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(Continued overleaf)

[1] Text with EEA relevance

EN

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.

The titles of all other acts are printed in bold type and preceded by an asterisk.

EN

[1] Text with EEA relevance

II

(Non-legislative acts)

REGULATIONS

COMMISSION REGULATION (EU) No 632/2010

of 19 July 2010

amending Regulation (EC) No 1126/2008 adopting certain international accounting standards in accordance with Regulation (EC) No 1606/2002 of the European Parliament and of the Council as regards International Accounting Standard (IAS) 24 and International Financial Reporting Standard (IFRS) 8

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards [1], and in particular Article 3(1) thereof,

Whereas:

(1) By Commission Regulation (EC) No 1126/2008 [2] certain international standards and interpretations that were in existence at 15 October 2008 were adopted.

(2) On 4 November 2009, the International Accounting Standards Board (IASB) published a revised International Accounting Standard (IAS) 24 *Related Party Disclosures*, hereinafter 'revised IAS 24'. The aim of the changes introduced by the revised IAS 24 is to simplify the definition of a related party while removing certain internal inconsistencies and provides some relief for government-related entities in relation to the amount of information such entities need to provide in respect to related party transactions.

(3) The consultation with the Technical Expert Group (TEG) of the European Financial Reporting Advisory Group (EFRAG) confirms that the revised IAS 24 meets the technical criteria for adoption set out in Article 3(2) of Regulation (EC) No 1606/2002. In accordance with Commission Decision 2006/505/EC of 14 July 2006 setting up a Standards Advice Review Group to advise the Commission on the objectivity and neutrality of the European Financial Reporting Advisory Group's (EFRAG's) opinions [3], the Standards Advice Review Group considered EFRAG's opinion on endorsement and advised the Commission that it is well-balanced and objective.

(4) The adoption of the revised IAS 24 implies, by way of consequence, amendments to International Financial Reporting Standard (IFRS) 8 in order to ensure consistency between international accounting standards.

(5) Regulation (EC) No 1126/2008 should therefore be amended accordingly.

(6) The measures provided for in this Regulation are in accordance with the opinion of the Accounting Regulatory Committee,

HAS ADOPTED THIS REGULATION:

Article 1

The Annex to Regulation (EC) No 1126/2008 is amended as follows:

1. International Accounting Standard (IAS) 24 is replaced by the revised IAS 24 as set out in the Annex to this Regulation;

2. International Financial Reporting Standard (IFRS) 8 is amended as set out in the Annex to this Regulation.

Article 2

Each company shall apply IAS 24 and amendment to IFRS 8, as set out in the Annex to this Regulation, at the latest, as from the commencement date of its first financial year starting after 31 December 2010.

[1] OJ L 243, 11.9.2002, p. 1.
[2] OJ L 320, 29.11.2008, p. 1.
[3] OJ L 199, 21.7.2006, p. 33.

Article 3

This Regulation shall enter into force on the third day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 19 July 2010.

For the Commission
The President
José Manuel BARROSO

ANNEX

INTERNATIONAL ACCOUNTING STANDARDS

IAS 24	**IAS 24 *Related Party Disclosures***
IFRS 8	**Amendment to IFRS 8 *Operating Segments***

International Accounting Standard 24

Related Party Disclosures

OBJECTIVE

1 The objective of this Standard is to ensure that an entity's financial statements contain the disclosures necessary to draw attention to the possibility that its financial position and profit or loss may have been affected by the existence of related parties and by transactions and outstanding balances, including commitments, with such parties.

SCOPE

2 **This Standard shall be applied in:**

(a) identifying related party relationships and transactions;

(b) identifying outstanding balances, including commitments, between an entity and its related parties;

(c) identifying the circumstances in which disclosure of the items in (a) and (b) is required; and

(d) determining the disclosures to be made about those items.

3 **This Standard requires disclosure of related party relationships, transactions and outstanding balances, including commitments, in the consolidated and separate financial statements of a parent, venturer or investor presented in accordance with IAS 27 *Consolidated and Separate Financial Statements*. This Standard also applies to individual financial statements.**

4 Related party transactions and outstanding balances with other entities in a group are disclosed in an entity's financial statements. Intragroup related party transactions and outstanding balances are eliminated in the preparation of consolidated financial statements of the group.

PURPOSE OF RELATED PARTY DISCLOSURES

5 Related party relationships are a normal feature of commerce and business. For example, entities frequently carry on parts of their activities through subsidiaries, joint ventures and associates. In those circumstances, the entity has the ability to affect the financial and operating policies of the investee through the presence of control, joint control or significant influence.

6 A related party relationship could have an effect on the profit or loss and financial position of an entity. Related parties may enter into transactions that unrelated parties would not. For example, an entity that sells goods to its parent at cost might not sell on those terms to another customer. Also, transactions between related parties may not be made at the same amounts as between unrelated parties.

7 The profit or loss and financial position of an entity may be affected by a related party relationship even if related party transactions do not occur. The mere existence of the relationship may be sufficient to affect the transactions of the entity with other parties. For example, a subsidiary may terminate relations with a trading partner on acquisition by the parent of a fellow subsidiary engaged in the same activity as the former trading partner. Alternatively, one party may refrain from acting because of the significant influence of another—for example, a subsidiary may be instructed by its parent not to engage in research and development.

8 For these reasons, knowledge of an entity's transactions, outstanding balances, including commitments, and relationships with related parties may affect assessments of its operations by users of financial statements, including assessments of the risks and opportunities facing the entity.

DEFINITIONS

9 **The following terms are used in this Standard with the meanings specified:**

A *related party* is a person or entity that is related to the entity that is preparing its financial statements (in this Standard referred to as the 'reporting entity').

(a) A person or a close member of that person's family is related to a reporting entity if that person:

(i) has control or joint control over the reporting entity;

(ii) has significant influence over the reporting entity; or

(iii) is a member of the key management personnel of the reporting entity or of a parent of the reporting entity.

(b) An entity is related to a reporting entity if any of the following conditions applies:

(i) The entity and the reporting entity are members of the same group (which means that each parent, subsidiary and fellow subsidiary is related to the others).

(ii) One entity is an associate or joint venture of the other entity (or an associate or joint venture of a member of a group of which the other entity is a member).

(iii) Both entities are joint ventures of the same third party.

(iv) One entity is a joint venture of a third entity and the other entity is an associate of the third entity.

(v) The entity is a post-employment benefit plan for the benefit of employees of either the reporting entity or an entity related to the reporting entity. If the reporting entity is itself such a plan, the sponsoring employers are also related to the reporting entity.

(vi) The entity is controlled or jointly controlled by a person identified in (a).

(vii) A person identified in (a)(i) has significant influence over the entity or is a member of the key management personnel of the entity (or of a parent of the entity).

A *related party transaction* is a transfer of resources, services or obligations between a reporting entity and a related party, regardless of whether a price is charged.

***Close members of the family of a person* are those family members who may be expected to influence, or be influenced by, that person in their dealings with the entity and include:**

(a) that person's children and spouse or domestic partner;

(b) children of that person's spouse or domestic partner; and

(c) dependants of that person or that person's spouse or domestic partner.

***Compensation* includes all employee benefits (as defined in IAS 19 *Employee Benefits*) including employee benefits to which IFRS 2 *Share-based Payment* applies. Employee benefits are all forms of consideration paid, payable or provided by the entity, or on behalf of the entity, in exchange for services rendered to the entity. It also includes such consideration paid on behalf of a parent of the entity in respect of the entity. Compensation includes:**

(a) short-term employee benefits, such as wages, salaries and social security contributions, paid annual leave and paid sick leave, profit-sharing and bonuses (if payable within twelve months of the end of the period) and non-monetary benefits (such as medical care, housing, cars and free or subsidised goods or services) for current employees;

(b) post-employment benefits such as pensions, other retirement benefits, post-employment life insurance and post-employment medical care;

(c) other long-term employee benefits, including long-service leave or sabbatical leave, jubilee or other long-service benefits, long-term disability benefits and, if they are not payable wholly within twelve months after the end of the period, profit-sharing, bonuses and deferred compensation;

(d) termination benefits; and

(e) share-based payment.

***Control* is the power to govern the financial and operating policies of an entity so as to obtain benefits from its activities.**

***Joint control* is the contractually agreed sharing of control over an economic activity.**

***Key management personnel* are those persons having authority and responsibility for planning, directing and controlling the activities of the entity, directly or indirectly, including any director (whether executive or otherwise) of that entity.**

***Significant influence* is the power to participate in the financial and operating policy decisions of an entity, but is not control over those policies. Significant influence may be gained by share ownership, statute or agreement.**

***Government* refers to government, government agencies and similar bodies whether local, national or international.**

A *government-related entity* is an entity that is controlled, jointly controlled or significantly influenced by a government.

10 In considering each possible related party relationship, attention is directed to the substance of the relationship and not merely the legal form.

11 In the context of this Standard, the following are not related parties:

(a) two entities simply because they have a director or other member of key management personnel in common or because a member of key management personnel of one entity has significant influence over the other entity.

(b) two venturers simply because they share joint control over a joint venture.

(c) (i) providers of finance,

(ii) trade unions,

(iii) public utilities, and

(iv) departments and agencies of a government that does not control, jointly control or significantly influence the reporting entity,

simply by virtue of their normal dealings with an entity (even though they may affect the freedom of action of an entity or participate in its decision-making process).

(d) a customer, supplier, franchisor, distributor or general agent with whom an entity transacts a significant volume of business, simply by virtue of the resulting economic dependence.

12 In the definition of a related party, an associate includes subsidiaries of the associate and a joint venture includes subsidiaries of the joint venture. Therefore, for example, an associate's subsidiary and the investor that has significant influence over the associate are related to each other.

DISCLOSURES

All entities

13 **Relationships between a parent and its subsidiaries shall be disclosed irrespective of whether there have been transactions between them. An entity shall disclose the name of its parent and, if different, the ultimate controlling party. If neither the entity's parent nor the ultimate controlling party produces consolidated financial statements available for public use, the name of the next most senior parent that does so shall also be disclosed.**

14 To enable users of financial statements to form a view about the effects of related party relationships on an entity, it is appropriate to disclose the related party relationship when control exists, irrespective of whether there have been transactions between the related parties.

15 The requirement to disclose related party relationships between a parent and its subsidiaries is in addition to the disclosure requirements in IAS 27, IAS 28 *Investments in Associates* and IAS 31 *Interests in Joint Ventures*.

16 Paragraph 13 refers to the next most senior parent. This is the first parent in the group above the immediate parent that produces consolidated financial statements available for public use.

17 **An entity shall disclose key management personnel compensation in total and for each of the following categories:**

(a) short-term employee benefits;

(b) post-employment benefits;

(c) other long-term benefits;

(d) termination benefits; and

(e) share-based payment.

18 **If an entity has had related party transactions during the periods covered by the financial statements, it shall disclose the nature of the related party relationship as well as information about those transactions and outstanding balances, including commitments, necessary for users to understand the potential effect of the relationship on the financial statements. These disclosure requirements are in addition to those in paragraph 17. At a minimum, disclosures shall include:**

(a) the amount of the transactions;

(b) the amount of outstanding balances, including commitments, and:

(i) their terms and conditions, including whether they are secured, and the nature of the consideration to be provided in settlement; and

(ii) details of any guarantees given or received;

(c) provisions for doubtful debts related to the amount of outstanding balances; and

(d) the expense recognised during the period in respect of bad or doubtful debts due from related parties.

19 **The disclosures required by paragraph 18 shall be made separately for each of the following categories:**

(a) the parent;

(b) entities with joint control or significant influence over the entity;

(c) subsidiaries;

(d) associates;

(e) joint ventures in which the entity is a venturer;

(f) key management personnel of the entity or its parent; and

(g) other related parties.

20 The classification of amounts payable to, and receivable from, related parties in the different categories as required in paragraph 19 is an extension of the disclosure requirement in IAS 1 *Presentation of Financial Statements* for information to be presented either in the statement of financial position or in the notes. The categories are extended to provide a more comprehensive analysis of related party balances and apply to related party transactions.

21 The following are examples of transactions that are disclosed if they are with a related party:

(a) purchases or sales of goods (finished or unfinished);

(b) purchases or sales of property and other assets;

(c) rendering or receiving of services;

(d) leases;

(e) transfers of research and development;

(f) transfers under licence agreements;

(g) transfers under finance arrangements (including loans and equity contributions in cash or in kind);

(h) provision of guarantees or collateral;

(i) commitments to do something if a particular event occurs or does not occur in the future, including executory contracts (*) (recognised and unrecognised); and

(j) settlement of liabilities on behalf of the entity or by the entity on behalf of that related party.

22 Participation by a parent or subsidiary in a defined benefit plan that shares risks between group entities is a transaction between related parties (see paragraph 34B of IAS 19).

23 Disclosures that related party transactions were made on terms equivalent to those that prevail in arm's length transactions are made only if such terms can be substantiated.

24 **Items of a similar nature may be disclosed in aggregate except when separate disclosure is necessary for an understanding of the effects of related party transactions on the financial statements of the entity.**

Government-related entities

25 **A reporting entity is exempt from the disclosure requirements of paragraph 18 in relation to related party transactions and outstanding balances, including commitments, with:**

(a) a government that has control, joint control or significant influence over the reporting entity; and

(b) another entity that is a related party because the same government has control, joint control or significant influence over both the reporting entity and the other entity.

26 **If a reporting entity applies the exemption in paragraph 25, it shall disclose the following about the transactions and related outstanding balances referred to in paragraph 25:**

(a) the name of the government and the nature of its relationship with the reporting entity (ie control, joint control or significant influence);

(b) the following information in sufficient detail to enable users of the entity's financial statements to understand the effect of related party transactions on its financial statements:

(i) the nature and amount of each individually significant transaction; and

(ii) for other transactions that are collectively, but not individually, significant, a qualitative or quantitative indication of their extent. Types of transactions include those listed in paragraph 21.

27 In using its judgement to determine the level of detail to be disclosed in accordance with the requirements in paragraph 26(b), the reporting entity shall consider the closeness of the related party relationship and other factors relevant in establishing the level of significance of the transaction such as whether it is:

(a) significant in terms of size;

(b) carried out on non-market terms;

(c) outside normal day-to-day business operations, such as the purchase and sale of businesses;

(d) disclosed to regulatory or supervisory authorities;

(e) reported to senior management;

(f) subject to shareholder approval.

EFFECTIVE DATE AND TRANSITION

28 An entity shall apply this Standard retrospectively for annual periods beginning on or after 1 January 2011. Earlier application is permitted, either of the whole Standard or of the partial exemption in paragraphs 25-27 for government-related entities. If an entity applies either the whole Standard or that partial exemption for a period beginning before 1 January 2011, it shall disclose that fact.

WITHDRAWAL OF IAS 24 (2003)

29 This Standard supersedes IAS 24 *Related Party Disclosures* (as revised in 2003).

(*) IAS 37 *Provisions, Contingent Liabilities and Contingent Assets* defines executory contracts as contracts under which neither party has performed any of its obligations or both parties have partially performed their obligations to an equal extent.

Appendix

Amendment to IFRS 8 *Operating Segments*

A1 Paragraph 34 is amended as follows (new text is underlined and deleted text is struck through) and paragraph 36B is added.

34 An entity shall provide information about the extent of its reliance on its major customers. If revenues from transactions with a single external customer amount to 10 per cent or more of an entity's revenues, the entity shall disclose that fact, the total amount of revenues from each such customer, and the identity of the segment or segments reporting the revenues. The entity need not disclose the identity of a major customer or the amount of revenues that each segment reports from that customer. For the purposes of this IFRS, a group of entities known to a reporting entity to be under common control shall be considered a single customer,. However, judgement is required to assess whether ~~and~~ a government (~~national~~, ~~state~~, ~~provincial~~, ~~territorial~~, ~~local or foreign~~ including government agencies and similar bodies whether local, national or international) and entities known to the reporting entity to be under the control of that government ~~shall be~~ are considered a single customer. In assessing this, the reporting entity shall consider the extent of economic integration between those entities.

36B IAS 24 *Related Party Disclosures* (as revised in 2009) amended paragraph 34 for annual periods beginning on or after 1 January 2011. If an entity applies IAS 24 (revised 2009) for an earlier period, it shall apply the amendment to paragraph 34 for that earlier period.

COMMISSION REGULATION (EU) No 633/2010

of 19 July 2010

amending Regulation (EC) No 1126/2008 adopting certain international accounting standards in accordance with Regulation (EC) No 1606/2002 of the European Parliament and of the Council as regards International Financial Reporting Interpretations Committee's (IFRIC) Interpretation 14

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards [1], and in particular Article 3(1) thereof,

Whereas:

(1) By Commission Regulation (EC) No 1126/2008 [2] certain international standards and interpretations that were in existence at 15 October 2008 were adopted.

(2) On 15 November 2009, the International Financial Reporting Interpretations Committee (IFRIC) published amendments to IFRIC Interpretation 14 *Prepayments of a Minimum Funding Requirement*, hereinafter 'amendments to IFRIC 14'. The aim of the amendments to IFRIC 14 is to remove an unintended consequence of IFRIC 14 in cases where an entity subject to a minimum funding requirement makes an early payment of contributions where under certain circumstances the entity making such a prepayment would be required to recognise an expense. In the case where a defined benefit plan is subject to a minimum funding requirement the amendment to IFRIC 14 prescribes to treat this prepayment, like any other prepayment, as an asset.

(3) The consultation with the Technical Expert Group (TEG) of the European Financial Reporting Advisory Group (EFRAG) confirms that amendments to IFRIC 14 meets the technical criteria for adoption set out in Article 3(2) of Regulation (EC) No 1606/2002. In accordance with Commission Decision 2006/505/EC of 14 July 2006 setting up a Standards Advice Review Group to advise the Commission on the objectivity and neutrality of the European Financial Reporting Advisory Group's (EFRAG's) opinions [3], the Standards Advice Review Group considered EFRAG's opinion on endorsement and advised the Commission that it is well-balanced and objective.

(4) Regulation (EC) No 1126/2008 should therefore be amended accordingly.

(5) The measures provided for in this Regulation are in accordance with the opinion of the Accounting Regulatory Committee,

HAS ADOPTED THIS REGULATION:

Article 1

In the Annex to Regulation (EC) No 1126/2008 International Financial Reporting Interpretations Committee's (IFRIC) Interpretation 14 is amended as set out in the Annex to this Regulation.

Article 2

Each company shall apply the amendments to IFRIC 14, as set out in the Annex to this Regulation, at the latest, as from the commencement date of its first financial year starting after 31 December 2010.

Article 3

This Regulation shall enter into force on the third day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 19 July 2010.

For the Commission
The President
José Manuel BARROSO

[1] OJ L 243, 11.9.2002, p. 1.
[2] OJ L 320, 29.11.2008, p. 1.
[3] OJ L 199, 21.7.2006, p. 33.

ANNEX

INTERNATIONAL ACCOUNTING STANDARDS

IFRIC 14	**Amendments to IFRIC Interpretation 14 *Prepayments of a Minimum Funding Requirement***

AMENDMENTS TO IFRIC 14

Paragraphs 16-18 and 20-22 are amended
Paragraphs 3A, 27B and 29 are added.

BACKGROUND

3A In November 2009 the International Accounting Standards Board amended IFRIC 14 to remove an unintended consequence arising from the treatment of prepayments of future contributions in some circumstances when there is a minimum funding requirement.

CONSENSUS

The economic benefit available as a contribution reduction

16 If there is no minimum funding requirement for contributions relating to future service, the economic benefit available as a reduction in future contributions is

(a) [deleted]

(b) the future service cost to the entity for each period over the shorter of the expected life of the plan and the expected life of the entity. The future service cost to the entity excludes amounts that will be borne by employees.

17 An entity shall determine the future service costs using assumptions consistent with those used to determine the defined benefit obligation and with the situation that exists at the end of the reporting period as determined by IAS 19. Therefore, an entity shall assume no change to the benefits to be provided by a plan in the future until the plan is amended and shall assume a stable workforce in the future unless the entity is demonstrably committed at the end of the reporting period to make a reduction in the number of employees covered by the plan. In the latter case, the assumption about the future workforce shall include the reduction.

The effect of a minimum funding requirement on the economic benefit available as a reduction in future contributions

18 An entity shall analyse any minimum funding requirement at a given date into contributions that are required to cover (a) any existing shortfall for past service on the minimum funding basis and (b) future service.

20 If there is a minimum funding requirement for contributions relating to future service, the economic benefit available as a reduction in future contributions is the sum of:

(a) any amount that reduces future minimum funding requirement contributions for future service because the entity made a prepayment (ie paid the amount before being required to do so); and

(b) the estimated future service cost in each period in accordance with paragraphs 16 and 17, less the estimated minimum funding requirement contributions that would be required for future service in those periods if there were no prepayment as described in (a).

21 An entity shall estimate the future minimum funding requirement contributions for future service taking into account the effect of any existing surplus determined using the minimum funding basis but excluding the prepayment described in paragraph 20(a). An entity shall use assumptions consistent with the minimum funding basis and, for any factors not specified by that basis, assumptions consistent with those used to determine the defined benefit obligation and with the situation that exists at the end of the reporting period as determined by IAS 19. The estimate shall include any changes expected as a result of the entity paying the minimum contributions when they are due. However, the estimate shall not include the effect of expected changes in the terms and conditions of the minimum funding basis that are not substantively enacted or contractually agreed at the end of the reporting period.

22 When an entity determines the amount described in paragraph 20(b), if the future minimum funding requirement contributions for future service exceed the future IAS 19 service cost in any given period, that excess reduces the amount of the economic benefit available as a reduction in future contributions However, the amount described in paragraph 20(b) can never be less than zero.

EFFECTIVE DATE

27B *Prepayments of a Minimum Funding Requirement* added paragraph 3A and amended paragraphs 16-18 and 20-22. An entity shall apply those amendments for annual periods beginning on or after 1 January 2011. Earlier application is permitted. If an entity applies the amendments for an earlier period, it shall disclose that fact.

TRANSITION

29 An entity shall apply the amendments in paragraphs 3A, 16–18 and 20–22 from the beginning of the earliest comparative period presented in the first financial statements in which the entity applies this Interpretation. If the entity had previously applied this Interpretation before it applies the amendments, it shall recognise the adjustment resulting from the application of the amendments in retained earnings at the beginning of the earliest comparative period presented.

COMMISSION REGULATION (EU) No 634/2010

of 19 July 2010

entering a name in the register of protected designations of origin and protected geographical indications (Ricotta di Bufala Campana (PDO))

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EC) No 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs [1], and in particular the first subparagraph of Article 7(4) thereof,

Whereas:

(1) Pursuant to the first subparagraph of Article 6(2) of Regulation (EC) No 510/2006, Italy's application to register the name 'Ricotta di Bufala Campana' was published in the *Official Journal of the European Union* [2].

(2) As no statement of objection under Article 7 of Regulation (EC) No 510/2006 has been received by the Commission, that name should therefore be entered in the register,

HAS ADOPTED THIS REGULATION:

Article 1

The name contained in the Annex to this Regulation is hereby entered in the register.

Article 2

This Regulation shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 19 July 2010.

For the Commission
The President
José Manuel BARROSO

[1] OJ L 93, 31.3.2006, p. 12.
[2] OJ C 260, 30.10.2009, p. 43.

ANNEX

Agricultural products intended for human consumption listed in Annex I to the Treaty:

Class 1.4. Other products of animal origin (eggs, honey, various dairy products except butter, etc.)

ITALY

Ricotta di Bufala Campana (PDO)

COMMISSION REGULATION (EU) No 635/2010

of 19 July 2010

opening the procedure for the allocation of export licences for cheese to be exported to the United States of America in 2011 under certain GATT quotas

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) [1], and in particular Article 171(1), in conjunction with Article 4 thereof,

Whereas:

(1) Section 2 of Chapter III of Commission Regulation (EC) No 1187/2009 of 27 November 2009 laying down special detailed rules for the application of Council Regulation (EC) No 1234/2007 as regards export licences and export refunds for milk and milk products [2] provides that export licences for cheese exported to the United States of America as part of the quotas under the agreements concluded during multilateral trade negotiations may be allocated according to a special procedure by which preferred importers in the USA may be designated.

(2) That procedure should be opened for exports during 2011 and the additional rules relating to it should be determined.

(3) In administering imports the competent authorities in the USA make a distinction between the additional quota granted to the European Community under the Uruguay Round and the quotas resulting from the Tokyo Round. Export licences should be allocated taking into account the eligibility of those products for the USA quota in question as described in the Harmonised Tariff Schedule of the United States of America.

(4) With a view to exporting the maximum quantity under the quotas for which there is moderate interest, applications covering the whole quota quantity should be allowed.

(5) For reasons of legal certainty and clarity, it should be laid down that the measures provided for in this Regulation cease to apply at the end of 2011.

(6) The measures provided for in this Regulation are in accordance with the opinion of the Management Committee for the Common Organisation of Agricultural Markets,

HAS ADOPTED THIS REGULATION:

Article 1

Export licences for products falling within CN code 0406 and listed in Annex I to this Regulation to be exported to the United States of America in 2011 under the quotas referred to in Article 21 of Regulation (EC) No 1187/2009 shall be issued in accordance with Section 2 of Chapter III of that Regulation and with the provisions of this Regulation.

Article 2

1. Applications for licences referred to in Article 22 of Regulation (EC) No 1187/2009 (hereinafter referred to as 'applications') shall be lodged with the competent authorities from 1 to 10 September 2010 at the latest.

2. Applications shall be admissible only if they contain all the information referred to in Article 22 of Regulation (EC) No 1187/2009 and if they are accompanied by the documents referred to therein.

Where, for the same group of products referred to in column 2 of Annex I to this Regulation the available quantity is divided between the Uruguay Round quota and the Tokyo Round quota, licence applications may cover only one of those quotas and shall indicate the quota concerned, specifying the identification of the group and of the quota indicated in column 3 of that Annex.

Information referred to in Article 22 of Regulation (EC) No 1187/2009 shall be presented in accordance with the model set out in Annex II to this Regulation.

3. As regards the quotas identified by 22-Tokyo, 22-Uruguay, 25-Tokyo and 25-Uruguay in column 3 of Annex I, applications shall cover at least 10 tonnes and shall not exceed the quantity available under the quota concerned as set out in column 4 of that Annex.

As regards the other quotas indicated in column 3 of Annex I, applications shall cover at least 10 tonnes and no more than 40 % of the quantity available under the quota concerned as set out in column 4 of that Annex.

[1] OJ L 299, 16.11.2007, p. 1.
[2] OJ L 318, 4.12.2009, p. 1.

4. Applications shall be admissible only if applicants declare in writing that they have not lodged other applications for the same group of products and the same quota and undertake not to do so.

If an applicant lodges several applications for the same group of products and the same quota in one or more Member States, all his applications shall be deemed inadmissible.

Article 3

1. Member States shall notify the Commission, within five working days after the end of the period for lodging applications, of the applications lodged for each of the groups of products and, where applicable, the quotas indicated in Annex I.

All notifications, including 'nil' notifications, shall be made by fax or e-mail on the model form set out in Annex III.

2. Notification shall comprise for each group and, where applicable, for each quota:

(a) a list of applicants;

(b) the quantities applied for by each applicant broken down by the product code of the Combined Nomenclature and by their code in accordance with the Harmonised Tariff Schedule of the United States of America (2010);

(c) the name and address of the importer designated by the applicant.

Article 4

The Commission shall, pursuant to Article 23(1) of Regulation (EC) No 1187/2009, determine the allocation of licences without delay and shall notify the Member States thereof by 31 October 2010 at the latest.

Member States shall notify the Commission, within five working days after publication of the allocation coefficients, for each group and, where applicable, for each quota, the quantities allocated by applicant, in accordance to Article 23(2) of Regulation (EC) No 1187/2009.

The notification shall be made by fax or e-mail on the model form set out in Annex IV to this Regulation.

Article 5

The information notified under Article 3 of this Regulation and under Article 22 of Regulation (EC) No 1187/2009 shall be verified by the Member States before the licences are issued and by 15 December 2010 at the latest.

Where it is found that incorrect information has been supplied by an operator to whom a licence has been issued, the licence shall be cancelled and the security forfeited. The Member States shall communicate it to the Commission without any delay.

Article 6

This Regulation shall enter into force on the day following its publication in the *Official Journal of the European Union*.

It shall expire on 31 December 2011.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 19 July 2010.

For the Commission
The President
José Manuel BARROSO

ANNEX I

Cheese to be exported to the United States of America in 2011 under certain GATT quotas

Section 2 of Chapter III of Regulation (EC) No 1187/2009 and Regulation (EU) No 635/2010

Identification of group in accordance with Additional Notes in Chapter 4 of the Harmonised Tariff Schedule of the United States		Identification of group and quota	Quantity available for 2011
Note to	Group		Kg
(1)	(2)	(3)	(4)
16	Not specifically provided for (NSPF)	16-Tokyo	908 877
		16-Uruguay	3 446 000
17	Blue Mould	17	350 000
18	Cheddar	18	1 050 000
20	Edam/Gouda	20	1 100 000
21	Italian type	21	2 025 000
22	Swiss or Emmenthaler cheese other than with eye formation	22-Tokyo	393 006
		22-Uruguay	380 000
25	Swiss or Emmenthaler cheese with eye formation	25-Tokyo	4 003 172
		25-Uruguay	2 420 000

ANNEX II

Presentation of information required pursuant to Article 22 of Regulation (EC) No 1187/2009

Identification of group and quota referred to in column 3 of Annex I to Regulation (EU) No 635/2010: ☐

Name of group indicated in column 2 of Annex I to Regulation (EU) No 635/2010: .....

.....

Origin of quota: Uruguay Round: ☐ Tokyo Round: ☐

Name/address of applicant	Product code of the Combined Nomenclature	Quantity applied for in kg	Harmonised Tariff Schedule of the USA code	Name/address of designated importer
	Total:			

ANNEX III

Presentation of information required pursuant to Article 3 of Regulation (EU) No 635/2010

Identification of group and quota referred to in column 3 of Annex I to Regulation (EU) No 635/2010: ☐

Name of group indicated in column 2 of Annex I to Regulation (EU) No 635/2010: .....

.....

Origin of quota: Uruguay Round: ☐ Tokyo Round: ☐

No	Name/address of Applicant	Product code of the Combined Nomenclature	Quantity applied for in kg	Harmonised Tariff Schedule of the USA code	Name/address designated importer
1					
		Total:			
2					
		Total:			
3					
		Total:			
4					
		Total:			
5					
		Total:			

ANNEX IV

Presentation of granted licences in accordance to Article 23 of Regulation (EC) No 1187/2009

Identification of group and quota referred to in column 3 of Annex I to Regulation (EU) No 635/2010	Origin of the quota	Name/address of applicant	Product code of the Combined Nomenclature	Quantity applied for in kg	Name/address of designated importer	Allocated Quantity (1) in kg
	Uruguay round ☐					
	Tokyo round ☐					
			Total:		Total:	
	Uruguay round ☐					
	Tokyo round ☐					
			Total:		Total:	
	Uruguay round ☐					
	Tokyo round ☐					
			Total:		Total:	

(1) Quantities allocated by drawing lots shall be distributed among the individual CN codes in proportion to the quantities of product by CN code applied for.

COMMISSION REGULATION (EU) No 636/2010

of 19 July 2010

establishing the standard import values for determining the entry price of certain fruit and vegetables

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) [1],

Having regard to Commission Regulation (EC) No 1580/2007 of 21 December 2007 laying down implementing rules for Council Regulations (EC) No 2200/96, (EC) No 2201/96 and (EC) No 1182/2007 in the fruit and vegetable sector [2], and in particular Article 138(1) thereof,

Whereas:

Regulation (EC) No 1580/2007 lays down, pursuant to the outcome of the Uruguay Round multilateral trade negotiations, the criteria whereby the Commission fixes the standard values for imports from third countries, in respect of the products and periods stipulated in Annex XV, Part A thereto,

HAS ADOPTED THIS REGULATION:

Article 1

The standard import values referred to in Article 138 of Regulation (EC) No 1580/2007 are fixed in the Annex hereto.

Article 2

This Regulation shall enter into force on 20 July 2010.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 19 July 2010.

For the Commission,
On behalf of the President,
Jean-Luc DEMARTY
Director-General for Agriculture and Rural Development

[1] OJ L 299, 16.11.2007, p. 1.
[2] OJ L 350, 31.12.2007, p. 1.

ANNEX

Standard import values for determining the entry price of certain fruit and vegetables

(EUR/100 kg)

CN code	Third country code (1)	Standard import value
0702 00 00	MK	22,1
	TR	89,8
	ZZ	56,0
0707 00 05	MK	41,0
	TR	105,8
	ZZ	73,4
0709 90 70	TR	92,6
	ZZ	92,6
0805 50 10	AR	86,4
	UY	57,6
	ZA	86,4
	ZZ	76,8
0808 10 80	AR	78,8
	BR	80,2
	CL	75,9
	CN	80,8
	NZ	109,5
	US	107,2
	UY	116,3
	ZA	95,0
	ZZ	93,0
0808 20 50	AR	76,4
	CL	121,8
	CN	98,4
	NZ	176,5
	ZA	93,1
	ZZ	113,2
0809 10 00	TR	193,7
	ZZ	193,7
0809 20 95	CL	150,0
	TR	270,8
	US	769,6
	ZZ	396,8
0809 30	AR	130,0
	TR	158,7
	ZZ	144,4
0809 40 05	BR	123,2
	IL	165,9
	TR	126,3
	ZZ	138,5

(1) Nomenclature of countries laid down by Commission Regulation (EC) No 1833/2006 (OJ L 354, 14.12.2006, p. 19). Code 'ZZ' stands for 'of other origin'.

COMMISSION REGULATION (EU) No 637/2010

of 19 July 2010

suspending submission of applications for import licences for sugar products under certain tariff quotas

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) [1],

Having regard to Commission Regulation (EC) No 891/2009 of 25 September 2009 opening and providing for the administration of certain Community tariff quotas in the sugar sector [2], and in particular Article 5(2) thereof,

Whereas:

(1) Quantities covered by applications for import licences submitted to the competent authorities from 1 to 7 July 2010 in accordance with Regulation (EC) No 891/2009, are equal to the quantity available under order number 09.4325.

(2) Submission of further applications for licences for order number 09.4325 should be suspended until the end of the marketing year, in accordance with Regulation (EC) No 891/2009,

HAS ADOPTED THIS REGULATION:

Article 1

Submission of further applications for licences, which correspond to the order numbers indicated in the Annex, shall be suspended until the end of the marketing year 2009/10.

Article 2

This Regulation shall enter into force on the day of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 19 July 2010.

For the Commission,
On behalf of the President,
Jean-Luc DEMARTY
Director-General for Agriculture and Rural Development

[1] OJ L 299, 16.11.2007, p. 1.
[2] OJ L 254, 26.9.2009, p. 82.

ANNEX

CXL Concessions Sugar

2009/2010 marketing year

Applications lodged from 1.7.2010 to 7.7.2010

Order No	Country	Allocation coefficient (%)	Further applications
09.4317	Australia	—	
09.4318	Brazil	—	
09.4319	Cuba	—	Suspended
09.4320	Any third countries	—	Suspended
09.4321	India	—	Suspended

'—': Not applicable: no licence application has been sent to the Commission.

Balkans Sugar

2009/2010 marketing year

Applications lodged from 1.7.2010 to 7.7.2010

Order No	Country	Allocation coefficient (%)	Further applications
09.4324	Albania	—	
09.4325	Bosnia and Herzegovina	(1)	
09.4326	Serbia, Montenegro and Kosovo (*)	(1)	
09.4327	Former Yugoslav Republic of Macedonia	—	
09.4328	Croatia	(1)	

'—': Not applicable: no licence application has been sent to the Commission.
(*) Kosovo under United Nations Security Council Resolution 1244/1999.
(1) Not applicable: the applications do not exceed the quantities available and are fully granted.

Exceptional import sugar and industrial import sugar

2009/2010 marketing year

Applications lodged from 1.7.2010 to 7.7.2010

Order No	Type	Allocation coefficient (%)	Further applications
09.4380	Exceptional	—	
09.4390	Industrial	—	

'—': Not applicable: no licence application has been sent to the Commission.

COMMISSION REGULATION (EU) No 638/2010

of 19 July 2010

on the issue of import licences for applications submitted in the first seven days of July 2010 under the tariff quota for high-quality beef administered by Regulation (EC) No 620/2009

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) [1],

Having regard to Commission Regulation (EC) No 1301/2006 of 31 August 2006 laying down common rules for the administration of import tariff quotas for agricultural products managed by a system of import licences [2], and in particular Article 7(2) thereof,

Whereas:

(1) Commission Regulation (EC) No 620/2009 of 13 July 2009 providing for the administration of an import tariff quota for high-quality beef [3] sets out detailed rules for the submission and issue of import licences.

(2) Article 7(2) of Regulation (EC) No 1301/2006 provides that in cases where quantities covered by licence applications exceed the quantities available for the quota period, allocation coefficients should be fixed for the quantities covered by each licence application. The applications for import licences submitted pursuant to Article 3 of Regulation (EC) No 620/2009 between 1 and 7 July 2010 exceed the quantities available. Therefore, the extent to which import licences may be issued and the allocation coefficient should be determined,

HAS ADOPTED THIS REGULATION:

Article 1

Import licence applications covered by the quota with order number 09.4449 and submitted between 1 and 7 July 2010 in accordance with Article 3 of Regulation (EC) No 620/2009, shall be multiplied by an allocation coefficient of 63,674825 %.

Article 2

This Regulation shall enter into force on the day following its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 19 July 2010.

For the Commission,
On behalf of the President,
Jean-Luc DEMARTY
Director-General for Agriculture and Rural Development

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[1] OJ L 299, 16.11.2007, p. 1.
[2] OJ L 238, 1.9.2006, p. 13.
[3] OJ L 182, 15.7.2009, p. 25.

COMMISSION REGULATION (EU) No 639/2010

of 19 July 2010

amending the representative prices and additional import duties for certain products in the sugar sector fixed by Regulation (EC) No 877/2009 for the 2009/10 marketing year

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (single CMO Regulation) [1],

Having regard to Commission Regulation (EC) No 951/2006 of 30 June 2006 laying down detailed rules for the implementation of Council Regulation (EC) No 318/2006 as regards trade with third countries in the sugar sector [2], and in particular Article 36(2), second subparagraph, second sentence thereof,

Whereas:

(1) The representative prices and additional duties applicable to imports of white sugar, raw sugar and certain syrups for the 2009/10 marketing year are fixed by Commission Regulation (EC) No 877/2009 [3]. These prices and duties have been last amended by Commission Regulation (EU) No 627/2010 [4].

(2) The data currently available to the Commission indicate that those amounts should be amended in accordance with the rules and procedures laid down in Regulation (EC) No 951/2006,

HAS ADOPTED THIS REGULATION:

Article 1

The representative prices and additional duties applicable to imports of the products referred to in Article 36 of Regulation (EC) No 951/2006, as fixed by Regulation (EC) No 877/2009 for the 2009/10, marketing year, are hereby amended as set out in the Annex hereto.

Article 2

This Regulation shall enter into force on 20 July 2010.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 19 July 2010.

For the Commission,
On behalf of the President,
Jean-Luc DEMARTY
Director-General for Agriculture and Rural Development

[1] OJ L 299, 16.11.2007, p. 1.
[2] OJ L 178, 1.7.2006, p. 24.
[3] OJ L 253, 25.9.2009, p. 3.
[4] OJ L 182, 16.7.2010, p. 12.

ANNEX

Amended representative prices and additional import duties applicable to white sugar, raw sugar and products covered by CN code 1702 90 95 from 20 July 2010

(EUR)

CN code	Representative price per 100 kg net of the product concerned	Additional duty per 100 kg net of the product concerned
1701 11 10 (1)	41,21	0,00
1701 11 90 (1)	41,21	2,54
1701 12 10 (1)	41,21	0,00
1701 12 90 (1)	41,21	2,24
1701 91 00 (2)	40,09	5,44
1701 99 10 (2)	40,09	2,31
1701 99 90 (2)	40,09	2,31
1702 90 95 (3)	0,40	0,28

(1) For the standard quality defined in point III of Annex IV to Regulation (EC) No 1234/2007.
(2) For the standard quality defined in point II of Annex IV to Regulation (EC) No 1234/2007.
(3) Per 1 % sucrose content.

DECISIONS

DECISION OF THE REPRESENTATIVES OF THE GOVERNMENTS OF THE MEMBER STATES OF THE EUROPEAN UNION

of 8 July 2010

appointing judges to the General Court

(2010/400/EU)

THE REPRESENTATIVES OF THE GOVERNMENTS OF THE MEMBER STATES OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Article 19 thereof,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 254 and 255 thereof,

Whereas:

(1) In accordance with the provisions of the Treaties, every three years there should be a partial replacement of the judges of the General Court. For the period from 1 September 2010 to 31 August 2016, 14 judges had to be appointed to the General Court.

(2) On 23 June 2010, the Conference of the Representatives of the Governments of the Member States appointed 10 judges to the General Court for the above period [1].

(3) To complete the partial replacement of the judges of the General Court, the governments of the Member States should appoint further judges to the four posts remaining to be filled.

(4) The governments of the Member States concerned have proposed respectively to reappoint Mr Ottó CZÚCZ and to appoint Mr Marc van der WOUDE as judges of the General Court. The panel set up by Article 255 of the Treaty on the Functioning of the European Union has given an opinion on the suitability of those two judges to perform the duties of judge of the General Court. While the candidacy of Mr Ottó CZÚCZ had been withdrawn, the government of the Member State concerned has recently indicated that it proposed Mr CZÚCZ for a further term of office as judge of the General Court.

(5) Two members of the General Court should therefore be appointed for the period from 1 September 2010 to 31 August 2016; judges for the two vacancies still to be filled will be appointed at a later date,

HAVE ADOPTED THIS DECISION:

Article 1

Mr Ottó CZÚCZ and Mr Marc van der WOUDE are hereby appointed judges of the General Court from 1 September 2010 to 31 August 2016.

Article 2

This Decision shall enter into force on the day following its publication in the *Official Journal of the European Union*.

Done at Brussels, 8 July 2010.

For the Council
The President
J. DE RUYT

[1] Decision of the Representatives of the Governments of the Member States of 23 June 2010 appointing judges to the General Court (OJ L 163, 30.6.2010, p. 41).

COUNCIL DECISION

of 13 July 2010

on the existence of an excessive deficit in Cyprus

(2010/401/EU)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 126(6) in conjunction with Article 126(13) and Article 136 thereof,

Having regard to the proposal from the European Commission,

Having regard to the observations made by Cyprus,

Whereas:

(1) According to Article 126(1) of the Treaty Member States shall avoid excessive government deficits.

(2) The Stability and Growth Pact is based on the objective of sound government finances as a means of strengthening the conditions for price stability and for strong sustainable growth conducive to employment creation.

(3) The excessive deficit procedure (EDP) under Article 126 of the Treaty, as clarified by Council Regulation (EC) No 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure [1] (which is part of the Stability and Growth Pact), provides for a decision on the existence of an excessive deficit. The Protocol on the excessive deficit procedure annexed to the Treaty sets out further provisions relating to the implementation of the EDP. Council Regulation (EC) No 479/2009 [2] lays down detailed rules and definitions for the application of the provision of the said Protocol.

(4) The 2005 reform of the Stability and Growth Pact sought to strengthen its effectiveness and economic underpinnings as well as to safeguard the sustainability of the public finances in the long run. It aimed at ensuring that, in particular, the economic and budgetary background was taken into account fully in all steps in the EDP. In this way, the Stability and Growth Pact provides the framework supporting government policies for a prompt return to sound budgetary positions taking account of the economic situation.

(5) Article 126(5) of the Treaty requires the Commission to address an opinion to the Council if the Commission considers that an excessive deficit in a Member State exists or may occur. Having taken into account its report in accordance with Article 126(3) and having regard to the opinion of the Economic and Financial Committee in accordance with Article 126(4), the Commission concluded that an excessive deficit exists in Cyprus. The Commission therefore addressed such an opinion to the Council in respect of Cyprus on 15 June 2010 [3].

(6) Article 126(6) of the Treaty states that the Council should consider any observations which the Member State concerned may wish to make before deciding, after an overall assessment, whether an excessive deficit exists. In the case of Cyprus, this overall assessment leads to the following conclusions.

(7) According to data notified by the Cypriot authorities in April 2010, the general government deficit in Cyprus reached 6,1 % of GDP in 2009, thus exceeding the 3 % of GDP reference value. The deficit was not close to the 3 % of GDP reference value, but the excess over the reference value can be qualified as exceptional within the meaning of the Treaty and the Stability and Growth Pact. In particular, it results from a severe economic downturn in the sense of the Treaty and the Stability and Growth Pact. According to the Commission services' 2010 spring forecast, real GDP in Cyprus is projected to shrink further, although to a lesser extent, by almost ½ % in 2010 compared with 1¾ % in 2009. However, the planned excess over the reference value cannot be considered temporary. According to the Commission services' spring 2010 forecast, the budgetary deficit would reach about 7¾ % of GDP in 2011 on a no-policy-change basis. The deficit criterion in the Treaty is not fulfilled.

[1] OJ L 209, 2.8.1997, p. 6.
[2] OJ L 145, 10.6.2009, p. 1.
[3] All EDP-related documents for Cyprus can be found at the following website: http://ec.europa.eu/economy_finance/sgp/deficit/countries/index_en.htm

(8) According to data notified by the Cypriot authorities in April 2010, the general government gross debt remains below the 60 % of GDP reference value and stood at 56,2 % of GDP in 2009. For 2010, Cyprus notified a planned debt of 62 % of GDP, thus exceeding the 60 % of GDP Treaty reference value. The Commission services' spring 2010 forecast projects debt to rise further to 62,3 % of GDP in 2010 and 67,6 % in 2011 on the back of a deteriorated primary balance. In view of these trends, the debt ratio cannot be considered as diminishing sufficiently and approaching the reference value at a satisfactory pace within the meaning of the Treaty and the Stability and Growth Pact. The debt criterion in the Treaty is not fulfilled.

(9) According to Article 2(4) of Regulation (EC) No 1467/97, 'relevant factors' can only be taken into account in the steps leading to the Council decision on the existence of an excessive deficit in accordance with Article 126(6) if the double condition — that the deficit remains close to the reference value and that its excess over the reference value is temporary — is fully met. In the case of Cyprus, this double condition is not met. Therefore, relevant factors are not taken into account in the steps leading to this Decision,

HAS ADOPTED THIS DECISION:

Article 1

From an overall assessment it follows that an excessive deficit exists in Cyprus.

Article 2

This Decision is addressed to the Republic of Cyprus.

Done at Brussels, 13 July 2010.

For the Council
The President
D. REYNDERS

COMMISSION DECISION

of 15 December 2009

on an aid measure which the Netherlands proposes to implement, granting ceramic producers exemption from an environmental tax C 5/09 (ex N 210/08)

(notified under document C(2009) 9972)

(Only the Dutch text is authentic)

(Text with EEA relevance)

(2010/402/EU)

THE EUROPEAN COMMISSION,

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

Having called on interested parties to submit their comments pursuant that provision [1], and having regard to their comments,

Whereas:

I. PROCEDURE

(1) By letter dated 24 April 2008, the Netherlands notified a plan to exempt ceramic products from the energy tax on natural gas. On 6 June 2008 the Commission requested further information; the Netherlands replied by letter dated 16 September 2008. A meeting between Commission staff and representatives of the Netherlands took place on 16 October 2008. On 17 November 2008 the Commission asked a number of further questions; the Netherlands replied by letter dated 19 December 2008.

(2) By letter dated 11 February 2009, the Commission informed the Netherlands that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union ('TFEU') in respect of the aid [2].

(3) On 25 April 2009 the Commission's decision to initiate the procedure was published in the *Official Journal of the European Union* [3]. The Commission asked interested parties to submit their comments on the measure.

(4) On 26 May 2009 the Netherlands submitted its observations on the decision to initiate the procedure.

(5) The Commission also received comments from other interested parties. It forwarded them to the Netherlands, giving it the opportunity to react; the Netherlands replied by letter dated 7 July 2009.

(6) On 7 October 2009 the Commission wrote to the Netherlands in order to clarify the procedural status of the case, and out of courtesy asked the Netherlands to submit by 13 October 2009 any observations that it wished the Commission to consider before its final decision.

(7) The Netherlands asked for more time, and by letter of 16 October 2009 the deadline was postponed until 1 November 2009. The Netherlands answered by letter of 30 October 2009.

II. DETAILED DESCRIPTION OF THE AID

(8) The Netherlands taxes the consumption of energy products under the Environmental Taxes Act [4], whereby a degressive rate applies based on the level of consumption of the business [5].

[1] OJ C 96, 25.4.2009, p. 16.

[2] From 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102 of the TFEU. The substance of the two articles has not changed. For the purposes of this Decision, references to Articles 101 and 102 TFEU should be understood as references to Articles 81 and 82 of the EC Treaty where appropriate.

[3] See footnote 1.

[4] The energy tax has been provided for in the Environmental Taxes Act *(Wet belastingen op milieugrondslag)* since 1 January 1996, and is levied on natural gas, electricity and mineral oils. The rates are set in terms of the amounts of energy used.

[5] The Netherlands has submitted the following rates for the energy tax on the natural gas consumed by a representative brick producer in the Netherlands (2009 data): 0–5 000 m^3: 0,1580 EUR/m^3; 5 000–170 000 m^3: 0,1385 EUR/m^3; 170 000–1 000 000 m^3: 0,0384 EUR/m^3; 1 000 000–10 000 000 m^3: 0,0122 EUR/m^3; > 10 000 000 m^3: 0,0080 EUR/m^3.

(9) Under the aid measure at issue here the Netherlands would grant an exemption from tax for the delivery of natural gas used in installations for the production of ceramic products. The proposed exemption would apply only to natural gas used for production purposes by the Dutch ceramic industry, and not to gas used for other mineralogical processes carried out in the Netherlands ([6]).

(10) The proposed exemption would be introduced by an amendment to the Environmental Taxes Act currently in force.

(11) According to the notification, the budget for the years 2008–2013 amounts to EUR 4 million annually.

(12) The duration of the measure is unlimited, as the Netherlands considers that it does not give rise to State aid (see further section IV below).

(13) The beneficiaries of the measure would be undertakings operating in the ceramic industry in the Netherlands ([7]).

(14) The Netherlands considers that the exemption is needed in order to restore a level playing field for the Dutch ceramic industry in the internal market. The Netherlands refers to the unique position of the Dutch ceramic sector compared with the position of competitors in the neighbouring countries. Owing to its geographical location, the Dutch ceramic industry makes use of wet clay, as opposed to the dry clay used in the surrounding countries, and wet clay requires more energy to achieve the same end result. Additionally, the Netherlands argues that competing producers in Belgium, Germany or Sweden, for example, are exempt from any similar energy tax.

([6]) 'Mineralogical processes' here means the processes which in accordance with Council Regulation (EEC) No 3037/90 of 9 October 1990 on the statistical classification of economic activities in the European Community (OJ L 293, 24.10.1990, p. 1) are classified under NACE nomenclature code DI 26, 'manufacture of other non-metallic mineral products'. Apart from the ceramic process, such processes include for instance the production of glass or cement.

([7]) The Netherlands reports that the ceramic industry in the Netherlands is composed mainly of large-scale, sometimes multinational, companies, with an estimated total turnover of approximately EUR 650–700 million and a labour force of around 3 000 (in 2008). There are more than 60 production locations in the Netherlands. Products include bricks, roof tiles, ceramic wall and floor tiles, sanitary products, decorative earthenware and porcelain, and fireproof bricks for applications in the steel and aluminium industry. Many production locations are situated in the regions bordering Germany and Belgium, and a large part of these belong to industrial groups with branch offices in other European countries.

(15) The Netherlands has confirmed that the measure will enter into force only once it has been authorised by the Commission.

III. THE OPENING DECISION

(16) The Commission doubted whether the proposed aid was compatible with the internal market, because it took the preliminary view that the tax exemption for the Dutch ceramic industry was not justified by the nature and overall structure of the national tax system. The measure was selective, since only the ceramic industry in the Netherlands would benefit from it, and the exemption would be financed through state resources. The measure also distorted or threatened to distort competition, and affected trade between Member States, as the proposed tax exemption would have a direct impact on production costs and would therefore improve the recipients' competitive position on the relevant ceramic product markets where they operated, which were open to trade between Member States. The Commission took the view that the measure would confer State aid on the Dutch ceramic industry, and concluded that such aid could be approved only if it satisfied the tests of Chapter 4 ('aid in the form of reductions of or exemptions from environmental taxes') of the Community guidelines on State aid for environmental protection ([8]) (hereinafter 'the environmental aid guidelines' or 'the guidelines'). As the Netherlands had not provided the information required for an assessment on this basis, the Commission was unable to confirm that the measure was compatible, and accordingly decided to initiate the formal investigation procedure.

IV. OBSERVATIONS SUBMITTED BY THE NETHERLANDS

(17) The Netherlands said that it was notifying the case primarily for the sake of legal certainty, and asked the Commission to find that no State aid was involved.

(18) The Netherlands took the view that the selective character of the exemption was justified by the nature and overall structure of the national tax system.

(19) The purpose of the energy tax was to tax electricity and energy products which were used as heating fuel or motor fuel. To include in the energy tax system an exemption for a process in which natural gas was not used as a heating or motor fuel, therefore, was in accordance with the nature and overall structure of the underlying frame of reference, namely the scheme of energy taxation in force. The energy tax legislation exempted the delivery of natural gas used for purposes other than as fuel ([9]). The delivery of electricity for

([8]) OJ C 82, 1.4.2008, p. 1.

([9]) Article 64(4) of the Environmental Taxes Act.

processes in which it had a dual use, such as for chemical reduction and in electrolytic and metallurgical processes, was likewise exempt from the energy tax ([10]). In the legislation on the taxation of coal, too, there was an exemption for coal used for purposes other than as fuel and for coal with a dual use ([11]). It was appropriate to add a tax exemption for the delivery of natural gas used in installations for the production of ceramic products. The ceramic process was comparable to a dual-use process, because natural gas was not being used solely as heating fuel or motor fuel. The Netherlands pointed out that the exemption from tax on the delivery of natural gas used in installations for the production of ceramic products was to be included in an amended version of Article 64 of the Environmental Taxes Act, which was the provision that exempted other forms of dual use.

(20) The Netherlands referred to Article 2(4)(b) of the Energy Taxation Directive, and to the Council minutes on that Directive ([12]), and submitted that it was in accordance with the nature and overall structure of the Dutch energy taxation system to add a provision granting exemption for the delivery of natural gas used for the mineralogical process concerned here, that is to say the production of ceramics.

(21) It was appropriate to exempt only ceramic processes, and not all mineralogical processes, because unlike other mineralogical processes the traditional ceramic process was irreversible (clay was changed into ceramic).

(22) The Netherlands further referred to the unique position of the Dutch ceramic industry compared with the position of competitors in the surrounding countries. Owing to its geographical location, the Dutch ceramic industry made use of wet clay (which originated in the Alps and was deposited in the rivers in the Netherlands), as opposed to the dry clay used in the surrounding countries, and wet clay required more energy to achieve the same end result ([13]).

(23) Additionally, competing producers in Belgium, Germany or Sweden, for example, were exempt from any similar energy tax. And prices for the use of natural gas in the Netherlands were high. Here too the Dutch ceramic industry was at a disadvantage compared to ceramic production in neighbouring countries.

(24) In the Netherlands' view these factors showed that the selectivity of the measure was justified on the basis of the nature and overall structure of the Dutch energy tax scheme. The Netherlands therefore considered that the tax exemption did not constitute State aid within the meaning of Article 107(1) TFEU.

(25) The proposed tax exemption would eliminate the disadvantage to the Dutch ceramic industry to some extent, thereby partially restoring a level playing field for the industry in the internal market.

(26) In the alternative, the Netherlands asked the Commission to authorise the aid on the basis of Article 107(3)(c) TFEU. The aid was necessary because of the unequal terms of competition in the internal market. It was proportionate, because the measure would apply only to natural gas used in the installations, and not to the electricity used in the production of ceramic products. It would offset only a part of the disadvantage to the industry, and consequently had to be considered proportionate. Finally, it would not lead to incompatible distortion of competition in the internal market.

(27) Besides, the Netherlands submitted that the Energy Taxation Directive did not apply to mineralogical processes, because it was in line with the nature and overall structure of the tax system to exclude mineralogical processes from the scope of the Directive. Member States were consequently free to decide whether or not to tax these forms of energy use. The proposed measure would not result in distortion of competition, but rather to greater harmonisation of the taxation of energy products, and would be in the Community interest.

V. OBSERVATIONS SUBMITTED BY INTERESTED PARTIES

(28) Observations on the Commission's decision to initiate the procedure were submitted by a trade organisation, the VKO *(Stichting Verenigde Keramische Organisaties)*. The VKO shared the view of the Netherlands that the tax exemption was justified by the nature and overall structure of the national tax system, and that the measure consequently did not comprise State aid. The

([10]) Article 64(3) of the Environmental Taxes Act.

([11]) Article 44(1) and (3) of the Environmental Taxes Act. Under Article 2(4)(b) of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity (OJ L 283, 31.10.2003, p. 51, 'the Energy Taxation Directive'), coal has a 'dual use' when it is used both as heating fuel and for purposes other than as motor fuel and heating fuel.

([12]) Council document 8084/03 ADD 1 Fisc 59, 3 April 2003.

([13]) An interested party, the VKO (see also section V below), stated that production in the Netherlands was based entirely on the processing of wet clay. Replacement of wet clay by dry clay from abroad was not a real option, even if the environmental effects of transporting the clay were to be ignored. The VKO confirmed that owing to the specific geographical location the production of ceramics needed more energy in the Netherlands than it did in surrounding countries.

VKO's comments were similar to those of the Netherlands. Like the Netherlands, the VKO considered that the tax exemption could not be regarded as an environmental measure, since it did not pursue any environmental objective. It would not be right, therefore, to judge the measure on the basis of the environmental aid guidelines.

VI. **ASSESSMENT**

EXISTENCE OF AID

(29) Article 107(1) TFEU states 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, insofar as it affects trade between Member States, be incompatible with the internal market.'

ADVANTAGE

(30) In the view of the Netherlands the measure does not confer any advantage, but instead offsets a disadvantage to the Dutch ceramic industry.

(31) The Commission is of the opinion that the tax exemption confers an advantage on undertakings operating in the ceramic industry in the Netherlands, which would benefit as a result of the tax relief because it would reduce the charges that would otherwise be included in their operating costs ([14]).

STATE RESOURCES AND IMPUTABILITY TO THE STATE

(32) The Netherlands considers that the measure would not be not financed through state resources, because the financing of the exemption is budget neutral ([15]). Thus no state resources would be involved. The VKO puts forward a similar argument.

(33) The Commission takes the view that the measure concerns a tax benefit that would be financed by the Dutch State, so that state resources are being forgone. Put differently, the proposed tax exemption results in a loss of tax revenue to the Dutch State. Even if the financing of the exemption were indeed to be offset indirectly by an increased rate of energy tax on natural gas in the highest tranche, that conclusion would remain unchanged. The Commission notes that the Netherlands has acknowledged that, compared with the current tax system, the measure gives rise to an advantage of an estimated EUR 4 million annually, without any quid pro quo on the part of the recipients ([16]). The proposed measure is imputable to the Netherlands, as it derives directly from an amendment to the national legislation in force.

SELECTIVITY

(34) Article 2(1) of the Energy Taxation Directive states that the Directive does not apply to the consumption of energy in mineralogical processes and certain other uses of energy products and electricity; it is left to the Member State, therefore, to decide whether or not to tax such processes and if so whether to tax them in their entirety or only in part. Irrespective of the Directive, however, Member States are in any event bound by the Community *acquis* in matters of State aid. This means that the selectivity of the measure at hand, and hence the existence of State aid, must be assessed by reference to the domestic energy tax system.

(35) There is recent case-law on the interpretation of selectivity. The *Gibraltar* judgment accepted a standard State aid analysis for tax cases ([17]). The Court said that there had to be an analysis consisting of: (i) a determination of the reference framework, (ii) a determination of the derogation from that reference framework, and (iii) a determination of whether the derogation was justified by the nature and general scheme of the system (that is to say whether the derogation derived directly from the basic or guiding principles of the tax system in the Member State concerned).

(36) The Netherlands has explained that the Dutch energy tax system — which is the reference framework — aims at the taxation of electricity and of energy products which are used as heating fuel or motor fuel. The Netherlands therefore considers that it is in line with the nature and overall structure of the Dutch energy tax system that certain kinds of use should be exempt from taxation, as already explained in recital 19. According to the Netherlands, the additional exemption now being introduced for ceramic process fits into this general scheme.

(37) The Netherlands further argues that the departure from the reference framework, i.e. the different tax treatment benefiting the ceramic industry, is justified by the objective distinction between the raw material that is used for the production of ceramics and material that is used in other mineralogical processes. Contrary to other mineralogical processes, the traditional ceramic process is irreversible.

([14]) See the decision on State aid measure N 820/06, 7 February 2007, section 4.

([15]) The explanatory memorandum to the parliamentary amendment providing for this tax exemption states that the exemption is to be financed by increasing the rate of energy tax on natural gas in the highest tranche by EUR 0,08.

([16]) Annex 1 to the notification.

([17]) Judgment of the Court of First Instance in Joined Cases T-211/04 and T-215/04 *Gibraltar*, 18 December 2008, not yet reported (an appeal has been brought against the judgment, but does not concern the steps in the standard State aid analysis followed above).

(38) This is not the first time that the Commission has assessed exemptions from energy taxes for mineralogical processes: it did so notably in its decision of 7 February 2007 in case N 820/06 regarding tax exemptions for certain energy-intensive processes in Germany. The Commission there decided that the measure did not comprise State aid. It looked in particular at the internal logic of the German energy taxation system, which was in line with the approach taken in the Energy Taxation Directive that fuel would be taxed only when it was used as heating or motor fuel. Germany consistently exempted all dual use and any workable mineralogical processes covered by the Directive, and thereby followed the same approach throughout its energy tax system. The Commission concluded that the tax exemption was in line with the nature and overall structure of the national energy taxation system.

(39) The tax exemption notified here applies only to the Dutch ceramic industry, and unlike the German measure does not cover all mineralogical processes; the Commission is not satisfied, therefore, that the proposed exemption derives directly from the basic or guiding principles of the Dutch energy taxation system. The Netherlands and the VKO argue that there is an objective distinction between the raw material that is used for the production of ceramics and the material used in other mineralogical processes ([18]), the ceramic processes being irreversible; but this reasoning does not in fact explain, in terms of the structure of the underlying domestic energy taxation system, why other mineralogical processes that also use natural gas in their production processes, such as the manufacture of glass, should not be eligible for exemption. In addition, as explained in recital 22 to the Energy Taxation Directive, energy products should be subject to a Community framework essentially when used as heating fuel or motor fuel. It was in this spirit that Article 2(4) of the Directive excluded mineralogical processes. In those processes fuel is considered to be used not as motor fuel or heating fuel, but to support the chemical process. The common element in the exclusion of all mineralogical processes from the scope of the Energy Taxation Directive, therefore, is that fuel is being used for the chemical process rather than as heating or motor fuel. A tax exemption for the processes concerned here ([19]) would be justified only if it applied to all mineralogical processes across the board, thus ensuring that all mineralogical processes were being treated consistently ([20]). As indicated, this would be in line with the Commission's reasoning in case N 820/06. That different mineralogical processes may use different raw materials, and that the ceramic process may be irreversible, are considerations which are irrelevant in this context.

(40) Moreover, from the parliamentary history of the Act it emerges that the objective of the intended measure is to improve the international competitive position of the ceramic industry in the Netherlands ([21]). The case-law of the Court of Justice makes it clear that the fact that a measure may bring charges in a particular sector more closely into line with those of competitors in other Member States does not alter the fact that it constitutes aid ([22]).

(41) The Commission therefore finds that the tax exemption is selective, in that it favours the production of certain goods and, de facto, certain undertakings, and cannot be justified on the basis of the overall structure of the domestic energy taxation system.

DISTORTION OF COMPETITION AND EFFECT ON TRADE

(42) The VKO has disputed the Commission's conclusion that because the proposed measure would cover a significant part of operating costs, and would thus allow recipients to charge a lower price for their ceramic products, it would distort competition or threaten to distort competition in the relevant ceramics markets. According to the VKO, the costs of the delivery and use of energy are a multiple of the cost of the energy tax.

(43) The Commission considers this argument irrelevant. According to the case-law of the Court of Justice, an improvement in the competitive position of an undertaking resulting from a State aid measure will usually indicate that there is a distortion of competition with other competing undertakings not receiving such assistance ([23]). Moreover, a measure is caught by Article 107(1) TFEU once it 'threatens to distort competition'. The tax exemption at issue has the potential to distort competition in the ceramics markets given that it leads to a decrease in the recipients' operating costs. Furthermore, the objective of the proposed measure is in fact to improve the international competitive position of the ceramic industry in the Netherlands. The Netherlands has stated that the tax exemption would, at least to some degree, restore a level playing field for the industry in the internal market. Logically it must be concluded, even without detailed data to substantiate the competitive effect of the measure in the ceramic sector, that the measure has the potential to distort competition in the relevant ceramics markets.

([18]) The Netherlands lists glass, mortar, concrete, plaster and sand lime.
([19]) In the notification the Netherlands classifies these under NACE code DI 26, 'manufacture of other non-metallic mineral products'.
([20]) In the German case N 820/06 this consistency was reinforced by the fact that Germany explicitly undertook to treat any further dual use or mineralogical processes that came to its notice equally, thereby ensuring that all mineralogical processes would be treated consistently.
([21]) Amendment put forward by Jules Kortenhorst, Member of the Lower House, and others, dated 21 November 2007, *Tweede Kamer, vergaderjaar 2007-2008, 31 205, nr.35*.
([22]) Case C-173/73 *Commission* v *Italy* [1974] ECR 709.
([23]) Case C-730/79 *Philip Morris Holland* v *Commission* [1980] 2671, paragraphs 11 and 12.

(44) The Netherlands has explained that the brick industry in the Netherlands, which accounts for 85–90 % of natural gas and energy consumption in the Dutch ceramic industry, employs approximately 1 500 people. In 2008 this subsector had a turnover of around EUR 370 million. The Dutch brick industry exports around 20 % of its annual output, whereas the level of imports equals 8 % of annual Dutch production. Because of the weight of bricks, the relevant market is defined as extending about 250 km from the brickworks where they are produced. Therefore the relevant competing markets for this subsector are the United Kingdom, Germany and Belgium.

(45) In the letter of 26 May 2009 the Netherlands asked the Commission to quantify and substantiate its conclusion that the proposed measure distorted competition or threatened to distort competition in the relevant markets in the ceramic sector with reference to data from the Dutch Central Statistics Office *(Centraal Bureau voor de Statistiek)* which the Netherlands had submitted to the Commission in the preliminary investigation phase, and in particular the import and export figures for bricks which are shown in Tables 1 and 2.

Table 1

Exports of Dutch bricks to Germany and Belgium

Year	Percentage	Share in EUR
2007	59 % of a total of EUR 255 million	150 million
2006	64 % of a total of EUR 234 million	150 million
2005	68 % of a total of EUR 213 million	145 million
2004	74 % of a total of EUR 242 million	180 million
2003	82 % of a total of EUR 234 million	191 million
2002	80 % of a total of EUR 183 million	146 million
2001	95 % of a total of EUR 189 million	180 million

(46) The figures in Table 1, according to the Netherlands, have to be read in the light of the following circumstances. At the beginning of the present century there was severe stagnation in the markets for the construction of housing in Germany and the Netherlands (in 2000/2001 the German brick industry experienced a loss of almost 20 % of turnover and sales). Afterwards, the situation on the Dutch and German housing market improved, with peaks in 2006 and 2007. According to the Netherlands, data from the German Tiles Federation *(Ziegelverband)* show that the German industry recovered from 2004/2005 onwards. Nevertheless, the Netherlands observes that the figures from the Dutch Central Statistics Office that have been submitted show that since then the export of Dutch bricks to Germany has lagged behind. In short, at the beginning of the century both the German and the Dutch industry made heavy losses on the German market, but the German brick sector has gained as a result of the recovery of the housing market in Germany, and the Dutch brick producers have not. According to the Netherlands, this is confirmed by the figures for imports from Germany shown in Table 2.

Table 2

Imports from Germany into the Netherlands

Year	Percentage	Share in EUR
2007	42 % of a total of EUR 91 million	36 million
2006	25 % of a total of EUR 101 million	25 million
2005	22 % of a total of EUR 82 million	18 million
2004	17 % of a total of EUR 121 million	21 million
2003	16 % of a total of EUR 110 million	18 million
2002	18 % of a total of EUR 107 million	20 million
2001	11 % of a total of EUR 124 million	14 million
2000	12 % of a total of EUR 155 million	19 million

(47) The Netherlands points out that the figures in Table 2 show strong growth in imports of German brick into the Netherlands from 2006/2007 onward. The figures submitted by the Netherlands for the first quarter of 2008 show that this trend continued. According to the Netherlands, the German ceramic industry has enjoyed exemption from energy tax since August 2006, an exemption that entered into force on 1 January 2004.

Table 3

Exports from the Netherlands to Member States other than Belgium and Germany (mainly the UK and Ireland)

Year	Percentage	Share in EUR
2007	40 % of a total of EUR 255 million	102 million
2006	37 % of a total of EUR 234 million	86 million
2005	32 % of a total of EUR 213 million	68 million
2004	17 % of a total of EUR 242 million	41 million
2003	10 % of a total of EUR 234 million	23 million
2002	18 % of a total of EUR 183 million	32 million
2001	12 % of a total of EUR 189 million	23 million

(48) On these figures the Netherlands has commented that an important factor helping to explain the increased exports to these countries is the very advantageous exchange rate between sterling and the euro. This factor, they argue, compensates for the high transport costs.

(49) The Commission accepts that the information shows that Germany and Belgium declined in importance as export destinations for Dutch bricks over the years 1998–2007, that imports of German bricks into the Netherlands increased in the years 2000–2007, and that exports to countries other than Germany and Belgium (mainly the UK and Ireland) increased in the period 2001–2007. As regards the figures presented for other countries, in particular the United Kingdom and Ireland, the increase in exports is due mainly to the favourable exchange rate.

(50) These figures are informative regarding trade flows in the brick segment between the Netherlands and its surrounding countries Germany, Belgium and the United Kingdom, but they do not allow the conclusion to be drawn that the tax measure is incapable of distorting competition in the relevant markets in the ceramic industry. For a measure to fall within the scope of Article 107(1) TFEU, as has been said, it is enough that there should be the potential for such distortion.

(51) The measure will probably affect trade between Member States, because ceramic products are bought and sold internationally, as can be seen from the statistical information provided by the Netherlands which is set out in Tables 1, 2 and 3.

CONCLUSION

(52) In light of the foregoing the Commission is of the opinion that the notified measure constitutes State aid which is caught by Article 107(1) TFEU.

LAWFULNESS OF THE AID

(53) The Netherlands has complied with the obligation imposed by Article 108(3) TFEU by notifying the aid measure before implementing it.

COMPATIBILITY OF THE AID

INTRODUCTION

(54) The Commission takes the view that the proposed exemption should be assessed in the light of the environmental aid guidelines. The kind of environmental tax exemption which is the subject of this notification is addressed expressly in Chapter 4 of the environmental aid guidelines, 'Aid in the form of reductions or of exemptions from environmental taxes'. For the assessment of the tax exemption at issue, Chapter 4 of the environmental aid guidelines must be considered exhaustive. Consequently, the measure cannot be assessed on the basis of Article 107(3)(c) TFEU, as the Netherlands has argued.

(55) The Netherlands agrees with the Commission that the proposed measure must be regarded as an 'exemption from an environmental tax' within the meaning of the environmental aid guidelines ([24]). However, the Netherlands does not consider this sufficient to bring the measure within the scope of the guidelines. In the view of the Netherlands, the measure does not meet the requirement in point 151 of the guidelines, which speaks of a measure that 'contributes at least indirectly to an improvement of the level of environmental protection', because the proposed exemption does not have this objective.

(56) This reasoning cannot be accepted. Both the title of Chapter 4 of the environmental aid guidelines ('Aid in the form of reductions of or exemptions from environmental taxes') and the first part of point 151 — which is identical — make it clear that this chapter does apply to the proposed aid. The chapter contains detailed provisions explaining the circumstances under which exemptions from environmental taxes are considered to be compatible with the internal market. Point 151 of the guidelines sets out a general condition for the compatibility of exemptions from environmental taxes under Chapter 4. It states that aid can be declared compatible only if it 'contributes at least indirectly to an improvement of the level of environmental protection'.

(57) To clarify the rationale of point 151 of the environmental aid guidelines, the Commission would observe that a proposed exemption from an environmental tax may make it feasible to set or maintain higher rates of domestic environmental taxation for other undertakings, so that it may have a positive environmental effect, at least indirectly ([25]). The Commission does not understand any of the arguments put forward by the Netherlands or the VKO to show that the proposed exemption would contribute to the continued application of the Dutch environmental tax at issue. The Netherlands does submit that the rate of tax in the highest band would be increased at the same time as the exemption entered into force, but it does so in order to argue that the proposed exemption would not lead to a loss of state resources, and does not appear to allege even that the proposed exemption is needed in order to make such an increase feasible. Thus it has not been shown that point 151 of the environmental aid guidelines is satisfied.

([24]) As confirmed in the letter of 19 December 2008.

([25]) In this context see also point 57 of the environmental aid guidelines, which states that 'this type of aid may be necessary to target negative externalities indirectly by facilitating the introduction or maintenance of relatively high national environmental taxation'.

(58) The Commission sought information from the Netherlands in order to enable it to assess the compatibility of the aid on the basis of the criteria laid down in Chapter 4 of the environmental aid guidelines, with special reference to the necessity and proportionality of the aid and its effects on the ceramic sector, as required by points 155–159 of the guidelines ([26]).

(59) Regarding the necessity of the aid, the Commission asked a number of specific questions in order to be able to assess whether any substantial increase in the production costs of the Dutch ceramic industry (due to the environmental tax) could be passed on to customers without resulting in a substantial loss of sales. Information was also requested on the following points in particular: the sales figures of the ceramic industry in the relevant markets over the last 10 years; the rate of the energy tax and the total amount of tax paid; total energy costs per undertaking over the last 10 years; estimates of the elasticity of the prices of the industry's products in the relevant markets; estimates of lost sales or reduced profits or both; information on the development of trade flows in the Dutch ceramic industry in and out of the Netherlands to and from the relevant geographic markets; the market shares of the recipients in the relevant geographic markets; and any other factor which might play a role in the assessment of the scope for passing on costs. The Commission also put questions to the Netherlands regarding the proportionality of the aid, with reference to point 159 in the environmental aid guidelines.

ASSESSMENT

Preliminary remarks

(60) In response to the Commission's letter of 7 October 2009, the Netherlands provided information with regard to a hypothetical average brick producer in the Netherlands ([27]). The Netherlands said it was not possible to answer the Commission's questions for all subsectors of the Dutch ceramic industry, because in some subsectors, such as tiles, ceramic pipes, and sanitary ceramic products, there was only one Dutch supplier. A representative situation could be described for brick producers, as there were currently 13 of them in the Netherlands, with around 40 production locations. In other cases, such as decorative earthenware, the Netherlands considered that it was not possible to gain sufficient insight into the relevant subsector within the tight deadline.

(61) The Commission would point out that in the opening decision of 11 February 2009 it stated that it had already requested this additional information — including the information on the various segments of the ceramic industry as identified by the Netherlands — during the preliminary investigation phase, but that the information had not been forthcoming.

(62) The Commission does not consider that information on one hypothetical average brick manufacturer is sufficient for an assessment of the compatibility of the proposed tax exemption with regard to the ceramic industry in the Netherlands as a whole, because one particular average producer cannot be considered representative of the whole industry. As emphasised by the Netherlands itself in relation to the import and export data submitted to the Commission, the relevant information relates only to the brick segment and cannot automatically be used as a model for trends in other ceramic segments, because each ceramic segment has specific product/market combinations in which other economic factors play a role. In its statement of 24 May 2009 the VKO came to a similar conclusion ([28]). The argument that no information can be provided on subsectors where only one recipient is operating is not convincing. Quite the reverse, it might have been easier to obtain information on an individual firm (as recently shown in a Danish case ([29]).

(63) In addition, part of the information sought was not provided. For instance, as indicated in recital 59, the Commission asked for information regarding the necessity and proportionality of the aid. As regards the necessity of the aid, the Commission requested estimates of the elasticity of the prices of the industry's products in the relevant markets, estimates of lost sales or reduced profits or both, the market shares of the recipients in the relevant geographic markets, and the development of the Dutch manufacturers' shares of those markets. The Commission's letter of 9 October 2009 gave the Netherlands an extra opportunity to provide the missing information, but it was never supplied.

(64) On the basis of the information available, the following analysis can be made of the brick segment.

([26]) These questions were put in the second request for information addressed to the Netherlands on 17 November 2008 (D/54544).

([27]) The Netherlands stated that it considered this information to be applicable to the other distinct segments of the ceramic industry; it said that the method had been used in other contexts, such as European legislation (e.g. for E-PRTR, the European Pollutant Release and Transfer Register) and national management studies (e.g. for NL-BAT best available techniques). For purposes of a competitive analysis, however, the Commission does not consider that information for one average undertaking in the brick segment can be regarded as being representative of the whole ceramic industry.

([28]) The environmental aid guidelines do not expressly say whether the assessment is to be made at the level of the industry or of the subsector. Here, however, the Netherlands itself has indicated that the different subsectors face different competitive conditions. For purposes of this case, therefore, an assessment had to be made at subsector level.

([29]) State aid case N 327/08, 29 October 2009, not yet published.

Necessity of the aid

(65) Point 155 of the environmental aid guidelines states that when analysing tax schemes which include elements of State aid in the form of reductions of or exemptions from an environmental tax, the Commission will analyse in particular the necessity and proportionality of the aid and its effects at the level of the economic sectors concerned.

(66) Point 158 of the environmental aid guidelines states that the Commission will consider the aid to be necessary if the following three conditions are all met. First, the choice of beneficiaries must be based on objective and transparent criteria, and the aid must be granted in principle in the same way for all competitors in the same sector if they are in a similar factual situation (point 158(a) of the guidelines). Second, the tax without reduction must lead to a substantial increase in production costs (point 158(b)). Third, there must be an assurance that the substantial increase in production costs cannot be passed on to customers without leading to important sales reductions (point 158(c)). In this respect, the Member State may provide estimates, inter alia of the product price elasticity of the sector concerned in the relevant geographic market and of lost sales or reduced profits for the companies in the sector or category concerned.

Point 158(a) of the environmental aid guidelines

(67) The Netherlands has argued that the exemption is directed at the ceramic process: all producers of ceramic products, and all competitors in the ceramic sector (or in the same relevant market when they are in a similar factual situation), are eligible for the exemption provided they satisfy the following tests:

— there must be supply of natural gas,

— the natural gas must be used in installations for the manufacture of products by heating,

— the products must consist of at least 90 % clay.

(68) These tests are set out in the draft legislation ([30]). It appears, therefore, that the criteria determining the choice of recipients are both objective and transparent.

Point 158(b) of the environmental aid guidelines

(69) The requirement that in the absence of the reduction the tax would lead to a substantial increase in production costs will be regarded as fulfilled, as explained in footnote 55 to the guidelines, if the recipient is an 'energy-intensive business' as defined in Article 17(1)(a) of the Energy Taxation Directive, i.e. one where either the purchases of energy products and electricity amount to at least 3,0 % of the production value ([31]) or the national energy tax payable amounts to at least 0,5 % of the added value.

(70) The Netherlands has submitted that brick producers belong to the group of energy-intensive users, because their energy costs amount to 20–30 % of their total production costs. The Netherlands has not specified how the total production costs stand in proportion to the production value; but it can be assumed that in normal business circumstances, i.e. when goods are sold at a price above production costs, the production costs will be lower than the production value, because production value is linked to turnover and thus to the price of the product sold. Assuming that the business circumstances are normal, therefore, the share of energy costs in the production value will be lower than the share of energy costs in the production costs submitted by the Netherlands. And the production value will not be so far above production costs, it can also be assumed, as to drive the share of energy costs from 20–30 % when the denominator is production costs to below 3 % when the denominator is production value. The Commission consequently accepts that the undertakings in the Dutch ceramic industry are 'energy-intensive businesses' as defined in the aforementioned Directive, so that the requirement of a substantial cost increase in point 158(b) is fulfilled. The Commission is thus basing its assessment on the legal presumption in footnote 55 to the environmental aid guidelines.

Point 158(b) of the environmental aid guidelines

(71) Turning to the criterion in point 158(c) of the environmental aid guidelines, detailed questions were asked in order to assess whether a substantial increase in production costs could be passed on to customers without resulting in a significant loss of sales. In particular, the Netherlands was asked to provide information on the sales figures of the ceramic industry in the relevant markets over the last 10 years; the rate of the energy tax and the total amount of tax paid; total energy costs per undertaking over the last 10 years; estimates of the elasticity of the prices of the industry's products in the relevant markets; estimates of lost sales or reduced profits or both; information on the development of trade flows in the Dutch ceramic industry in and out of the Netherlands to and from the relevant

([30]) The draft legislation (the provision is to be included in Article 64 of the Environmental Taxes Act) refers to ceramic products that consist exclusively or almost exclusively of clay.

([31]) Article 17(1)(a) of the Energy Taxation Directive states that '"Production value" shall mean turnover, including subsidies directly linked to the price of the product, plus or minus the changes in stocks of finished products, work in progress and goods and services purchased for resale, minus the purchases of goods and services for resale.'

geographic markets; the market shares of the recipients in the relevant geographic markets; and any other factor which might play a role in the assessment of the scope for passing on costs (see recitals 59 and 63).

(72) The Netherlands has confirmed that in principle the relevant costs can be passed on, but says that it is becoming more and more difficult to do so. In recent years producers that have not been able to pass on their costs have closed or been declared insolvent. However, the Netherlands has not provided any evidence in order to demonstrate a causal link between the cost of the tax and the fact that these firms have gone out of business. The Commission observes that it is for the Member State to provide the necessary information in support of its claims.

(73) The Netherlands has also indicated that the price elasticity of demand for bricks is low, but has not substantiated this by reference to actual data.

(74) The Netherlands has explained that competition in the brick sector is steadily increasing, owing to imports of similar bricks produced by competitors in other Member States, and that the market share of the Dutch-made brick is in decline. In an annex to the letter of 30 October 2009 the Netherlands submitted import and export data showing that imports from Germany into the Netherlands had increased over recent years and that exports from the Netherlands to Germany and Belgium had decreased ([32]). The main reason, according to the Netherlands, is that the foreign producers of bricks enjoy exemption from energy tax, whereas Dutch producers do not.

(75) As a matter of principle, however, State aid, including exemption from an environmental tax, cannot be justified solely by the existence of comparable measures in other Member States. To accept such a justification would be to accept that the existence of state measures in one Member State allows other Member States to take compensatory measures in order to mitigate the detrimental effect on their own industry. From a State aid perspective, retaliation of this kind cannot be accepted. The true remedy to the harm caused by State aid is not a subsidy race but the enforcement of the State aid rules, including the environmental aid guidelines. Thus, the notified measure cannot in any way be justified solely as a legitimate remedy to aid that is suspected to exist elsewhere: if it is to be approved, it must be shown that there is a substantial increase in costs, and that the costs cannot be passed on to customers.

([32]) The same data were supplied with the letter dated 16 September 2008.

(76) Despite the limitations imposed by transport costs, which reduce the geographical market for bricks to 250 km, from the information submitted the Commission can conclude that the brick industry is exposed to trade between Member States. The Netherlands has submitted that 20 % of the bricks produced annually are exported. From the data provided the Commission has been able to calculate an approximate value for trade intensity ([33]), which amounts to 75 %. Owing to a lack of consistent data, however, this figure for trade intensity had to be calculated on the basis of 2007 data for trade flows and 2008 data for turnover. These circumstances might suggest that the industry is experiencing difficulty in passing on the tax burden imposed by the Netherlands. However, the allegation that it is difficult to pass on the cost increase is contradicted by the Netherlands' statement that the tax has been passed on so far, and by the fact that over the period for which the data are submitted exports by the Dutch brick sector increased, from EUR 189 million in 2001 to EUR 225 million in 2007. Owing to the lack of further information and data, no more conclusive analysis is possible.

(77) Additionally, and in spite of the Commission's express request that the recipients' market shares in the relevant geographic markets should also be provided, no multi-annual market data has been submitted in support of the Netherlands' statement that the market share of the Dutch-made brick is in decline.

(78) The following information was also requested for purposes of an assessment of the possibility of passing on costs, but was not supplied: sales figures for ceramics, in volume and value per year, for an average undertaking in each relevant market over the last 10 years (it was indeed submitted that the brick segment had an annual turnover of EUR 370 million in the Netherlands, but no information on volume was given; on the basis of historical information it was also estimated that the decorative earthenware segment had an annual turnover of EUR 7–10 million); the total figure paid per year in energy tax by an undertaking in the relevant market over the last 10 years (the Netherlands provided data only for an average brick company in 2009); energy costs for an undertaking in the relevant market over the last 10 years (the Netherlands provided data only for an average brick undertaking in 2009); estimates of price elasticity for products in the relevant product and geographic markets; estimates of decreasing turnover or profit, or both, for undertakings in these markets; and the development of the market shares of Dutch producers in the relevant geographic markets. The Commission also asked for data on changing trade flows in the Dutch ceramic industry, i.e. imports into the Netherlands from the relevant geographic markets and exports from the Netherlands to these markets, but no multiannual information was submitted with regard to the total imports and exports of the ceramic industry (nor on changes in the total turnover of the industry over

([33]) 'Trade intensity' means the total value of exports and imports divided by the total value of turnover and imports in the respective market.

changes in the total turnover of the industry over the years). Hence, it is not possible to draw any meaningful conclusion with regard to the level of trade intensity in the ceramic industry, and for the brick industry there is only the approximate value referred to in recital 76.

(79) For the other segments identified by the Netherlands, notably roof tiles, sewage pipes, sanitary products, ceramic wall and floor tiles, fireproof material and porcelain and decorative earthenware, the Netherlands refers to the information provided for an average undertaking in the brick segment. Moreover, only very limited information was provided on the separate segments. In the letter of 16 September 2008 the Netherlands stated the size of the relevant geographic market for each segment and the share of national output imported or exported, in percentage points, specifying the various different export destinations ([34]). However, the detailed information per segment that the Commission had requested, outlined in paragraph 78, has not been provided.

([34]) With the letter of 16 September 2008 the Netherlands provided the following specific information on the ceramic industry subsectors identified; it is unclear to what year the data relates: from the general description of the ceramic industry it might be inferred that the data per segment likewise relates to 2008. Bricks: The segment has a turnover of around EUR […] (*) and employs about […] persons. The Dutch brick industry exports around […] % of its annual output. Imports amount to around […] % of annual Dutch output. Owing to the weight of bricks, the geographic market is bounded by a circle of […] km around the business producing them, and thus includes […], […] and […]. Ceramic roof tiles: No turnover figure was provided. This segment employs around […] persons. It exports around […] % of its annual output, mainly to directly surrounding countries. Imports amount to […] %, and come from the same neighbouring countries. Owing to the weight of the products, the geographic market is bounded by a circle of […] km around the business producing them, and thus includes […] and […]. Ceramic sewage pipes: There is one producer, which has two production locations. Owing to the weight of the products, the geographic market is bounded by a circle of […] km around the business producing them, although it was stated that the company concerned exports throughout Europe. Sanitary products: No turnover figure was provided; the segment employs about […] persons. Around […] % of annual Dutch output is exported, whereas around […] % is imported. The relevant geographic market is bounded by a circle […] km around the business producing the products. The producer is part of a European group. Fireproof materials: This segment is almost exclusively internationally oriented. It employs around […] persons. It exports around […] % of its annual output, and imports about […] %. Ceramic tiles: The segment employs around […] persons, and exports […] % of its annual output. Imports equal […] % of annual output. The biggest important importing countries in the EU are […], […] and […]. The biggest importing countries outside the EU are […] and […]. Decorative earthenware: This segment has four production locations and employs around […] persons. It exports […] % of its annual output, and imports are equal to about […] % of Dutch annual output. On the basis of historical data, the turnover of this segment is estimated at around EUR […] million (broadly […] % of the estimated total turnover of the ceramic industry in the Netherlands).

(*) Confidential information.

(80) On the basis of the information available, the Commission is not able to make a finding that an increase in the production costs of Dutch ceramic producers cannot be passed on to customers without leading to important sales reductions. It must therefore be concluded that the Netherlands has not shown that the criterion laid down in point 58(c) of the environmental aid guidelines is fulfilled.

CONCLUSION REGARDING THE NECESSITY OF THE PROPOSED AID

(81) The Commission therefore considers that the information provided does not show that the proposed aid to the Dutch ceramic industry is necessary. For this reason alone it must be concluded that the aid measure is incompatible with the internal market.

Proportionality of the aid

(82) Turning to the question of proportionality, point 159 of the environmental aid guidelines states that every beneficiary must satisfy one of the following tests:

(a) The beneficiary pays a proportion of the national tax level which is broadly equivalent to the environmental performance of each individual beneficiary compared to the performance related to the best performing technique within the EEA. The beneficiary can benefit, at most, from a reduction corresponding to the increase in production costs from the tax, using the best performing technique, and which cannot be passed on to customers.

(b) The beneficiary pays at least 20 % of the national tax, unless a lower rate can be justified.

(c) The beneficiary can enter into agreements with the Member State whereby it commits itself to achieve environmental protection objectives which have the same effect as if point (a) or (b) or the Community minimum tax level were applied.

(83) The Netherlands has confirmed that the test in point (a) is not satisfied. The Netherlands has not discussed the test in point (c). As regards the test in point (b), i.e. that the beneficiary should pay at least 20 % of the national tax unless a lower rate can be justified, the Netherlands has submitted that all the beneficiaries together do not pay at least 20 % of the national (energy) tax (the revenue stemming from e.g. the electricity tax that companies do still pay). According to the Netherlands, the size of the sector means that the proportion in fact paid is much less. The Netherlands has reiterated in this context that the application of the exemption for ceramic products from the energy tax on natural gas removes a distortion of competition, as it creates a level playing field for all ceramic works in the internal market.

(84) Point (b) refers to the national energy tax rate, and not to a 20 % proportion of the total amount of tax borne by the taxpayers in respect of different energy products. The notified measure involves a complete exemption from the national tax rate on natural gas, which means that the percentage threshold set out in point 159(b) of the environmental aid guidelines is not met. Furthermore, the Netherlands has not demonstrated that there is only a 'limited distortion of competition', which might justify a lower rate: this is simply because the market data requested on the competitive position of the industry have not been provided. From the information that has been provided, therefore, it cannot be concluded that this criterion is fulfilled.

CONCLUSION REGARDING THE PROPORTIONALITY OF THE PROPOSED AID

(85) The Commission therefore considers that the information provided does not show that the proposed aid to the Dutch ceramic industry is proportional.

VII. **CONCLUSION**

(86) The Commission finds that the proposed tax exemption, which constitutes operating aid, is not eligible for any of the exemptions from the general prohibition of State aid in the TFEU, and is therefore incompatible with the internal market. Consequently, the aid measure may not be put into effect,

HAS ADOPTED THIS DECISION:

Article 1

The State aid in the form of an exemption from the energy tax on natural gas which the Netherlands is planning to grant to the Dutch ceramic industry is incompatible with the internal market.

Consequently, the aid measure may not be put into effect.

Article 2

Within two months of notification of this Decision, the Netherlands shall inform the Commission of the measures it has taken to comply with it.

Article 3

This Decision is addressed to the Kingdom of the Netherlands.

Done at Brussels, 15 December 2009.

For the Commission

Neelie KROES

Member of the Commission

COMMISSION DECISION

of 14 July 2010

exempting the production and wholesale of electricity in Italy's Macro-zone North and the retail of electricity to end customers connected to the medium, high and very high voltage grid in Italy, from the application of Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors

(notified under document C(2010) 4740)

(Only the Italian text is authentic)

(Text with EEA relevance)

(2010/403/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors [1], and in particular Article 30(5) and (6) thereof,

Having regard to the request submitted by the Compagnia Valdostana delle Acque SpA — Compagnie valdôtaine des eaux SpA (hereinafter 'CVA') by e-mail of 15 February 2010,

After consulting the Advisory Committee for Public Contracts,

Whereas:

I. FACTS

(1) On 15 February 2010, CVA transmitted a request pursuant to Article 30(5) of Directive 2004/17/EC to the Commission by e-mail. The Commission requested additional information of the Italian Authorities by e-mail of 15 April 2010, and of CVA by e-mail of 15 April 2010. Additional information was transmitted by the Italian authorities by e-mail of 10 May 2010 and of 20 May 2010 and, following a prolongation of the initial deadline, by CVA on 7 May 2010.

(2) The request submitted by CVA, a public undertaking within the meaning of Directive 2004/17/EC, concerns the following activities, as described in the request:

(a) production and wholesale of electricity, in the entire territory of the Italian Republic;

(b) in the alternative, the production and wholesale of electricity in the territory of the Northern Geographical Zone (hereinafter 'Macro-zone North' [2]); and

(c) retail sale of electricity to the final customers on the free electricity market in the entire territory of the Italian Republic.

II. LEGAL FRAMEWORK

(3) Article 30 of Directive 2004/17/EC provides that contracts intended to enable the performance of one of the activities to which the Directive applies shall not be subject to the Directive if, in the Member State in which it is carried out, the activity is directly exposed to competition on markets to which access is not restricted. Direct exposure to competition is assessed on the basis of objective criteria, taking account of the specific characteristics of the sector concerned. Access is deemed to be unrestricted if the Member State has implemented and applied the relevant Community legislation opening a given sector or a part of it. This legislation is listed in Annex XI of Directive 2004/17/EC, which, for the electricity sector, refers to Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity [3]. Directive 96/92/EC has been superseded by Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC [4].

[1] OJ L 134, 30.4.2004, p. 1.

[2] This includes the Zone Nord as well as four smaller zones (Ene, Enw, Turbigo and Monfalcone), as referred to in Annex B to Commission Communication of 10 January 2007 'Inquiry pursuant to Article 17 of Regulation (EC) No 1/2003 into the European gas and electricity sectors (Final Report)' (COM(2006) 851 final, 'Final Report').

[3] OJ L 27, 30.1.1997, p. 20.

[4] OJ L 176, 15.7.2003, p. 37. It is to be noted that Directive 2003/54/EC has been replaced by Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (OJ L 211, 14.8.2009, p. 55), which requires an even higher degree of market opening than the previous two directives. However, as the deadline for its implementation has not yet expired, reference will continue to be made to the legal framework introduced by Directive 2003/54/EC.

(4) Italy has implemented and applied not only Directive 96/92/EC but also Directive 2003/54/EC, opting for legal and functional unbundling for transmission and distribution networks except for the smallest companies, which are exempted from the requirements of functional unbundling. Consequently, and in accordance with the first subparagraph of Article 30(3), access to the market should be deemed not to be restricted on the entire territory of the Italian Republic.

(5) Direct exposure to competition should be evaluated on the basis of various indicators, none of which are, per se, decisive. In respect of the markets concerned by this decision, the market share of the main players on a given market constitutes one criterion which should be taken into account. Another criterion is the degree of concentration on those markets. Given the characteristics of the markets concerned, further criteria should also be taken into account such as the functioning of the balancing market, price competition and the degree of customer switching.

(6) This Decision is without prejudice to the application of the rules on competition.

III. **ASSESSMENT**

(7) Based on Commission precedents [1], the following relevant product markets could be distinguished in the electricity sector: (i) generation and wholesale supply; (ii) transmission; (iii) distribution and (iv) retail supply. Consequently, CVA's request should be analysed independently in respect of production and wholesale supply on the one hand and retail on the other.

Production and wholesale supply of electricity

(8) As recalled in recital 2 above, the request submitted by CVA concerns production and wholesale of electricity, in the entire territory of the Italian Republic, or alternatively in the Macro-zone North.

(9) According to the available information [2], the national territory of Italy should, due to congestions on links between different zones whose prices are almost perfectly correlated, be considered to be constituted by four regional geographical markets as far as the production and wholesale supply of electricity is concerned: Macro-zone North, Macro-zone Centre South [3], Macro-zone Sicily [4] and Sardinia. The Italian Authorities have confirmed that the delimitation of Macro-zone North remains valid as a relevant market; adding, however, that changes are ongoing so that the delimitation between the remainder of the macro-zones is not clear for the time being, pending extensive inquiries, a definitive evaluation of the state of competition on these geographical markets is therefore currently not possible. On the basis of the above, and considering also that, incidentally, the power plants of CVA are all located in the Macro-zone North, the present Decision will, for the purposes of evaluating the conditions laid down in Article 30(1) of Directive 2004/17/EC, limit itself to an examination of the competitive situation existing within the territory of Macro-zone North in respect of production and wholesale supply of electricity. Although Macro-zone North forms a relevant market on its own, it can, however, not be seen as being completely isolated from the surrounding countries and the other regions.

(10) As it results from a constant practice [5] in respect of Commission Decisions pursuant to Article 30, the Commission considered that, in respect of electricity generation, 'one indicator for the degree of competition on national markets is the total market share of the biggest three producers'. According to the Italian Authorities, for 2009, the share of the three largest generators in Macro-zone North is indicated as 49,7 %. This level of concentration, encompassing the total market share of the largest three generators, is lower than the level (52,2 %) referred to in Decision 2008/585/EC in respect of Austria, as well as being lower than the level (58 % of gross production) referred to in Decision 2008/741/EC in the case of Poland, and much lower than the respective levels referred to in Decisions 2006/422/EC and 2007/706/EC concerning, respectively Finland (73,6 %) and Sweden (86,7 %). It is however noted that the level is higher than the corresponding percentage, 39, to which Decisions 2006/211/EC and 2007/141/EC refer to for the UK. Nevertheless this level is considered satisfactorily low, and therefore could be taken as an indication of a certain degree of direct exposure to competition as regards production and wholesale supply of electricity in the Macro-zone North.

(11) Moreover, Italy has also substantial imports of electricity, in 2008 of the order of more than 42 997 GWh. Italy is a net importer and imported electricity accounting for approximately 13,43 % of its total needs [6]. As confirmed by the Italian Authorities [7], the imports have a pro-competitive effect, notably in the Macro-zone North. Although this effect is conditioned by the

[1] MERGER COMP M - 4110 E.ON – Endesa, p. 3.
[2] See Final Report, Annex B, point A1, 2.
[3] This includes the Zones Centro Nord, Piombino, Centro Sud, Sud, Rossano, Brindisi and Calabria.
[4] This includes the zones Sicilia, Priolo and Calabria.
[5] See Commission Decisions 2009/47/EC (OJ L 19, 23.1.2009, p. 57); 2008/585/EC (OJ L 188, 16.7.2008, p. 28); 2008/741/EC (OJ L 251, 19.9.2008, p. 35); 2007/141/EC (OJ L 62, 1.3.2007, p. 23); 2007/706/EC (OJ L 287, 1.11.2007, p. 18); 2006/211/EC (OJ L 76, 15.3.2006, p. 6) and 2006/422/EC (OJ L 168, 21.6.2006, p. 33).
[6] i.e. the quantity of electricity needed for internal consumption and exports.
[7] Letter 0018212 of 10 May 2010 of the Italian Authority for Electricity and Gas.

technical limitation of the interconnection with other countries, it is expected that, in view of the new legislation in place [1], the situation would improve further. There is therefore a certain degree of constraint on the pricing behaviour of the leading producers in Macro-zone North through imports of electricity from outside the Italian territory. These factors should therefore be taken as an indication of a certain degree of direct exposure to competition from other EU Member States, as regards production and wholesale supply of electricity in Macro-zone North.

(12) The Commission Communication of 11 March 2010 'Report on progress in creating the internal gas and electricity market' [2] revealed that the three biggest generators still control more than 75 % of the generation capacity in 14 Member States. However, the report places the Italian electricity market in the category of 'moderately concentrated' markets [3], whereby the Herfindahl-Hirchman Index (HHI) has lower values compared to the other categories. Given that the competition pressure is felt even more in the Macro-zone North than in the rest of the zones, the degree of concentration can be considered as an indication of direct exposure to competition of electricity production and wholesale in the Macro-zone North.

(13) Furthermore, even though they represent a small part of the total amount of electricity produced and/or consumed in a Member State, the functioning of the balancing mechanisms should also be considered as an additional indicator. According to the available information, the workings of the balancing mechanism — in particular the markets based pricing and the well-developed intra-day market — are such that it does not constitute an obstacle to electricity production being subject to direct exposure to competition.

Retail supply of electricity

(14) As regards retail supply, a further distinction of the relevant product market could be made between: (A) retail supply to industrial customers connected to the medium, high and very high voltage grid and (B) retail supply to smaller industrial, commercial and domestic customers connected to the low-voltage grid. These markets shall be analysed further separately.

Retail supply of electricity to end customers connected to the medium, high and very high voltage grid

(15) As confirmed by the Italian Authorities, the market for retail supply of electricity to end customers connected to the medium, high and very high voltage grid is national in scope.

(16) According to the available information [4], the aggregate market shares of the three largest retailers of electricity to end customers connected to the medium, high and very high voltage grid amounts to 43,89 %, which is a satisfactorily low level [5] and it should be taken as an indication of direct exposure to competition.

(17) Given the characteristics of the product concerned (electricity) and the scarcity or unavailability of suitable substitutable products or services, price competition and price formation assume greater importance when assessing the competitive state of the electricity markets. The number of customers switching supplier may therefore serve as an indicator of price competition and, thus, indirectly, 'a natural indicator of the effectiveness of competition. If few customers are switching, there is likely to be a problem with the functioning of the market, even if the benefits from the possibility of renegotiating with the historical supplier should not be ignored' [6].

(18) According to the latest available information [7], switching rates by eligible point in 2008 amount to 32,50 % for large industrial customers and to 32,80 % for medium sized industry in Italy. While lower than the degree of switching in e.g. Austria, where the degree of switching for large and very large industrial customers amounted to 41,5 % [8], the degree of switching in Italy is still considerable, involving nearly one third of the large and medium sized industrial customers. Furthermore, the retail market to end customers connected to the medium, high and very high voltage grid is not subject to regulated prices. The situation in Italy is therefore satisfactory as far as switching and end-user price control are concerned and should be taken as an indicator of direct exposure to competition.

Retail supply of electricity to end customers connected to the low voltage grid

(19) As regards the relevant geographical market for retail supply, this has traditionally been considered to be national in scope. In its application, CVA uses the national market as relevant market for retail supply of electricity.

[1] Law No 99/2009 of 23 July 2009.
[2] SEC(2010) 251, hereinafter '2010 Communication'.
[3] Table 3.1 of the Technical Annex (p. 12) to 2010 Communication.
[4] Annual Report on the State of Services and the Regulatory Activities of Italian Authority for electricity and Gas (AEEG) of 31 March 2009 (hereinafter the '2009 Annual Report of AEEG'), p. 76.
[5] It corresponds very closely to the level of concentration, 43 %, found on the Swedish retail market (see recital 14 of Decision 2007/706/EC).
[6] Commission Communication of 15 November 2005 'Report on progress in creating the internal gas and electricity market' (COM(2005) 568 final, hereinafter '2005 Communication'), p. 9.
[7] Table 2.2 of Technical Annex to 2010 Communication.
[8] See recital 13 of Decision 2008/585/EC.

(20) Based on the assumption that the geographical market is national in scope, and on the information currently available [1], it appears that the level of market concentration for the retail supply of electricity on the Italian market is very high. The cumulated market shares of the biggest three retailers to customers connected to the low voltage grid is of 79,44 %, of which the largest company holds a share of 71,11 % on its own. A constant jurisprudence should also be recalled in this context [2], according to which 'very large market shares are in themselves, save in exceptional circumstances, evidence of the existence of a dominant position. That is the situation when there is a market share of 50 %'.

(21) Moreover, the retail market in Italy is subdivided into three subcategories, out of which the first two are subject to regulated prices:

(a) an enhanced protection service for domestic customers and small companies (with less than 50 employees and a turnover of no more than EUR 10 million) connected to the low voltage grid, and that have not signed a contract for purchases in the free market. Operation of these service is reserved for the company Acquirente Unico SpA (hereinafter the 'Single buyer');

(b) a safeguarded service for all customers not eligible for the enhanced protection service and that have no contract for purchases on the free market. This service is delivered by providers selected by the Single buyer through a competitive tender; and

(c) the free market, namely the remainder of the retail market.

(22) These markets should, however, not be considered as independent, relevant markets, for the purpose of the present decision since customers may switch from one subcategory to another and since the prices within all three subcategories are market-based [3]. However, according to the 2009 Annual Report of AEEG, the so-called 'captive market' which includes the 'enhanced protection service' and the 'safeguarded service', accounts for about 36 % of the entire retail market. Moreover, according to the same report, the enhanced protection service is characterised by a very strong presence (84,3 %) of one specific supplier, who is also active in the free market. According to the Italian authorities, the costs of switching are perceived by customers to be high and the perceived benefits of switching are seen as low. This, combined with low prices under the enhanced protection service renders it very difficult for new operators to obtain a sufficient customer-base within this subcategory. This basically results in a competitive advantage for operators under the enhanced protection service which operate also on the free market, given that customers who wish to switch from an enhanced protection service to the free market or vice versa often do so without changing supplier.

(23) However, based on the information received from the relevant Italian authorities [4], it can be concluded for the purposes of the present Decision that the geographical market for retail sale of electricity in Italy is not national in scope, as traditionally considered and as assumed by the applicant, but is local in scope, with a territory most often not exceeding the municipal level.

(24) In the absence of information on the degree of competition on each of the thus defined local markets for retail supply of electricity to end users connected to the low voltage grid and considering the above-mentioned doubts about the degree of competition in the retail market to customers connected to low voltage grid, seen globally at national level, as discussed in recitals 19 to 22, it is not possible to conclude that the conditions for granting an exemption under Article 30(1) of Directive 2004/17/EC to retail supply of electricity to end customers connected to the low voltage grid in Italy, are met.

(25) Directive 2004/17/EC therefore continues to apply when contracting entities award contracts intended to enable the retail supply of electricity to end customers connected to low voltage grid to be carried out in Italy and when they organise design contests for the pursuit of such an activity in Italy.

IV. **CONCLUSIONS**

(26) In respect of production and wholesale of electricity in the Macro-zone North, the situation can thus be summarised as follows: the aggregate market shares of the three biggest generators is moderately low, and the substantial amount of electricity imported is having a pro-competitive effect on this zone. As set out in recital 13, the functioning of the balancing mechanism does not constitute an obstacle to direct exposure to competition of the electricity generation market. Consequently it can be considered that all the above factors are indications of direct exposure to competition on the Macro-zone North.

(27) In view of the factors examined in recitals 8 to 13, the condition of direct exposure to competition laid down in Article 30(1) of Directive 2004/17/EC should be considered to be met in respect of production and wholesale supply of electricity in the Macro-zone North.

[1] 2009 Annual Report of AEEG.

[2] See point 328 of the judgment of the Court of First Instance of 28 February 2002 in Case T-395/94 *Atlantic Container Line AB and Others* v *Commission*, [2002] ECR II-875.

[3] In fact, the regulated prices are set on the basis of prices that are found on the free market.

[4] Letter 0032953 of 20 May 2010 of the Italian Competition Authority.

(28) Furthermore, since the condition of unrestricted access to the market is deemed to be met, Directive 2004/17/EC should not apply when contracting entities award contracts intended to enable electricity production and wholesale supply to be carried out in Macro-zone North nor when they organise design contests for the pursuit of such an activity in that geographical area.

(29) In respect of retail sale of electricity to end customers connected to the medium, high and very high voltage grid, in Italy, the situation can thus be summarised as follows: the aggregate market shares of the three biggest retail companies is low, and the degree of switching by withdrawal point is satisfactory and there is no end-user price control. These conclusions are also in line with the opinion of the relevant Italian Authorities whereby this market has been exposed to competition for several years and the resulting degree of competition is satisfactory.

(30) In view of the factors examined in recitals 15 to 18, the condition of direct exposure to competition laid down in Article 30(1) of Directive 2004/17/EC should be considered to be met in respect of retail supply of electricity to end customers connected to the medium, high and very high voltage grid on the entire territory of the Italian Republic.

(31) Furthermore, since the condition of unrestricted access to the market is deemed to be met, Directive 2004/17/EC should not apply when contracting entities award contracts intended to enable retail supply of electricity to end customers connected to the medium, high and very high voltage grid in Italy nor when they organise design contests for the pursuit of such an activity in that geographical area.

(32) In view of the factors examined in recitals 19 to 25 and given the doubts about the existence of sufficient competition at the national level in respect of retail supply to end customers connected to the low voltage grid and moreover in the absence of detailed information on each and every relevant local market, as defined by the Italian authorities, it is not possible to conclude that the conditions for granting an exemption under Article 30(1) of Directive 2004/17/EC for the retail supply of electricity to end customers connected to low voltage grid in Italy, are met. Consequently, Directive 2004/17/EC continues to apply when contracting entities award contracts intended to enable the retail supply of electricity to end customers connected to low voltage grid, to be carried out in Italy and when they organise design contests for the pursuit of such an activity in Italy. As the statistical obligations pursuant to Article 67 will continue to apply, it may be necessary to ensure that the contracting entities concerned take appropriate measures such as managerial and/or accounting separation so as to be able to report correctly on procurement made for the pursuit of the relevant activities which have not been exempted pursuant to the present Decision.

(33) Also, it is recalled that contracts covering several activities shall be treated in accordance with Article 9 of Directive 2004/17/EC. In the present context this means that when a contracting entity is engaged in 'mixed' procurement, that is procurement used to support the performance of both activities exempted from the application of Directive 2004/17/EC and activities not exempted, regard shall be had to the activities for which the contract is principally intended. In the event of such mixed procurement, where the purpose is principally to support the retail of electricity to end customers connected to the low voltage grid, the provision of Directive 2004/17/EC shall apply. If it is objectively impossible to determine for which activity the contract is principally intended, the contract shall be awarded in accordance with the rules referred to in paragraphs (2) and (3) of Article 9.

(34) This Decision is based on the legal and factual situation as of February to May 2010 as it appears from the information submitted by the Italian Republic, CVA, the 2005 and 2010 Communications and their Technical annexes and the 2007 Staff Document, the Final Report and the 2009 Annual Report of AEEG. It may be revised, should significant changes in the legal or factual situation mean that the conditions for the applicability of Article 30(1) of Directive 2004/17/EC for wholesale supply of electricity in the Macro-zone North and retail supply to end customers connected to medium, high and very high voltage grid are no longer met,

HAS ADOPTED THIS DECISION:

Article 1

Directive 2004/17/EC shall not apply to contracts awarded by contracting entities and intended to enable the following activities to be carried out:

(a) production and wholesale supply of electricity in the Macro-zone North;

(b) retail supply of electricity to end customers connected to the medium, high and very high voltage grid in the entire territory of the Italian Republic.

Article 2

This Decision is addressed to the Italian Republic.

Done at Brussels, 14 July 2010.

For the Commission
Michel BARNIER
Member of the Commission

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