at Brussels, 6 November 2008.

For the Commission
Neelie KROES
Member of the Commission

ANNEX

INFORMATION REGARDING THE IMPLEMENTATION OF THE PRESENT DECISION

1. Calculation of the amount to be recovered

- 1.1. Please provide the following details on the amount of unlawful State aid that has been put at the disposal of the beneficiary:

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

(*) Date(s) on which (individual instalments of) the aid was (were) put at the disposal of the beneficiary.

(**) Amount of aid put at the disposal of the beneficiary (in gross aid equivalents).

Comments:

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

2. Measures planned and already taken to recover the aid

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

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

3. Recovery already effected

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

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

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

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

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