

EUROPEAN COMMISSION

Brussels, 15.2.2012  
C(2012) 834 final

In the published version of this decision, some information has been omitted, pursuant to articles 24 and 25 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, concerning non-disclosure of information covered by professional secrecy. The omissions are shown thus [...].

**PUBLIC VERSION**

**WORKING LANGUAGE**

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**Subject: State aid SA.19045 (ex CP 46/2005) – Germany**  
**Alleged aid of the Land Bavaria (Bavarian State Forest Enterprise) in form of**  
**long-term supply agreements for wood with the company Klausner**

Sir,

**I. Procedure**

1. By letter dated 1 March 2005, the Verband der Bayerischen Säge- und Holzindustrie e.V. (hereinafter the "Bavarian Verband") complained of a forthcoming contract between the Bayerische Staatsforstverwaltung (hereinafter "BaySF") and the saw mill Klausner (nowadays Ilim Timber Bavaria). Commission services met with the complainant on 29 June 2005. On 5 April 2005, as well as on 22 April, 26 July, 25 August 2005, the Commission received further information from the complainant. The Commission also received correspondence from a Member of the European Parliament (3 May 2005, 23 January 2008), from a private person (19 August 2005, 6 January 2006), from the Wirtschaftskammer Tirol (7 July 2005), from the European saw mill association (February 2007).
2. On 16 March 2006, Germany informed the Commission of its views. The Commission informed the Bavarian Verband and the before mentioned private person on 22 respectively 23 May 2006 by service letter that it considered that the measure did not involve state aid.
3. On 17 July 2006, 20 December 2006 and 11 January 2007, the Commission received further letters from the Bavarian Verband. On 10 January, the Commission services wrote to the

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Bavarian Verband. On 19 January 2007, the Commission received another letter from the Bavarian Verband. On 4 January 2007 the Commission received a letter from the Fachverband der Holzindustrie Österreichs to which it replied on 2 February 2007. On 12

4. February 2007, the Commission received a letter from the Verband der Deutschen Säge und Holzindustrie e.V. (this entity is referred to as "German Verband") (Commission reply 23 March 2007) and on the same day from the European Association of the Sawmill Industry. Legal action before the Austrian authorities caused a suspension in the BaySF-Klausner contracts so that the complainants did not follow up on the matter. The Austrian Supreme Court decided on 9 June 2010 that there were no objections to the contract and the suspension came to an end.
5. Then on 6 July 2010 Holzwerke Pröbstl wrote to the Commission with regard to Klausner and its transaction with BaySF, followed on 12 October 2010 by the German Verband. These complaints contained various new elements<sup>1</sup>.
6. On 13 September 2010 Germany wrote to the Commission, followed on 30 November 2010 by Ilim Timber Bavaria GmbH. Germany commented upon the complaints forwarded to it on 15 December 2010, a reply that it completed on 19 January 2011. This reply was forwarded to the German Verband and Holzwerke Pröbstl who replied on 4 April 2011 and 15 April 2011.
7. On 24 May, Ilim Timber wrote to the Commission. On 26 May 2010, Commission services met the complainants who asked the Commission to adopt a Decision (Pröbstl, the German Verband and their lawyers; Austrian sawmill Donausäge; the complainants further submitted information on 1 and 6 June 2011). Following that meeting, on 26 May 2011, the Commission sent a request for information to Germany replied on 8 and 14 June 2011. On 19 August 2011, Holzwerke Pröbstl provided additional information.

## **II. Description**

### **The parties to the transaction**

8. Klausner is a large Austrian undertaking. The company nowadays employs 1200 people and has an annual turnover of ca. EUR 537 Mio. (business year 2004/2005: EUR 383 Mio.) and supplies wood in Europe, North America and Asia. It has grown substantially in the early years of 21<sup>st</sup> century, notably in the new Bundesländer of Germany. In 2005, it had subsidiaries in i.a. Bavaria and Thüringen. The Bavarian subsidiary has since been sold to Ilim Timber, a Russian group (Klausner Holz Bayern GmbH is nowadays named Ilim Timber Bavaria GmbH) as have been several others but not subsidiary Klausner Thüringen.
9. BaySF was created as a State company ("mit Rechtsform einer Anstalt des öffentlichen Rechts") on 1 July 2005 to manage the Bavarian public woods in a reform decided upon in 2003. Before that date the woods were directly managed by the Bavarian ministry für Landwirtschaft und Forsten. The Ministry is equally referred to as "BaySF" in the context of this decision.

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<sup>1</sup> Notably the fact that the Klausner Thüringen contract also contained a clause requiring Klausner to establish a plant in Bavaria and a study (Gutachten), see paragraph 41 below.

10. BaySF owns and manages approximately 720 000 hectares of forest areas which constitutes approximately 30% of the total forest area in Bavaria (it supplies approximately 3,9 Mio m<sup>3</sup> of wood per year<sup>2</sup>). It is one of Europe's largest forestry enterprises. This 30% share constitutes, however, in practice the most valuable part of wood supply. According to the complainants, quality, standardisation, homogenisation and stability of supply make BaySF the desired supplier for saw mills. Many of the other suppliers are owners of small plots of lands who do not supply wood on a regular basis (there are in total 700 000 wood owners in Bavaria).

### **The transaction**

11. In 2005, BaySF and Klausner agreed to two contracts:
- For the delivery of wood to Klausner Bavaria (date: 4 April 2005, 5 year duration and possibly 5 more years if one party requires this, 500 000 m<sup>3</sup>/year)
  - For the delivery of wood to Klausner Thüringen (date: 4 April 2005, duration 6 years – possibly 4 more years if one party requires this, 400 000 m<sup>3</sup>/year)
12. The contracts are conditional upon the establishment of a saw mill by Klausner in Landsberg (Bavaria): both parties could end the contract if Klausner had not started operations in Landsberg by 31 December 2007. While the contract between BaySF and Klausner Bavaria was a new commercial agreement (the Landsberg mill had not even been built), an agreement with Klausner Thüringen existed already for some time and involved huge deliveries that grew from 200 000 m<sup>3</sup> in 2001 to 384 000 in 2004.
13. The price for the wood was EUR 45 ("1b"; ca. 15% of supplies), EUR 55 ("2a", ca. 20%) and EUR 60 ("2b+", ca. 65%) per m<sup>3</sup>, where "1b", "2a" and "2b" are different qualities. The price is adjusted according to the wood price index but with a maximum adjustment of plus or minus EUR 2/m<sup>3</sup> per year (plus or minus EUR 5 of the first year in case of a prolongation after the first five/six years).
14. The contract for the delivery of wood to Klausner Bavaria contains a disaster clause (Kalamitätenklausel) which applies in a catastrophic event leading to a felling limitation and states that Klausner can in such a situation insist on the supply of the minimum quantity agreed upon in the contract. In return Klausner is obliged, on demand of the BaySF, to buy the wood. The contract quantity increases up to 1.6 times of the monthly quantity as long as the felling limitation exists and the BaySF insists on the increase. The prices will be reduced by 10 % as long as the felling limitation exists.
15. Together, in 2004-2008, the two contracts accounted for approximately 13-18% of output of BaySF.
16. After the signing of these contracts, legal action was filed also in Germany and in Austria in order to obtain an annulment of the contract. Following the latter, the contract between BaySF and Klausner was suspended in December 2008 until it was decided by the Austrian

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<sup>2</sup> The volume of wood produced and the contracts discussed in this decision are expressed in "Festmeter", a solid, space-free, cubic meter of wood. The above mentioned 3,9 Mio m<sup>3</sup> concern the wood of interest for the saw mills. The total output of BaySF is much larger.

Supreme Court on 9 June 2010 that the contract was, indeed, legal<sup>3</sup>. This is the reason that the complainants did not pursue their complaint between 2007 and 2010.

### **The complaints**

17. The complainants consider the price of the wood to be sold by BaySF to Klausner too low in comparison with market prices. Moreover, they note the conditionality of the contract to the establishment of the saw mill in Landsberg in Bavaria. The contract would thus involve incompatible State aid.
18. They also claim that long-term contracts were not available for other saw mills. Long term contracts agreed upon later between BaySF and other saw mills were for substantially higher prices and with price adjustments of up to EUR 4/year.
19. For example, while Klausner paid EUR 45, 55 and 60 per m<sup>3</sup> for categories 1b, 2a and 2b respectively, the contracts between BaySF and the other saw mills, already agreed upon at the time, would be for EUR 5-6/m<sup>3</sup> higher, EUR 2/m<sup>3</sup> higher and EUR 3-4/m<sup>3</sup> higher. Moreover, these contracts mostly had a clause with a larger annual price adjustment.<sup>4</sup>
20. Finally, they note that the Freistaat Bavaria praised the BaySF-Klausner contracts for their positive impact upon employment, tax revenues and environment<sup>5</sup>.
21. The complainants (not only the one based close to Klausner Bavaria in Landsberg) all find fault with the long-term contract per se. During the meeting with the complainants they indicated that for them, the termination of the BaySF-Klausner contracts would be sufficient as it is very difficult for them to obtain substantial quantities of wood as Klausner has a claim on 13-18% of the production of BaySF and more in the area of Landsberg.

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<sup>3</sup> The Austrian Supreme Court, concluding that the contracts between BaySF and Klausner were not illegal, found among others that:

- BaySF wanted to conclude similar contracts with other sawmills at that time which initially refused similar contracts;
- the proposed price was appropriate (in line with the market) at that time and did not constitute an unilateral preferential treatment;
- there existed meanwhile similar agreements with many other suppliers;
- a major client similar to Klausner was not interested in a contract;
- BaySF has in the meantime a similar long-term contract with another sawmill;
- it was in any case up to the competitors of Klausner to aim for similar long-term contracts (as negotiating for favourable conditions is not an unusual business behaviour as long as there is no abuse of dominant position).

<sup>4</sup> The complainants have submitted one example of an EUR 4/yr price adjustment contract. This is a 215 000 - 250 000 m<sup>3</sup>/year contract for 2006 and 2007. The indexation is formulated as follows: the obligation to deliver and to buy depends on the agreement of a price to be yearly renegotiated. The price adjustment may annually only be adjusted by +/- EUR 4 in comparison to last year's price. If no agreement is reached, the amounts to be delivered are reduced to half the agreed amounts. These amounts will be exchanged against the price of the previous year ("die Liefer- und Abnahmeverpflichtung ist abhängig von der Einigung auf einen jährlich auszuhandelnden Preis. Die Preisanpassung darf sich dabei jährlich nur in einem Rahmen von +/- 4 Euro des Vorjahrespreises bewegen. Kommt keine Einigung zustande, reduziert sich die Angebotsmenge auf jeweils die Hälfte der werkspezifischen Bezugsmenge. Diese Menge wird dann zum Preis des jeweiligen Vorjahresvertrags abgewickelt").

<sup>5</sup> Due to reduced transport of wood.

## The market for wood

22. Wood is expensive to transport. This leads to a degree of localisation of the market. Therefore saw mills cannot be too far away from the source of wood. That transport costs are highly relevant is illustrated by the fact that the contracts between BaySF and Klausner specify the price "frei Waldstrasse" (i.e. Klausner or another client transports the wood from the Waldstrasse; comparable to the "ex factory" price) and that the wood will be made available in woods at most 100 km away from the Klausner saw mill.
23. In the period 2004-5, there was a much larger production capacity for wood (ca. 10 million m<sup>3</sup>) than saw capacity (ca. 7,6 million m<sup>3</sup>). This meant, because of the role of transport costs that this was a buyers' market. Moreover, prices had fallen over the recent years and saw mill capacity was falling further in Bavaria.
24. In 2004, the "Bundeswaldinventur (federal wood inventory) II" was published. This report suggested that in Germany in general and for most regional markets, the annual production of wood was substantially in excess of saw mill capacity. This report may have been behind the surge in investment in saw mills that followed.
25. At the time the contracts were signed, prices were at a historical low (see graph in paragraph 40 below). On 4 April 2004, it was far from clear whether the existing trend would continue and prices were slightly higher than the market price.
26. One of the complainants contends that it was asked to pay EUR 66/m<sup>3</sup> when he was negotiating with BaySF early 2005 for wood that Klausner paid EUR 60/m<sup>3</sup> for. The complainant would have been interested in large quantities as well (300 000 m<sup>3</sup>/year); another complainant was asked to pay EUR 64/m<sup>3</sup> for the second and third quarter of 2005.
27. On 27. March 2005, Klausner<sup>6</sup> signed a contract with four private associations for the delivery of at least 160 000 m<sup>3</sup> / year for a duration of five years with prices EUR 2 below the contract described in recitals 10-12<sup>7</sup>. Prices are fixed for 2 years and are then adjusted according to a complex index with a maximum adjustment of plus or minus EUR 2 per m<sup>3</sup> per year. If one of the parties would like to continue the contract, it can be prolonged for another five years (price adjustment plus or minus EUR 5 of the first year in case of a prolongation after the first five years). The contract contains a disaster clause similar to the BaySF-Klausner contracts.
28. Under this contract, 21 000 m<sup>3</sup> was delivered to the Friesau mill in Thüringen and 96 000 m<sup>3</sup> to the Landsberg mill (Bavaria) between the summer of 2006 and the end of 2007 but

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<sup>6</sup> This is a contract between Klausner Thüringen and? mention the other party? BaySF but the deliveries are to be made up to 100 km from the "Klausner Standort im Groszraum Augsburg", i.e. what would become the Klausner Bavaria plant in Landsberg.

<sup>7</sup> There is a clause specifying that under certain circumstances of dependable delivery ("Liefertreue"), the supplier will benefit from a fee of EUR 2/Fm, bringing prices to the level of the contract between Klausner and BaySF.

against somewhat different prices<sup>8</sup>. After that date no more deliveries were made under this framework contract.

29. In Germany, and in particular in Bavaria, saw mill capacity increased substantially since the middle of the decade, helping prices increase above their 2005 levels. According to the German authorities, it was only after the signing of the BaySF-Klausner contracts that a number of competitors made their investment decisions public.
30. Following the delayed opening of the mill in Landsberg, it was operated below capacity for many years, i.a. because of the economic recession. The mill was eventually sold to Ilim Timber of Russia.

### III. Assessment

#### III. 1 Existence of State aid

31. The Commission has examined whether the measure can be qualified as State aid within the meaning of Article 107 (1) of the TFEU, which 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 shall, in so far as it affects trade between Member States, be incompatible with the internal market*”. It follows that in order for a measure to be qualified as State aid, the following cumulative conditions have to be met: 1) the measure has to be granted out of State resources and be imputable to the State, 2) it has to confer an economic advantage to undertakings, 3) the advantage has to be selective and distort or threaten to distort competition, 4) the measure has to affect intra-Community trade.
32. That the decision is imputable to Germany is not in doubt: at the time of the signing of the contract, BaySF was part of a State level ministry. The measure is specific to Klausner and at least threatens to distort competition. Wood is clearly traded among Member States in the area, notably between Germany and Austria.
33. The main question is whether the mentioned measure confers an economic advantage to Klausner.
34. Assessing whether a transaction concerning State's goods or services involves an aid generally implies evaluating whether a market economy operator placed in a similar situation would have behaved in the same way, i.e. would have sold at the same price. In applying the market economy operator principle, non-economical considerations, such as for example industrial policy reasons, employment considerations or regional development objectives, which would not be acceptable to a market economy operator, cannot be taken into account as reasons for accepting a lower price and, on the contrary, point at the

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<sup>8</sup> Prices for deliveries to Klausner Thüringen varied from just over EUR 35 to just under EUR 58 /Fm, deliveries to Landsberg varied from just over EUR 59 to EUR 83 /Fm.

existence of aid. This principle has been repeatedly explained by the Commission and constantly been confirmed by the Court.<sup>9</sup>

35. In the present case the question is whether the contract between BaySF and Klausner was a contract that BaySF as a market economy operator would have agreed to given the circumstances in early 2005. What happened after that, is not relevant for the present analysis.

## Prices and indexation

36. Germany and the complainants each identify indications that support their respective views that prices could not or could be expected to go up in the period after the signature of the contract.
37. A report<sup>10</sup> concluded that *"contract prices correspond nearly exactly to prevailing sales prices. With the volume-wise most important type (SL B/BC 2b+), the sales price is even approximately EUR 2/m<sup>3</sup> above the January market price. For the volume-wise less important wood qualities (qualities C and D), the contractual price agreed with Klausner exceeds the market prices realised by BaySF [...] Therefore, the evaluator cannot find evidence that the prices agreed upon between BaySF and Klausner in January 2005 for standard length (spruce) wood would have been under the prevailing realised market prices and would thereby have constituted a hidden State aid. The agreed prices were at the time of the signing of the contract absolutely at the market level."*
38. Certain sources expected a recovery of prices. For example, a speech by Ltd. Forstdirektor Gerhard Tausch during the Holzbörse Regensburg on 28 October 2004 (expecting an increase of several EUR presumably per m<sup>3</sup>). Moreover, in negotiations between BaySF and the sawmill Rumpelmayr on 4 August 2004, BaySF indicated expecting a price increase of EUR 5/m<sup>3</sup> before the end of 2004 (from around EUR 60). According to complainants, Bundeswaldinventur II of 2004 would indicate that prices can be expected to go up. This report indicates, however, that yearly production in Germany is well in excess of saw mill capacity. Only in conjunction with the investment that this report perhaps induced, can such report perhaps been seen as indicative of a future price increase. Also, according to complainants, a letter to Ministerpräsident Edmund Stoiber of 25 April 2004 would also indicate an expected price increase; this letter indicates, however, that without additional (saw mill) capacity, wood would not be sold against realistic prices. Finally complainants note that prices did go up in the first months of 2004 which would predict further price

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<sup>9</sup> See for instance Judgment of the Court of 8 May 2003 In Joined Cases C-328/99 and C-399/00: *Italian Republic and SIM 2 Multimedia SpA v Commission* [2003] ECR I-4035, paragraphs 37-38, "Seleco judgement"; Joined Cases 296 and 318/82, *Netherlands and Leeuwarder Papierwarenfabriek BV v Commission* [1985] ECR 809, paragraph 17; Application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aid in the aviation sector, op. cit. points 25 and 26; Commission Decision of 2 August 2004 (2006/621/EC) *on the State Aid implemented by France for France Télécom*, OJ L 257/11, 20.09.2006, p. 11-67; Communication of the Commission to the Member States 93/C 307/03 *on the application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector*, OJ 1993 C 307/3, paragraph 2.

<sup>10</sup> Gutachten. Marktpreise von Fichten-Stammholz in Süddeutschland am Jahreswechsel 2004/2005. Endbericht, 6 März 2006. [CONFIDENTIAL]

increases. It is difficult to see that this is indeed a reasonable conclusion. Other reports did not expect such a recovery. E.g., in a letter from the Bayerischer Waldbesitzer Verband e.V. to the Bavarian Finance Minister of 7 March 2005, a further decrease of the frei Waldstrasse price for wood is expected as exports to Austria are becoming increasingly expensive due to rising fuel prices and a recently implemented lorry toll. This letter is written in the context of the contract referred to in paragraph 24.

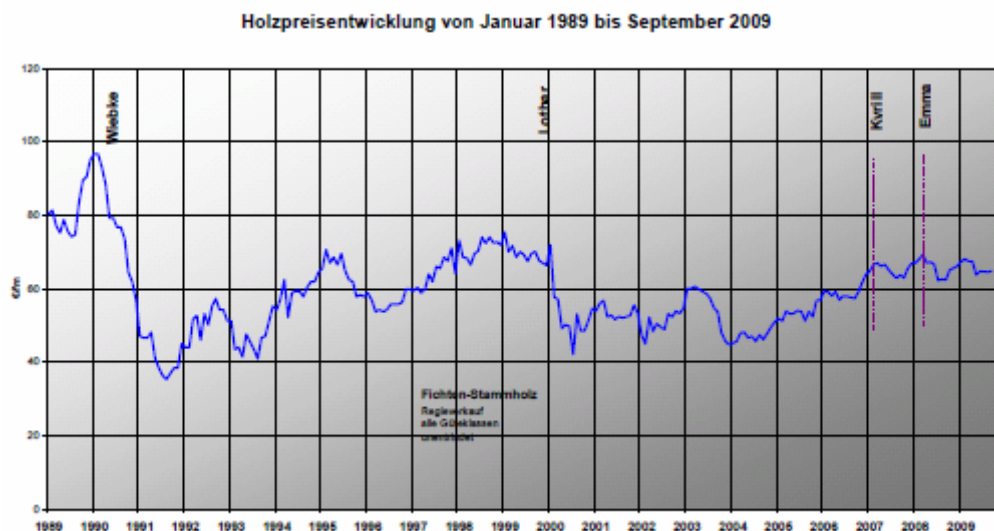
39. Furthermore, it has been argued that prices in Europe were bound to fall further in comparison to world level prices.

#### Development of wood prices

	Japan	Oceania	Scandinavia	Western Europe	North America
1990-1995	+10.3%	-9.6%	-2.2%	+10.2%	-5%
1995-2000	+6.5%	-9%	-1.7%	+5.2%	-3.2%
2000-2005	+4.3%	-3.5%	-1.6%	+4.2%	-2.7%

(figures are approximations)

40. The table shows that western European (and Japanese) wood prices converge downwards towards world level prices, while in other regions, prices move upwards.<sup>11</sup>
41. The actual outcome in the development of prices is irrelevant for the purpose of this decision<sup>12</sup>: what counts here is what a market economy operator could reasonably expect in early 2005.



#### Price index 1989-2009<sup>13</sup>

<sup>11</sup> Pöyry Gutachten, Entwicklung der Rundholzpreise Nadelholz 1995 (sic)-2005. Abweichung vom globalen Mittelwert

<sup>12</sup> In a market with a large supplier, outcomes are in any case profoundly affected by decisions of this supplier. The contract between BaySF and Klausner is, in fact, likely to have strengthened prices (see 23).

<sup>13</sup> The above shows the development over time of a price index for wood in Bavaria. Sie stellt den Durchschnittspreis für Fichten-Stammholz aller Stärke- und Güteklassen dar. Darin ist auch das in der Vereinbarung mit KHB genannte Fichten-Stammholz der Stärkeklasse 2b+ enthalten (73%).



42. A study provided by the German authorities<sup>14</sup> considers the prices for wood at the time of the signing of the BaySF-Klausner contracts. The study notes that published market prices are not very reliable. For example, a press release of BaySF refers to wood being sold for EUR 64-65/m<sup>3</sup> while the accounting data only show that it was sold for EUR 58/m<sup>3</sup>. Moreover, for many transactions a price is mentioned without any quantities so that meaningful market averages cannot be calculated. The study also observes that there is a considerable margin (EUR 5) around published market prices for wood and that BaySF tends to sell against the lower bound of these margins. The study therefore compares the actual prices from accounting data<sup>15</sup> of BaySF in the period around early 2005 with the BaySF-Klausner contract prices. It concludes that for most types of wood, the contract price for that type of wood is identical or just above the accounting data of the period. The study compares prices from other perspectives and arrives at the same conclusion, i.e. that the contract prices were at that point in time correct<sup>16</sup>. Complainants also provided a study ("Gutachten erstattet von Professor Dr. Michael Schweitzer and Professor Dr. Hans-Georg Kamann") according to which from the perspective of a market economy operator, i.a. agreed upon prices would have been too low (in view of prices being at a historical low at the start of 2005), its indexation too weak, and the conditionality upon the construction of the Landsberg saw mill (in both contracts) unjustified.
43. The Commission notes that prices of the BaySF-Klausner contracts were apparently at the same level as other market transactions (paragraph 41). It cannot be claimed ex post – given the higher market prices now – that the prices foreseen in early 2005 should have been higher in stead.
44. Another indication for that comes from the contract between Klausner and four private associations described in paragraph 26 above. These associations with numerous members each agreed in the same year as the concerned contracts between Klausner and BaySF (2005) to a contract with a duration of five years which involved a 3-4% lower level of prices as the BaySF-Klausner Bavaria contract and the same indexation mechanism.
45. Even though these contracts were not exactly executed in accordance with their original terms, it remains the case that private wood owners considered the terms of their own contract, and therefore of the BaySF-Klausner contract, to be realistic. This shows that at

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<sup>14</sup> Gutachten – Marktpreise von Fichten-Stammholz in Süddeutschland am Jahreswechsel 2004/2005. Endbericht 06 März 2006 by [CONFIDENTIAL].

<sup>15</sup> By relying on accounting data of BaySF, i.e. by relying on the actual amounts paid for wood by BaySF's clients, a more accurate picture is arrived at than by comparing the BaySF-Klausner contract data with market data. These market data are compiled in a manner that allows for errors and biases (samples may be small, self-reporting may induce biases, interviewed market participants may round off data and/or report data in a biased manner).

<sup>16</sup> The study concludes "that the contract prices corresponded almost exactly to the prevailing sales prices. For the volume-wise most important types (SL B/BC 2b+) the sale price is even around EUR 2 /m<sup>3</sup> higher than the January market price. Also for the wood sorts of lower value (quality classes C and D), the prices agreed with [Klausner] exceed the market prices realised by [BaySF] at the start of 2005. [...] the evaluator can therefore not find any proof that the prices agreed upon between [BaySF] and [Klausner] in January 2005 would have been under the prevailing market prices and would constitute a covert State aid. The agreed upon contract prices were at the time of the contract unconditionally in line with the market."

least for the first five years, expectations for price developments as incorporated in the BaySF-Klausner Bavaria contract were in line with market expectations.

46. The complainants have provided only a single contract with an indexation clause (see footnote 4). In this contract the price adjustment is for at most EUR 4, twice as much as the BaySF-Klausner contracts. It should be noted, however that there are two important differences. Firstly, either party to the transaction can altogether refuse the indexation. In that case, last year's price prevails but only half of the quantities foreseen will exchange hands. Secondly and more important, the contracts are not comparable: while the BaySF-Klausner contracts are together for 900 000 m<sup>3</sup>/year and if one of the parties wants may run as long as 10 years, the contract submitted by the complainants is a 2 year contract for approximately a fourth of the quantity and the obligation for the client to buy is only for 100 m<sup>3</sup>, a ninth of the quantity. This is, in conclusion, rather weak evidence of the unusual nature of the indexation of the BaySF-Klausner contracts.
47. In any case, a supplier, especially on a buyers' market, may well agree to terms (such as a weak indexation) that do not seem a priori very favourable if that assures him of demand for a very long term.

### **Strengthening demand**

48. In its assessment, the Commission underlines the following with respect to the market for wood in general and for wood in Bavaria in particular.
49. Wood is expensive to transport. While this does not lead to clearly demarcated markets, it does lead to a situation where a source of wood can sell only to clients relatively close by. The further away it tries to sell its wood, the more transport costs are incurred which makes selling prices of the wood, in view of competition from other sources, especially those closer to the client, too low from the perspective of the seller.
50. In fact, the wood industry in Bavaria underwent a substantial change around the years 2004-2005. A number of smaller saw mills went under while larger and more modern mills took over market share.
51. The Bavarian woods (private and public) produced almost a third more than mills in the state/Land could handle. This led to very favourable circumstances for buyers and made Bavarian suppliers sell wood outside of the state/Land. As a result of the high transport costs involved in transporting wood, these sales happened under unfavourable conditions for the suppliers as well.
52. From this perspective, it was logical for BaySF, as it would have been for a private seller, to find an additional, large, client for its product so as to make sure that its products would not remain unsold. By agreeing to a long-term contract with Klausner and requiring that it established itself inside Bavaria (via the clause in the contracts described in paragraph 11), BaySF made certain it would have a stable and significant customer in the medium and long term, a client, moreover with incentives to maintain a long-term supply relationship with BaySF. This way, BaySF ensured that its future sales would be guaranteed and against better prices than in the recent past.

53. In view of the development of the market, notably Klausner's rapidly increasing acquisitions from BaySF for its Thüringen subsidiary (almost doubling in the period 2001-2004 from 200 000 to 384 000 m<sup>3</sup> per year), Klausner must have appeared a very good candidate for such strategy in 2005.
54. The subsequent increase in prices may well have been caused by the decision of Klausner (and possibly others) to increase saw mill capacity with Bavaria and thereby further increase demand and the market price.
55. It should furthermore be remarked that Klausner, given its negotiating position as a very large customer in a buyers' market (see paragraph 22), can reasonably be expected to obtain attractive prices in standard commercial negotiations, at the very least as effectively as its competitors, in particular since it was already a regular customer and the prospect of establishing an operation in Bavaria would logically lead to an increase of its purchases from BaySF.
56. The German authorities argue at length that the price level and adjustments foreseen in the contracts with Klausner is reasonable. In fact, they add that the recovery of price levels for Bavarian wood since 2005 may be attributed to the higher demand for Bavarian wood, among others because of an increase in saw capacity of 6.5 Mio m<sup>3</sup>. In the years following the signing of the contract with Klausner, other long-term contract have been signed in this industry with similar price-adjustment mechanisms.
57. Moreover, the contract for the delivery of wood to Klausner Bavaria containing the catastrophe clause requiring the client to buy up to 60% more wood in case of a disaster is not as favourable for Klausner as it seems to be. There are circumstances where many clients reduce their demand so that such a clause is very favourable to the seller and a risk for the buyer of wood, Klausner. The limitation to 30% of the supply amount of wood coming from felling caused by incidental happenings (such as windthrow, snow break, beetle wood without drill holes; in each instance without impairment) which is suspended for the duration of the felling limitation is also not very convenient for the Klausner company.
58. Therefore, the installation of an out of state (Land) buyer made prima facie very good economic sense from the perspective of BaySF as a market economy operator.

## **Synthesis**

59. From the above (paragraphs 30-57), it is clear that the argument that prices agreed between Klausner and BaySF were unusually low, cannot be deemed correct, a conclusion also drawn by the Austrian Supreme Court (see paragraph 15 above).
60. Prices of the BaySF-Klausner contracts were in line with market prices and market expectations of the moment.
61. Moreover, BaySF, as a market economy operator, could be expected to search for an additional, large, client and possibly (although it has not appeared to have done so) offer

some degree of a discount to its prices to make sure that the overall demand for Bavarian wood is ensured and even increases by creating additional demand for the product.

62. The catastrophe clause does not constitute as favourable a prescription to the Klausner enterprise as it seems. It has both positive and negative aspects for each of the contract parties.
63. In the light of the above, the actions of BaySF should be considered in line with the Market Economy Operator Principle. The BaySF behaved as a rationally acting entity operating under market economy conditions. The transaction therefore does not involve State aid.
64. The fact that some German authorities have praised the contract with Klausner for employment and environmental reasons is of no effect for this analysis. State aid is an objective concept<sup>17</sup>. Even if the authorities acted only from these motives, the fact that the terms of this contract can be justified on the basis of the Market Economy Operator Principle, is sufficient to conclude that there is no advantage granted and there is no state aid involved.
65. In view of the conclusion that there has been no State Aid, the reluctance of BaySF to agree to long-term contracts with other saw mills is irrelevant from the perspective of Article 107 TFEU.

### *Conclusion*

66. On the basis of the conclusion that the measure confers no advantage to the enterprise Klausner, it should be considered free of aid within the meaning of Article 107(1) of the TFEU. The present decision is without prejudice to the status of the contractual relationship in light of the competition rules applicable to undertakings (Articles 101 and 102).

## **III. 2 Compatibility**

67. As there is no aid, there is no need to assess the compatibility with the internal market.

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<sup>17</sup> See for instance Judgment of the Court of 1 July 2008 in Case T-266/02 *Deutsche Post v. Commission*, paragraph 71.

## IV. Decision

68. For the reasons indicated above, the Commission finds that the measure does not contain State aid within the meaning of Article 107(1) of the TFEU.

If this letter contains confidential information which should not be disclosed to third parties, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the Internet site:

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Directorate-General for Competition  
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Belgium  
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We would ask you to state the case name and number in all correspondence.

Yours faithfully,

For the Commission

Joaquin Almunia  
Vice-President of the Commission

