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Contents

II *Non-legislative acts*

REGULATIONS

- ★ **Council Regulation (EU) No 1032/2010 of 15 November 2010 amending Regulation (EC) No 174/2005 imposing restrictions on the supply of assistance related to military activities to Côte-d'Ivoire** 1
- ★ **Commission Regulation (EU) No 1033/2010 of 15 November 2010 amending Regulation (EC) No 1505/2006 as regards the annual reports by the Member States on the results of the checks carried out in relation to the identification and registration of ovine and caprine animals ⁽¹⁾** 5
- ★ **Commission Regulation (EU) No 1034/2010 of 15 November 2010 amending Regulation (EC) No 1082/2003 as regards checks concerning the requirements for the identification and registration of bovine animals ⁽¹⁾** 7
- ★ **Commission Regulation (EU) No 1035/2010 of 15 November 2010 imposing a provisional anti-dumping duty on imports of melamine originating in the People's Republic of China** 10
- ★ **Commission Regulation (EU) No 1036/2010 of 15 November 2010 imposing a provisional anti-dumping duty on imports of zeolite A powder originating in Bosnia and Herzegovina** 27

Price: EUR 4

(Continued overleaf)

⁽¹⁾ Text with EEA relevance

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

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

Commission Regulation (EU) No 1037/2010 of 15 November 2010 establishing the standard import values for determining the entry price of certain fruit and vegetables	44
Commission Regulation (EU) No 1038/2010 of 15 November 2010 fixing the import duties in the cereals sector applicable from 16 November 2010	46
Commission Regulation (EU) No 1039/2010 of 15 November 2010 amending the representative prices and additional import duties for certain products in the sugar sector fixed by Regulation (EU) No 867/2010 for the 2010/11 marketing year	49

DECISIONS

2010/690/EU:

- ★ **Commission Decision of 4 August 2010 on State aid C 40/08 (ex N 163/08) implemented by Poland for PZL Hydral S.A. (notified under document C(2010) 5406) ⁽¹⁾** 51

2010/691/EU:

- ★ **Commission Decision of 15 November 2010 granting the Czech Republic a derogation from the application of Decision 2006/679/EC concerning the technical specification for interoperability relating to the control-command and signalling subsystem of the trans-European conventional rail system to the line Strančice–České Budějovice (notified under document C(2010) 7789)** 85

Corrigenda

- ★ **Corrigendum to Commission Regulation (EU) No 1015/2010 of 10 November 2010 implementing Directive 2009/125/EC of the European Parliament and of the Council with regard to ecodesign requirements for household washing machines (OJ L 293, 11.11.2010)** 87



⁽¹⁾ Text with EEA relevance

II

(Non-legislative acts)

REGULATIONS

COUNCIL REGULATION (EU) No 1032/2010

of 15 November 2010

amending Regulation (EC) No 174/2005 imposing restrictions on the supply of assistance related to military activities to Côte-d'Ivoire

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 215 thereof,

Having regard to Council Decision 2010/656/CFSP of 29 October 2010 renewing the restrictive measures against Côte d'Ivoire ⁽¹⁾,

Having regard to the joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the European Commission,

Whereas:

(1) Council Regulation (EC) No 174/2005 of 31 January 2005 imposing restrictions on the supply of assistance related to military activities to Côte d'Ivoire ⁽²⁾ provides for prohibitions on the export of equipment which might be used for internal repression and on the provision of certain technical assistance, financing and financial assistance. Those restrictions were enacted in accordance with Council Common Position 2004/852/CFSP of 13 December 2004 concerning restrictive measures against Côte d'Ivoire ⁽³⁾.

(2) Taking into account United Nations Security Council Resolution 1946 (2010) of 15 October 2010 and Decision 2010/656/CFSP, it is necessary to amend Regulation (EC) No 174/2005 in order to permit the export of non-lethal equipment, as well as non-lethal equipment capable of being used for internal repression, intended solely to enable the Ivorian security forces to use only appropriate and proportionate force while maintaining public order, as well as the provision of related technical assistance, financing and financial assistance.

(3) The list of equipment which might be used for internal repression should be updated following recommendations made by experts, taking into account Council Regulation (EC) No 1236/2005 of 27 June 2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment ⁽⁴⁾.

(4) It is appropriate to update the article on Union jurisdiction in light of recent drafting practice.

(5) Regulation (EC) No 174/2005 should be amended accordingly,

HAS ADOPTED THIS REGULATION:

Article 1

Regulation (EC) No 174/2005 is amended as follows:

(1) Article 4(1) is replaced by the following:

‘1. By way of derogation from Article 2, the prohibitions referred to therein shall not apply to:

(a) the provision of technical assistance, financing and financial assistance related to arms and related materiel, where such assistance or services are intended solely for support of and use by the United Nations Operation in Côte d'Ivoire (UNOCI) and the French forces who support it;

(b) the provision of technical assistance related to non-lethal military equipment intended solely for humanitarian or protective use, including such equipment intended for EU, UN, African Union and Economic Community of West African States (ECOWAS) crisis management operations, where such activities have also been approved in advance by the Sanctions Committee;

⁽¹⁾ OJ L 285, 30.10.2010, p. 28

⁽²⁾ OJ L 29, 2.2.2005, p. 5.

⁽³⁾ OJ L 368, 15.12.2004, p. 50.

⁽⁴⁾ OJ L 200, 30.7.2005, p. 1.

- (c) the provision of financing or financial assistance related to non-lethal military equipment intended solely for humanitarian or protective use, including such equipment intended for EU, UN, African Union and ECOWAS crisis management operations;
- (d) the provision of technical assistance related to arms and related materiel intended solely for support of or use in the process of restructuring defence and security forces pursuant to paragraph 3, subparagraph (f) of the Linas-Marcoussis Agreement, where such activities have also been approved in advance by the Sanctions Committee;
- (e) the provision of financing or financial assistance related to arms and related materiel intended solely for support of or use in the process of restructuring defence and security forces pursuant to paragraph 3, subparagraph (f) of the Linas-Marcoussis Agreement;
- (f) the sales or supplies temporarily transferred or exported to Côte d'Ivoire to the forces of a State which is taking action, in accordance with international law, solely and directly to facilitate the evacuation of its nationals and those for whom it has consular responsibility in Côte d'Ivoire, where such activities have also been notified in advance to the Sanctions Committee;
- (g) the provision of technical assistance, financing or financial assistance related to non-lethal military equipment intended solely to enable the Ivorian security forces to use only appropriate and proportionate force while maintaining public order.;

(2) the following Article is inserted:

'Article 4a

1. By way of derogation from Article 3, the competent authority, as listed in Annex II, of the Member State where the exporter or service provider is established may authorise, under such conditions as it deems appropriate, the sale, supply, transfer or export of non-lethal equipment listed in Annex I or the provision of technical assistance, financing or financial assistance related to such non-lethal equipment, after having determined that the non-lethal equipment concerned is intended solely to enable the Ivorian security forces to use only appropriate and proportionate force while maintaining public order.

2. The relevant Member State shall inform the other Member States and the Commission of any authorisation granted under paragraph 1.

3. No authorisations shall be granted for activities that have already taken place.;

(3) Article 9 is replaced by the following:

'Article 9

This Regulation shall apply:

- (a) within the territory of the Union, including its airspace;
- (b) on board any aircraft or any vessel under the jurisdiction of a Member State;
- (c) to any person inside or outside the territory of the Union who is a national of a Member State;
- (d) to any legal person, entity or body which is incorporated or constituted under the law of a Member State;
- (e) to any legal person, entity or body in respect of any business done in whole or in part within the Union.;

(4) Annex I is replaced by the text in the Annex to this Regulation;

(5) the title of Annex II is replaced by the following:

'List of competent authorities referred to in Articles 4 and 4a'.

Article 2

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

It shall apply from 29 October 2010.

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

Done at Brussels, 15 November 2010.

For the Council
The President
S. VANACKERE

ANNEX

‘ANNEX I

List of equipment which might be used for internal repression as referred to in Articles 3 and 4a

1. Fire-arms, ammunition and related accessories therefor, as follows:
 - 1.1 Firearms not controlled by ML 1 and ML 2 of the Common Military List of the European Union ⁽¹⁾ (“EU Common Military List”);
 - 1.2 Ammunition specially designed for the firearms listed in 1.1 and specially designed components therefor;
 - 1.3 Weapon-sights not controlled by the EU Common Military List.
2. Bombs and grenades not controlled by the EU Common Military List.
3. Vehicles as follows:
 - 3.1 Vehicles equipped with a water cannon, specially designed or modified for the purpose of riot control;
 - 3.2 Vehicles specially designed or modified to be electrified to repel borders;
 - 3.3 Vehicles specially designed or modified to remove barricades, including construction equipment with ballistic protection;
 - 3.4 Vehicles specially designed for the transport or transfer of prisoners and/or detainees;
 - 3.5 Vehicles specially designed to deploy mobile barriers;
 - 3.6 Components for the vehicles specified in 3.1 to 3.5 specially designed for the purposes of riot control.

Note 1 This item does not control vehicles specially designed for the purposes of fire-fighting.

Note 2 For the purposes of item 3.5 the term “vehicles” includes trailers.
4. Explosive substances and related equipment as follows:
 - 4.1 Equipment and devices specially designed to initiate explosions by electrical or non-electrical means, including firing sets, detonators, igniters, boosters and detonating cord, and specially designed components therefor; except those specially designed for a specific commercial use consisting of the actuation or operation by explosive means of other equipment or devices the function of which is not the creation of explosions (e.g. car air-bag inflators, electric-surge arresters of fire sprinkler actuators);
 - 4.2 Linear cutting explosive charges not controlled by the EU Common Military List;
 - 4.3 Other explosives not controlled by the EU Common Military List and related substances as follows:
 - a. amatol;
 - b. nitrocellulose (containing more than 12,5 % nitrogen);
 - c. nitroglycol;
 - d. pentaerythritol tetranitrate (PETN);
 - e. picryl chloride;
 - f. 2,4,6-trinitrotoluene (TNT).
5. Protective equipment not controlled by ML 13 of the EU Common Military List as follows:
 - 5.1 Body armour providing ballistic and/or stabbing protection;
 - 5.2 Helmets providing ballistic and/or fragmentation protection, anti-riot helmets, anti-riot shields and ballistic shields.

⁽¹⁾ OJ C 69, 18.3.2010, p. 19.

Note This item does not control:

- equipment specially designed for sports activities;*
 - equipment specially designed for safety of work requirements.*
6. Simulators, other than those controlled by ML 14 of the EU Common Military List, for training in the use of firearms, and specially designed software therefor.
 7. Night vision, thermal imaging equipment and image intensifier tubes, other than those controlled by the EU Common Military List.
 8. Razor barbed wire.
 9. Military knives, combat knives and bayonets with blade lengths in excess of 10 cm.
 10. Production equipment specially designed for the items specified in this list.
 11. Specific technology for the development, production or use of the items specified in this list'.
-

COMMISSION REGULATION (EU) No 1033/2010**of 15 November 2010****amending Regulation (EC) No 1505/2006 as regards the annual reports by the Member States on the results of the checks carried out in relation to the identification and registration of ovine and caprine animals****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

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

Having regard to Council Regulation (EC) No 21/2004 of 17 December 2003 establishing a system for the identification and registration of ovine and caprine animals and amending Regulation (EC) No 1782/2003 and Directives 92/102/EEC and 64/432/EEC⁽¹⁾, and in particular the first subparagraph and point (a) of the second subparagraph of Article 10(1) thereof,

Whereas:

- (1) Commission Regulation (EC) No 1505/2006 of 11 October 2006 implementing Council Regulation (EC) No 21/2004 as regards the minimum level of checks to be carried out in relation to the identification and registration of ovine and caprine animals⁽²⁾ provides that the Member States are to carry out checks in order to verify compliance by keepers with the requirements of Regulation (EC) No 21/2004.
- (2) In addition, Regulation (EC) No 1505/2006 provides that Member States are to submit an annual report to the Commission each year, in accordance with the model set out in the Annex thereto, on the results of the checks carried out in the preceding annual inspection period.
- (3) The collection of the data during the reporting process should be adequate and proportionate to the objectives

pursued. For the sake of a more targeted and fit for purpose reporting, certain requirements as well as the model report set out in the Annex to Regulation (EC) No 1505/2006 should be simplified to better provide with the relevant information of the implementation of the controls and to avoid unnecessary administrative burden.

- (4) Regulation (EC) No 1505/2006 should therefore be amended accordingly.
- (5) The measures provided for in this Regulation are in accordance with the opinion of the Standing Committee on the Food Chain and Animal Health,

HAS ADOPTED THIS REGULATION:

Article 1

Regulation (EC) No 1505/2006 is amended as follows:

- (1) in Article 7, point (b) is replaced by the following:
‘(b) the number of holdings that have been checked;’
- (2) the Annex is amended in accordance with the Annex to this Regulation.

*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, 15 November 2010.

*For the Commission**The President*

José Manuel BARROSO

⁽¹⁾ OJ L 5, 9.1.2004, p. 8.⁽²⁾ OJ L 280, 12.10.2006, p. 3.

ANNEX

The Annex to Regulation (EC) No 1505/2006 is replaced by the following:

‘ANNEX

Report on the results of checks made in the ovine and caprine sector regarding requirements for the identification and registration of those animals in accordance with Regulation (EC) No 21/2004

1. General information on holdings, animals and checks

Total number of holdings in the Member State at the beginning of the year of the reporting period ⁽¹⁾	
Total number of holdings checked during the year of the reporting period	
Total number of animals registered in the Member State at the beginning of the year of the reporting period ⁽¹⁾	
Total number of animals checked in holdings during the reporting period ⁽¹⁾	
⁽¹⁾ Or other national reference date for animal statistics.	

2. Findings of non-compliance

Number of holdings with non-compliance	
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3. Penalties imposed

Number of holdings with penalties imposed	
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COMMISSION REGULATION (EU) No 1034/2010**of 15 November 2010****amending Regulation (EC) No 1082/2003 as regards checks concerning the requirements for the identification and registration of bovine animals****(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 1760/2000 of the European Parliament and of the Council of 17 July 2000 establishing a system for the identification and registration of bovine animals and regarding the labelling of beef and beef products and repealing Council Regulation (EC) No 820/97 ⁽¹⁾, and in particular the introductory phrase and Article 10(d) thereof,

Whereas:

- (1) Commission Regulation (EC) No 1082/2003 of 23 June 2003 laying down detailed rules for the implementation of Regulation (EC) No 1760/2000 of the European Parliament and of the Council as regards the minimum level of controls to be carried out in the framework of the system for the identification and registration of bovine animals ⁽²⁾ lays down minimum requirements for such controls.
- (2) Experience gained following the implementation of the on-the-spot inspection laid down in Regulation (EC) No 1082/2003 as reported in the annual reports and the implementation of the on-the-spot check in ovine and caprine animals laid down in Commission Regulation (EC) No 1505/2006 ⁽³⁾ supports a reduction in the percentage of holdings to be inspected each year and on the animals to be checked. As a general rule, all animals on a holding should be covered by the checks. However, for holdings with more than 20 animals the competent authority should be permitted to restrict the checks to an appropriate representative sample of the animals.
- (3) In addition, Regulation (EC) No 1082/2003 provides that Member States are to submit an annual report to the Commission, in accordance with the model set out in Annex I thereto, giving details of the implementation of those controls.
- (4) The collection of the data for the annual report should be adequate and proportionate to the objectives pursued. For the sake of a more targeted and proportionate reporting, certain requirements of Regulation (EC) No 1082/2003, as well as the model set out in Annex I

thereto, should be simplified to better provide with the relevant information of the implementation of the controls.

- (5) Regulation (EC) No 1082/2003 should therefore be amended accordingly.
- (6) The measures provided for in this Regulation are in accordance with the opinion of the Committee on Agricultural Funds,

HAS ADOPTED THIS REGULATION:

Article 1

Regulation (EC) No 1082/2003 is amended as follows:

- (1) in Article 2, paragraphs 1 and 2 are replaced by the following:

‘1. The competent authority shall carry out checks each year which shall cover at least 3 % of holdings.

2. Where the checks provided for in paragraph 1 reveal a significant degree of non-compliance with Regulation (EC) No 1760/2000, the minimum rate of checks shall be increased in the following annual inspection period.’;

- (2) Article 3 is replaced by the following:

‘Article 3

The competent authority shall check the identification of all animals on the holding.

However, where the number of animals on the holding exceeds 20, the competent authority may decide to check the means of identification of a representative sample of those animals in accordance with internationally recognised standards provided that the number of animals checked is sufficient to detect 5 % of cases of non-compliance with Regulation (EC) No 1760/2000 by the keepers of such animals at a 95 % confidence level.’;

- (3) in Article 5(1), point (b) is replaced by the following:

‘(b) the number of holdings that have been checked.’;

- (4) Annex I is amended in accordance with the Annex to this Regulation.

⁽¹⁾ OJ L 204, 11.8.2000, p. 1.

⁽²⁾ OJ L 156, 25.6.2003, p. 9.

⁽³⁾ OJ L 280, 12.10.2006, p. 3.

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, 15 November 2010.

For the Commission

The President

José Manuel BARROSO

ANNEX

Annex I to Regulation (EC) No 1082/2003 is replaced by the following:

‘ANNEX I

Report on the results of checks carried out in accordance with Title I of Regulation (EC) No 1760/2000

1. General information on holdings and animals

Total number of holdings in the Member State at the beginning of the reporting period ⁽¹⁾	
Total number of holdings checked during the reporting period	
Total number of animals registered in the Member State at the beginning of the reporting period ⁽¹⁾	
Total number of animals checked in holdings during the reporting period	
⁽¹⁾ Or other national reference date for animal statistics.	

2. Non-Compliance with Regulation (EC) No 1760/2000

Holdings with non-compliance	
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3. Sanctions imposed in accordance with Commission Regulation (EC) No 494/98 (*)

	Affected animals	Affected holdings
1. Restriction of movements of individual animals		
2. Restriction of movements of all animals on the holding		
3. Destruction of animals		
In total		

(*) OJ L 60, 28.2.1998, p. 78.

COMMISSION REGULATION (EU) No 1035/2010**of 15 November 2010****imposing a provisional anti-dumping duty on imports of melamine originating in the People's Republic of China**

THE EUROPEAN COMMISSION,

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

Having regard to Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community ⁽¹⁾ (the basic Regulation), and in particular Article 7 thereof,

After consulting the Advisory Committee,

Whereas:

A. PROCEDURE**1. Initiation**

- (1) On 4 January 2010, the Commission received a complaint concerning imports of melamine originating in the People's Republic of China lodged pursuant to Article 5 of the basic Regulation by Borealis Agrolinz Melamine GmbH, DSM Melamine BV and Zakłady Azotowe Puławy ('the complainants'), representing a major proportion, in this case more than 50 %, of the total Union production of melamine.
- (2) This complaint contained prima facie evidence of dumping and of material injury resulting there from, which was considered sufficient to justify the opening of a proceeding.
- (3) On 17 February 2010, the Commission announced, by a notice published in the *Official Journal of the European Union* ⁽²⁾ ('the notice of initiation'), the initiation of an anti-dumping proceeding with regard to imports into the Union of melamine originating in the People's Republic of China ('the country concerned' or 'the PRC').

2. Parties concerned by the proceeding

- (4) The Commission officially advised the complainants, exporting producers in the PRC, importers, traders, users, suppliers and associations known to be concerned, and the representatives of the PRC of the initiation of the proceeding. Interested parties were given the opportunity to make their views known in writing and to request a hearing within the time limit set in the notice of initiation.
- (5) In view of the apparent high number of exporting producers in the PRC sampling was envisaged in the notice of initiation for the determination of dumping and injury in accordance with Article 17 of the basic

Regulation. In order to enable the Commission to decide whether sampling would be necessary and if so, to select a sample, all exporting producers in the PRC were asked to make themselves known to the Commission and to provide, as specified in the notice of initiation, basic information on their activities related to the product concerned during the investigation period (1 January 2009-31 December 2009).

- (6) Seven replies were received to the sampling exercise from exporting producers or groups of exporting producers in the PRC. However two companies withdrew from further cooperation with the investigation at an early stage. Sampling was therefore no longer necessary and all parties were informed that a sample would not be selected.
- (7) In order to allow exporting producers in the PRC to submit a claim for market economy treatment (MET) or individual treatment (IT), if they so wished, the Commission sent claim forms to the Chinese exporting producers known to be concerned, the Chinese authorities and to other Chinese exporting producers that made themselves known within the deadlines set out in the notice of initiation. Three Chinese exporting producer groups and one individual company requested MET pursuant to Article 2(7) of the basic Regulation, or IT should the investigation establish that they did not meet the conditions for MET. One further group requested IT only.
- (8) Questionnaires were sent to all parties known to be concerned and to all other companies that made themselves known within the deadlines set out in the notice of initiation. Replies were received from five exporting producers and related companies in the PRC, one producer in the United States of America which was the proposed analogue country as mentioned in the notice of initiation, and one producer in another possible analogue country, Indonesia. Questionnaire replies were also received from three Union producers and seven users cooperated by submitting a questionnaire reply. None of the importers supplied the Commission with any information or made themselves known in the course of this investigation.
- (9) The Commission sought and verified all the information deemed necessary for a provisional determination of dumping, resulting injury and Union interest and carried out verifications at the premises of the following companies:

⁽¹⁾ OJ L 343, 22.12.2009, p. 51.

⁽²⁾ OJ C 40, 17.2.2010, p. 10.

(a) *Union producers*

- Borealis Agrolinz Melamine GmbH, Austria
- DSM Melamine BV (now OCI Melamine BV), the Netherlands
- Zakłady Azotowe Puławy, Poland

(b) *Exporting producers in the PRC*

- Sichuan Chemical Group: Sichuan Chemical Co., Ltd, Sichuan Jinhua Chemical Co., Ltd, New Tianfu Chemicals Co., Ltd and M&A Chemicals Corporation
- Sichuan Golden Elephant Group: Sichuan Golden Elephant Chemical Industry Group Co., Ltd and Sichuan Jade Elephant Melamine S&T Co., Ltd
- Shandong Liaherd Group: Shandong Liaherd Chemical Industry Co., Ltd, Shandong Lianhe Fengyuan Chemical Industry Co., Ltd and Yiyuan Lianhe Fertilizer Co., Ltd
- Tianjin Kaiwei Chemical Co., Ltd
- Henan Junhua Group: Henan Junhua Chemical Company Ltd and Haohua-Junhua Group Zhengyang Chemical Co., Ltd

- (10) In view of the need to establish a normal value for the exporting producer that requested only IT and exporting producers to which MET might not be granted, a verification to establish normal value on the basis of data from Indonesia as analogue country took place at the premises of the following company:

(c) *Producer in Indonesia*

- DSM Kaltim Melamine (DKM)

3. Investigation period

- (11) The investigation of dumping and injury covered the period from 1 January 2009 to 31 December 2009 ('investigation period' or 'IP'). The examination of the trends relevant for the assessment of injury covered the period from 1 January 2006 to the end of the investigation period (period considered).

B. PRODUCT CONCERNED AND LIKE PRODUCT**1. Product concerned**

- (12) The product concerned is melamine, currently falling within CN code 2933 61 00 and originating in the People's Republic of China.

- (13) Melamine is a white crystalline powder obtained from urea. Melamine is mainly used in laminates, moulding powders, wood based panels and coating resins.

2. Like product

- (14) The investigation has shown that melamine produced and sold by the Union industry in the Union, melamine produced and sold on the domestic market of the PRC and melamine imported into the Union from the PRC, as well as that produced and sold in Indonesia, which served as an analogue country, has essentially the same basic physical and chemical characteristics and the same basic end uses.
- (15) Therefore these products are provisionally considered to be alike within the meaning of Article 1(4) of the basic Regulation.

C. DUMPING**1. Market Economy Treatment**

- (16) Pursuant to Article 2(7)(b) of the basic Regulation, in anti-dumping investigations concerning imports originating in the PRC, normal value shall be determined in accordance with paragraphs 1 to 6 of the said Article for those producers which were found to meet the criteria laid down in Article 2(7)(c) of the basic Regulation. Briefly and for ease of reference only, these criteria are set out in summarised form below:

- business decisions are made in response to market signals, without significant State interference, and costs reflect market values,
- firms have one clear set of basic accounting records, which are independently audited in line with international accounting standards and are applied for all purposes,
- there are no significant distortions carried over from the former non-market economy system,
- bankruptcy and Property laws guarantee stability and legal certainty, and
- exchange rate conversions are carried out at market rates.

- (17) Three exporting producer groups and one exporting producer from the PRC requested MET and replied to the MET claim form within the given deadline.

- (18) For all these cooperating companies in the PRC, the Commission sought all information deemed necessary and verified information submitted in the MET claim at the premises of the companies in question.

- (19) All of the cooperating exporting producers and groups in the PRC were found not to meet criteria to be granted MET. All companies involved in the production or commercialisation of melamine located in the PRC were invited to claim MET. Should one company in a group be denied MET then the group as a whole is also denied.
- (20) For those companies producing urea from natural gas to manufacture melamine this denial was based on the grounds that the costs of the major input, natural gas, did not substantially reflect market values, as required by Article 2(7)(c) of the basic Regulation. The MET investigation determined that this was due to State interference in the natural gas market in the PRC.
- (21) The natural gas market in the PRC is dominated by three State-owned companies. Companies that produce urea, which is then used by them to produce melamine, benefit from a low government fixed gas price for the production of urea. A company producing urea, which is a fertiliser and important for the Chinese agricultural and food industry, pays a significantly lower price for its gas compared to companies which need gas for other industrial uses. In addition to this dual-pricing mechanism, the price of natural gas for industrial use is itself distorted by State interference and is itself considerably lower than the world market price for gas.
- (22) This low gas price allows these melamine producers to produce it at unnaturally reduced prices, taking advantage of the distorted low price of natural gas. Since natural gas forms a major part of the cost of urea (around 80 %) and that urea represents between 50 and 60 % of the cost of production of melamine, criterion 1 cannot be considered to be met for those companies in the PRC that produce urea from natural gas.
- (23) Some companies do not produce urea themselves but purchase it from unrelated suppliers. However the urea market itself is also distorted by three main types of State interference. Firstly the existence of strict import quotas for urea and export taxes of 110 % during mid-season and 10 % during off-season in the IP. Secondly the Chinese government has exempted the domestic sale of urea from VAT since 1 July 2005. Thirdly the Chinese government is directly involved in the market through the State Fertilizer System, operating since 2004, whereby the State purchases urea directly from producers to keep in a strategic reserve and can also release quantities of urea in the domestic market. Urea producers also benefit from preferential electricity rates, preferential railway freight rates and, as mentioned above, preferential natural gas prices.
- (24) The restraints on exports, in combination with the benefits in the case of domestic sales, have the effect of reducing export volumes of urea, thereby diverting supplies to the domestic market and creating a downward pressure on the domestic price. This low domestic price is directly caused by State interference in the urea market in the PRC. Accordingly, criterion 1 cannot be considered to be met for those companies in the PRC that do not produce urea but purchase it from third parties.
- (25) In addition to the general situation described above, one group of companies did not meet the other requirements of criterion 1 as the holding company is fully State-owned and the individual companies within the group are majority State-owned. Accordingly, this group is subject to significant State interference in relation to important business decisions.
- (26) Two companies did not meet either criterion 2 or criterion 3. One of them was not able to show complete accounting records and received office space from a public body for free. The other company did not keep its accounts in line with international accounting standards and was not able to demonstrate that their take over of a State-owned company was done at a fair value.
- (27) One company did not demonstrate that it met criterion 3 as no interest was paid on the debt regarding the sale of its shares emanating from the privatisation process. More specifically, at the beginning of the privatisation process a shareholder was loaned back the capital it had invested. At subsequent transfers of the shares, the liability of the debt was used as a payment. Only after 10 years was the loan repaid by the then privately-owned holder of those shares without any interest ever charged or paid on the amount.
- (28) One company was refused MET as its related sales company, dealing with the product concerned as well, failed to complete a MET claim form.
- (29) The Commission officially disclosed the results of the MET findings to the companies concerned in the PRC, the authorities of the PRC and the complainants. They were also given an opportunity to make their views known in writing and to request a hearing if there were particular reasons to be heard.

- (30) Several written submissions were provided and a hearing with some exporting producers took place. The exporting producers argued that in the PRC some 70 % of urea is mainly produced by using coal as the major input and only some 30 % of urea is produced from natural gas. However, as the State also interferes in the urea market, as set out in recitals 23 and 24, it does not change the conclusion that the costs of production of melamine are significantly distorted. The argument is therefore rejected.
- (31) Other arguments brought forward in the written submissions and the hearing following disclosure were not such as to change the proposal to refuse MET to all companies that requested so.
- (32) On the basis of the above, none of the cooperating companies in the PRC that had requested MET could show that they fulfilled the criteria set out in Article 2(7)(c) of the basic Regulation. It was therefore considered that MET should be refused for all these companies. The Advisory Committee was consulted and did not object to these conclusions.

2. Individual Treatment

- (33) Pursuant to Article 2(7)(a) of the basic Regulation a countrywide duty, if any, is established for countries falling under Article 2(7) of the basic Regulation, except in those cases where companies are able to demonstrate that they meet the criteria set out in Article 9(5) of the basic Regulation.
- (34) All of those companies and groups which requested MET also claimed IT in the event they would not be granted MET. In addition one group only claimed IT. On the basis of the information available, it was provisionally established that three of the five exporting producer companies or groups in the PRC met all the requirements for IT. One group of companies in the PRC was refused IT on the grounds that the holding is fully State-owned and the individual companies within the group are majority State-owned. Another company was refused IT as a related sales company failed to complete a MET/IT claim form. It was therefore not possible to assess the criteria for IT.

3. Normal value

(a) Choice of the analogue country

- (35) According to Article 2(7)(a) of the basic Regulation, normal value for exporting producers not granted MET has to be established on the basis of the domestic prices or constructed normal value in an analogue country.
- (36) In the notice of initiation, the Commission indicated its intention to use the United States of America as an

appropriate analogue country for the purpose of establishing normal value and interested parties were invited to comment on this.

- (37) The Commission examined whether other countries could be a reasonable choice of analogue country and questionnaires were sent to melamine producers in India, Iran, Indonesia and the United States of America. Only the melamine producers in the USA and Indonesia replied to the questionnaires.
- (38) Following the examination of the replies, Indonesia was chosen as an analogue country which appears to be an open market with a low import duty and with significant imports from several third countries. In addition, it was found that the cost structure of an Indonesian producer was more comparable to a Chinese producer than the cost structure of a US producer and would therefore result in a more realistic normal value. The investigation showed no reason to consider that Indonesia was not adequate for the purpose of establishing normal value.
- (39) Eventually, no interested party, including the complainants, argued that the USA was to be used as an appropriate analogue country for the present investigation.
- (40) The data submitted in the cooperating Indonesian producer's reply were verified *in situ* and found to be reliable information on which a normal value could be based.
- (41) It is therefore provisionally concluded that Indonesia is an appropriate and reasonable analogue country in accordance with Article 2(7) of the basic Regulation.
- (b) *Determination of normal value*
- (42) Pursuant to Article 2(7)(a) of the basic Regulation normal value was established on the basis of verified information received from the producer in the analogue country.
- (43) The product concerned was sold in representative quantities on the Indonesian domestic market.
- (44) As sales on the domestic market to unrelated customers were not profitable during the investigation period, normal value was constructed using the cost of manufacturing of the Indonesian producer plus a reasonable amount for SG&A and for profit on the domestic market.
- (45) SG&A costs and profit were established pursuant to Article 2(6)(c) on the basis of another reasonable method by comparing the SG&A costs and profit to the Union industry. The amount for SG&A used was considered reasonable as it was in line with the SG&A for the Union industry. The amount for profit was close

to that achieved by the Union industry in profitable years. There were no indications that such a profit would exceed the profit normally realised by other exporters or producers on sales of products of the same general category in the domestic market of the country or origin.

(c) *Export prices for the exporting producers granted IT*

- (46) As all cooperating exporting producers granted IT made export sales to the Union directly to independent customers in the Union, the export prices were based on the prices actually paid or payable for the product concerned, in accordance with Article 2(8) of the basic Regulation.

(d) *Comparison*

- (47) The normal value and export prices were compared on an ex-works basis. For the purpose of ensuring a fair comparison between the normal value and the export price, due allowance in the form of adjustments was made for differences affecting prices and price comparability in accordance with Article 2(10) of the basic Regulation. Adjustments were made, where appropriate, in respect of transport, insurance, handling and ancillary costs, packing, credit, bank charges and commissions in all cases where they were found to be reasonable, accurate and supported by verified evidence.
- (48) It is noted that normal value and export price were compared at the same level of indirect taxation, i.e. VAT included.

4. Dumping margins

(a) *For the cooperating exporting producers granted IT*

- (49) Pursuant to Articles 2(11) and (12) of the basic Regulation, the dumping margins for the cooperating exporting producers granted IT were established on the basis of a comparison of a weighted average normal value established for the analogue country with each company's weighted average export price of the product concerned to the Union as established above.
- (50) On this basis, the provisional dumping margins expressed as a percentage of the cif Union frontier price, duty unpaid, are:

Company	Provisional dumping margin
Sichuan Golden Elephant Chemical Industry Group Co., Ltd and its related company Sichuan Jade Elephant Melamine S&T Co., Ltd	44,9 %
Shandong Liahed Chemical Industry Co., Ltd and its related companies Shandong Lianhe Fengyuan Chemical Industry Co., Ltd and Yiyuan Lianhe Fertilizer Co., Ltd	47,6 %
Henan Junhua Chemical Company Ltd and its related company Haohua-Junhua Group Zhengyang Chemical Co., Ltd	49,0 %

(b) *For all other exporting producers*

- (51) In order to calculate the countrywide dumping margin applicable to all other exporting producers in the PRC, the level of cooperation was first established by comparing the volume of exports to the Union reported by the cooperating exporting producers with the equivalent Eurostat statistics.
- (52) Given that cooperation from the PRC was low, i.e. 30 %, the countrywide dumping margin applicable to all other exporters in the PRC was established by comparing the normal value as established for Indonesia with export price data of the cooperating exporting producers to which neither MET nor IT was granted.
- (53) On this basis the countrywide level of dumping was provisionally established at 65,6 % of the cif Union frontier price, duty unpaid.

D. INJURY

1. Union production and Union industry

- (54) The complaint was lodged by the three main Union producers of melamine, having production facilities in Austria, Germany and Italy (Borealis), The Netherlands (DSM) and Poland (Puławy) which together accounts for over 90 % of total Union production during the IP. Two other producers with limited production did not object to the initiation of the investigation.

- (55) All available information concerning Union producers, including information provided in the complaint and data collected from Union producers before and after the initiation of the investigation, was used in order to establish the total Union production.
- (56) On that basis, the total Union production was estimated to be around 340 000 tonnes during the IP. This amount included the production of all Union producers that made themselves known and the estimated production of other producers which remained silent in the proceeding ('silent producers'). In the absence of any other information, the data indicated in the complaint in respect of the silent producers was used to establish the total Union production and consumption.

2. Union consumption

- (57) Consumption was established on the basis of the total imports, derived from Eurostat, the total sales on the Union market of the Union industry, including an estimate of the sales of the producers that did not come forward. The estimate was based on the data provided in the complaint.

Table 1

	2006	2007	2008	IP
Volume (tons)	367 476	388 567	323 638	266 178
<i>Indexed</i>	100	105	88	72

Source: Eurostat and questionnaire replies.

- (58) Consumption increased by 5 % between 2006 and 2007 and then decreased by 17 % between 2007 and 2008, and by 16 % during the IP. Overall, consumption decreased by 28 % during the period considered.
- (59) The fall in melamine consumption can be attributed to the conjuncture, and in particular to the temporary contraction of the housing and construction markets which are the main markets for the main applications of melamine. Melamine is an important input material in this sector and is not expected to be replaced by any other materials. Hence, melamine demand is expected to resume together with the overall economic recovery.

3. Imports into the Union from the country concerned

(a) Volume, price and market share of imports from the PRC

- (60) The investigation showed that the imports of melamine from the PRC developed as follows:

Table 2

Imports from the PRC	2006	2007	2008	IP
Volume (tonnes)	26 565	42 750	34 595	17 434
<i>Indexed</i>	100	161	130	66

Source: Eurostat.

- (61) Chinese imports increased their presence in the Union market between 2006 and 2008. While the total consumption in the EU market has decreased by 12 % over the same period, Chinese exporters have increased the volume of their sales to the Union market by 30 %. As shown in the table below, there was also a gain in market share in that period.
- (62) The situation reversed during the IP: whilst consumption decreased by 18 % the Chinese producers' volume of exports decreased even more. As with the export volume, the Chinese imports lost market share during the IP.

Table 3

Market share of the imports from the PRC	2006	2007	2008	IP
Market share	7,2 %	11,0 %	10,7 %	6,5 %
<i>Indexed</i>	100	153	148	91

Based on Eurostat, it would appear that the import price from China increased overall by 10 % during the period considered.

Table 4

	2006	2007	2008	IP
Average price/tonne	EUR 814	EUR 802	EUR 1 149	EUR 896
<i>Indexed</i>	100	99	141	110

Source: Eurostat.

- (63) However, there was a high level of non-cooperation from Chinese exporters and the investigation showed that the average import price of the cooperating Chinese exporters, which represent around 30 % of total Chinese imports, was much lower than the Eurostat price and lower than the Union industry's price and was 806 EUR/tonne on average during the IP.
- (64) Hence, at this stage of the investigation, it is considered that the verified price at the premises of the cooperating exporting producers in China should be taken into consideration for the injury and causality analysis.
- (65) During the investigation some parties claimed that the melamine imported from China was of a lower quality than that produced by the Union industry and that it could not be used for certain applications such as surface applications. Given that this claim could not be substantiated it was not taken into consideration at this stage of the investigation.

(b) Price undercutting

- (66) For the purposes of analysing price undercutting, the weighted average sales prices of the Union industry to unrelated customers on the Union market, adjusted, in particular for transport and handling costs, to an ex-works level, were compared to the corresponding weighted average prices of the cooperating exporters from the PRC to the first independent customer on the Union market, established on a cif basis.
- (67) The comparison showed that during the IP, the dumped product concerned originating in the PRC sold in the Union undercut the Union industry's prices by 10,3 %.

4. Economic situation of the Union industry

(a) Preliminary remarks

- (68) In accordance with Article 3(5) of the basic Regulation, the examination of the impact of the dumped imports on the Union industry included an evaluation of all economic indicators for an assessment of the state of the Union industry from 2006 to the end of the IP.

(b) Production, production capacity and capacity utilisation

Table 5

	2006	2007	2008	IP
Production (tonnes)	378 961	371 564	358 794	304 028
<i>Indexed</i>	100	98	95	80

	2006	2007	2008	IP
Capacity (tonnes)	442 000	442 000	396 200	396 200
<i>Indexed</i>	100	100	90	90
Capacity Utilisation	86 %	84 %	91 %	77 %
<i>Indexed</i>	100	98	106	90

Source: Questionnaire replies.

- (69) As shown in the above table, the production of the Union industry decreased by 20 % during that period. The production capacity of the Union industry decreased by 10 % over the period considered.
- (70) The Union industry decreased its production capacity to around 396 200 tonnes in 2008. However, in view of stagnating sales and decreasing production volumes, the utilisation of the available capacity decreased from 86 % in 2006 to 77 % in the IP. The main decrease occurred between 2008 and the IP.

(c) *Sales volume and market share*

- (71) The sales figures in the table below relate to the volume sold to the first independent customer on the Union market.

Table 6

	2006	2007	2008	IP
Volume (tonnes)	254 707	274 211	241 867	215 469
<i>Indexed</i>	100	108	95	85
Market share	74 %	75 %	80 %	86 %
<i>Indexed</i>	100	107	107	116

Source: Questionnaire replies.

- (72) While Union consumption dropped by 28 % during 2006 and the IP, the sales volume of the like product by the Union industry to independent customers on the Union market dropped by 15 %. Hence, the Union industry was able to increase its market share from 74 % in 2006 to 86 % in the IP.

(d) *Average unit prices of the Union industry and cost of production*

- (73) Average ex-works sales prices of the Union industry to unrelated customers on the Union market decreased by 5 % over the period considered. A significant decrease in sales price by 26 % occurred between 2008 and the IP.

Table 7(a)

	2006	2007	2008	IP
Average Price/tonne	EUR 949	EUR 998	EUR 1 217	EUR 898
<i>Indexed</i>	100	105	128	95

Source: Questionnaire replies.

- (74) It was found that the average cost of production of the Union industry decreased by 2 % between 2006 and the IP. However, during the same period, the Union industry was forced to keep its sales prices down in order to compete with the low-priced dumped imports. Consequently, the sales prices of the Union industry were significantly below the cost of production during the IP.

- (75) The cost of production (COP) of the Union industry developed as follows during the period considered:

Table 7(b)

	2006	2007	2008	IP
Average COP/tonne	EUR 1 076	EUR 1 054	EUR 1 229	EUR 1 060
<i>Indexed</i>	100	98	114	98

Source: Questionnaire replies.

(e) *Stocks*

- (76) Stocks represented around 5 % of the production volume in the IP. The Union industry decreased its stock levels by 68 % during the period considered, in particular between 2008 and the IP. However, this decrease in stocks should be seen in light of the lower level of activity following the downsizing of the Union industry.

Table 8

	2006	2007	2008	IP
Stocks (tonnes)	51 650	31 019	48 732	16 611
<i>Indexed</i>	100	60	94	32

Source: Questionnaire replies.

(f) *Employment, wages and productivity*

Table 9

	2006	2007	2008	IP
Employment — full-time equivalent (FTE)	706	688	613	606
<i>Index</i>	100	97	87	86
Labour cost (EUR/FTE)	57 736	57 248	63 273	61 025
<i>Index</i>	100	99	110	106
Productivity (unit/FTE)	537	540	585	502
<i>Index</i>	100	101	109	94

Source: Questionnaire replies.

- (77) Due to the downsizing activities of the Union industry, the number of employees was reduced by 13 % in 2008, and by another 1 % during the IP. The decrease in the productivity should be seen in light of the general nature of downsizing activities, where the decrease in the number of employees follows the drop in production only after a certain delay. As regards labour costs, they increase slightly by 6 % over the period considered.

(g) *Profitability, cash flow, investments, return on investment and ability to raise capital*

Table 10

	2006	2007	2008	IP
Profitability	– 9,9 %	– 2,4 %	– 1,3 %	– 18,0 %

	2006	2007	2008	IP
Year/year		- 7,5 %	+ 1,1 %	- 16,7 %
Cash flow (EUR thousand)	- 5 091	36 162	19 682	- 20 847
Year/year		41 253	- 18 480	- 40 529
Investments (EUR thousand)	29 070	14 630	32 540	21 465
Index	100	50,3	112	74
Return on investments	- 10 %	- 3 %	- 2 %	- 25 %
Year/year		+ 7 %	+ 1 %	- 23 %

Source: Questionnaire replies.

- (78) Profitability of the Union industry was established by expressing the pre-tax net profit of the sales of the like product as a percentage of the turnover of these sales. Over the period considered the profitability of the Union industry decreased dramatically from a loss of 9,9 % in 2006 to a loss of 18 % in the IP. This situation occurred despite a decrease in the COP of the Union industry by 14 % between 2008 and the IP as shown in Table 7(b) above.
- (79) The trend shown by the cash flow, which is the ability of the industry to self-finance its activities, reflects to a large extent the evolution of profitability. Consequently, the cash flow shows a substantial decrease during the period considered. The same can be said about the return on investments, which showed a similar development in line with the negative results achieved by the Union industry over the period considered.
- (80) Following the above, the ability of the Union industry to invest became limited as the cash flow significantly deteriorated during the period considered. As a consequence, the investments dropped by 26,2 % during the period considered.

(h) Growth

- (81) While the Union consumption decreased by 28 % between 2006 and the IP, the Union industry decrease its sales volume on the Union market by 15 %. When looking at the development over the period considered, the drop of 15 % in the sales volume of the Union industry was less pronounced than the decrease of 28 % in Union consumption. As a consequence, the market share of the Union industry increased by 12 percentage points during the same period.

(i) Magnitude of the actual margin of dumping

- (82) The dumping margins for the PRC, specified above in the dumping section, are above *de minimis*. Given the volumes and the prices of the dumped imports, the impact of the actual margins of dumping cannot be considered to be negligible.

5. Conclusion on injury

- (83) The investigation showed that a number of indicators pertaining to the economic situation of the Union industry significantly deteriorated during the period considered.
- (84) Sales volume decreased by 15 %, production volume by 20 %, the utilisation of the production facilities dropped from 86 % to 77 %, employment had to be reduced by 14 %. In the same period prices were reduced by 5 %. A decrease in sales price by 26 % occurred between 2008 and the IP, hence profitability was dramatically low with negative consequences on investments and financial indicators such as cash flow and return on investment.
- (85) Even if, in the context of a declining consumption, the Union industry managed to increase its market share by 12 percentage points in the Union market, the low level of prices on the Union market in particular during the IP led to a significant deterioration during the IP in particular of the financial situation of the Union industry. Indeed, prices did not allow covering the cost of production and the losses incurred were as high as - 18 % on turnover.

- (86) On that basis, it is considered that the Union industry suffered material injury during the IP.

E. CAUSALITY

1. Introduction

- (87) In accordance with Article 3(6) and 3(7) of the basic Regulation, it was examined whether the material injury suffered by the Union industry had been caused by the dumped imports from the country concerned. Furthermore, known factors other than the dumped imports, which might have injured the Union industry, were examined to ensure that any injury caused by those other factors was not attributed to the dumped imports.

2. Effect of the dumped imports

- (88) It should be recalled that cooperation from Chinese exporting producers was very low in this investigation. The cooperating exporting producers represent around 29 % of the total imports of melamine during the IP.
- (89) The Eurostat import statistics showed that overall, imports volume from China significantly decreased by 34 % during the period considered. In other words, these imports decreased relatively at a higher pace than consumption (– 28 %) during that period.
- (90) With regards to prices, Eurostat indicate that the import price of Chinese melamine increased by 10 % during the period considered. It decreased significantly by 31 % in the period from 2008 to the IP. However, the verified information of the Chinese cooperating exporters which represent around 30 % of the total imports from China showed that the average Chinese import price was much lower than Eurostat. It was found that the cooperating producers were undercutting on average by 10,3 % the Union industry price during the IP.
- (91) Given the high level of non-cooperation from the PRC it is considered that the verified price at the premises of the cooperating producers should prevail over the Eurostat price data.
- (92) An analysis on a monthly basis of the import volume of melamine showed that the Chinese imports were massively present in the Union market in the first semester of the IP, when the crisis in the sector was at its peak, and held up to 15 % share of the Union market in the first semester of the IP. Given the structure and the production process of the Union industry, it had no choice other than lowering its sales price to keep market share. Even though the Chinese exporters had significantly reduced their exports to the Union in the second semester of the IP, the negative effect of their massive presence in the beginning of the IP and their low level of sales prices continued to affect the Union market and the Union industry in the remainder of the IP.
- (93) The investigation showed that the Union industry suffered from serious cuts in production, a decrease in the rate of capacity utilisation, losses in sales volume and in employment in the period considered. The structure of the Union industry and the development of the above injury factors suggest that the deterioration in its economic situation was due to a certain extent to the crisis situation and the low demand on the market as explained in recitals 97 to 100 below. But it is also due to the low level of prices and the pressure exerted by the Chinese exports in particular between 2008 and the IP which did not allow it to cover its costs. As a result the losses accumulated during the IP were as high as – 18 % on turnover.
- (94) Taking into account the distortion encountered during the MET investigation in the PRC, the high level of dumping found, and in view of the findings made in particular in recital 92 above, it is considered that even with a decreasing market share, the presence of low-priced dumped imports undercutting the Union industry price by over 10 % on the Union market played a role in further exacerbating the negative trend on sales prices on the Union market during the whole IP.

- (95) On this basis a causal link between the dumped imports and the injury suffered by the Union industry can be established.

3. Effect of other factors

- (96) The other factors which were examined in the context of the causality are the development of demand on the Union market, the economic crisis, the production cost of the Union industry, the export performance of the Union industry and the imports of melamine from other third countries.

(a) *Development of demand on the Union market and the economic crisis*

- (97) It should be recalled that the main applications of melamine are in the housing and construction markets. Following the economic crisis, the housing and construction markets contracted which also resulted in a contraction of consumption not only on the Union market but on a global scale. Given that the EU is by far the largest worldwide market for melamine; the crisis has had a negative impact on that market. This was illustrated by a 28 % decrease in consumption, stoppages in production by the Union industry and a decrease in sales prices.
- (98) The above facts and considerations thus suggest that a part of the injury suffered by the Union industry could be attributed to the economic crisis.
- (99) However, as explained in recitals 88 to 95 above, it should be borne in mind that there were clear distortions on the Chinese market for melamine. Moreover, the dumped imports from the PRC were undercutting on average by 10 % the price of the Union industry during the IP thus further exacerbating the negative effects on the price level, in particular during the IP.
- (100) In view of the undercutting practiced by the Chinese exporters and the selective increase of their presence during the IP as described in recital 92 above, even if it is considered that part of the material injury suffered by the Union industry can be attributed to the economic crisis, it is not such as to break the causal link between the dumped import and the material injury of the Union industry.

(b) *Production cost of the Union industry*

- (101) The investigation showed that the production of melamine is capital intensive with a high proportion of fixed costs. The cost of production of the Union industry to produce melamine remained stable over the period considered but decreased by 14 % between 2008 and the IP as shown in Table 7(b) above. This should have allowed for a certain recovery in the profitability of the Union industry but the low level of price in the Union market and the undercutting practiced by the low-priced dumped imports from the PRC did not allow this situation to materialise.
- (102) Accordingly, it is concluded that the cost of production is not a cause of the injury suffered by the Union industry.

(c) *Export performance of the Union industry*

- (103) Although the analysis of injury and causation focused on the situation of the Union industry in the Union market, its export performance was examined as a potential other factor that may explain the injury found.

Table 11

	2006	2007	2008	IP
Exports (thousand tonnes)	84 103	78 956	68 560	85 146
<i>Index</i>	100	94	82	101

Source: questionnaire replies of the Union industry.

- (104) The analysis showed that the export sales to unrelated parties made by the Union industry remained stable at around 85 000 tonnes, or 28 % of production during the period considered. The export performance of the complainants has thus been very good even during the crisis. Hence the injurious situation of the Union industry cannot be explained or attributed to exports.

(d) *Imports from other third countries*

- (105) The trends in import volumes and prices from other third countries between 2006 and the IP were as follows:

Table 12

Other third countries	2006	2007	2008	IP
Imports (tonnes)	45 480	41 060	24 835	16 473
<i>Index</i>	100	90	55	36
Market share	12,3 %	10,6 %	7,7 %	6,2 %
<i>Index</i>	100	86	62	50
Price (EUR/tonne)	820	941	1 094	895
<i>Index</i>	100	115	133	109

Source: Eurostat.

- (106) Apart from Iran and Saudi Arabia, imports from individual third countries were below the *de minimis* threshold of 1 % of market share of the Union market during the IP. The investigation showed that imports volume from third countries have decreased over the period considered. As regard to Iran and Saudi Arabia which accounted respectively for 4,4 % and 1,4 % of EU consumption during the IP, it was found that their pricing was higher than that of the cooperating Chinese exporters. It is therefore considered that such quantities and prices would only have had a limited impact, if any, on the EU market.

- (107) On the basis of the above, it was provisionally concluded that the imports from these third countries did not significantly contribute to the material injury suffered by the Union industry.

4. Conclusion on causation

- (108) The above analysis showed that there was a substantial decrease in the volume of import and market share of the low-priced dumped imports originating in the PRC over the period considered. Nevertheless, these imports were made at significant dumped prices which were undercutting by 10 % the prices charged by the Union industry on the Union market during the IP. This negative effect on the sales price prevailing on the Union market lasted during the whole IP. Based on all facts and considerations, it was considered that there was a causal link between the dumped imports and the injury suffered by the Union industry during the IP.
- (109) The examination of the other known factors which could have caused injury to the Union industry revealed that these factors did not appear to be such as to break the causal link established between the dumped imports from the PRC and the material injury suffered by the Union industry.
- (110) Based on the above analysis, which has properly distinguished and separated the effects of all known factors on the situation of the Union industry from the injurious effects of the dumped imports, it was provisionally concluded that the dumped imports from the PRC have caused material injury to the Union industry within the meaning of Article 3(6) of the basic Regulation.

F. UNION INTEREST

1. Preliminary remark

- (111) In accordance with Article 21 of the basic Regulation, it was examined whether, despite the provisional conclusion on injurious dumping, compelling reasons existed for concluding that it was not in the Union interest to adopt provisional anti-dumping measures in this particular case. The analysis of the Union interest was based on an appreciation of all the various interests involved, including those of the Union industry, importers and users of the product concerned.

2. Interest of the Union industry

- (112) The Union industry is composed of three producers with factories located in different Member States of the Union, employing directly over 600 people related to the like product.
- (113) The Union industry has suffered material injury caused by the dumped imports from the PRC. It is recalled that most relevant injury indicators showed a negative trend during the period considered. In particular injury indicators related to the financial performance of the Union industry, such as profitability, cash flow and return on investments were seriously affected. In the absence of measures, it is considered that the recovery in the melamine sector will not be sufficient to allow the recovery of the Union industry's financial situation.
- (114) It is expected that the imposition of provisional anti-dumping duties will restore effective trade conditions on the Union market, allowing prices of melamine to reflect the costs of the various components and the market conditions. It can be expected that the imposition of provisional measures and the recovery in the sector would enable the Union industry to make economies of scale in order to keep its market share with a positive impact on its economic situation and profitability.
- (115) It was therefore concluded that the imposition of provisional anti-dumping measures on imports of melamine originating in the PRC would be in the interest of the Union industry.

3. Interest of users

- (116) The cooperation by the users was relatively low in this case. 44 questionnaires were sent to the known users in the Union market and only seven replies could be considered to be sufficiently meaningful to assess their economic situation and the possible impact of anti-dumping measures on their activity. The cooperating users represented around 10 % of the EU consumption.
- (117) According to the Union industry the share of melamine in the cost of production of the user's industry would be 3 % at most and 2 % on average. If this is confirmed by the further verification visits which will take place in the remainder of the investigation at the premises of the users, the impact of the proposed anti-dumping measures would be limited on the users' industry.
- (118) Based on the few meaningful replies received from users, it would appear that the share of melamine in the users cost of production would be around 10 %. The possible impact of measures may therefore be negative depending on the level of their profitability which was not clearly disclosed by the users. As mentioned above verification visits will take place at the main users' premises in the remainder of the investigation. The Commission will also seek for more cooperation from the user industry.
- (119) Some parties also suggested that because the market share held by the Union industry is very high a price increase which that industry will apply on melamine once measures are imposed may be the main impact of the imposition of anti-dumping measures in this case.
- (120) Nevertheless, it is considered that not imposing measures on Chinese dumped imports may lead to further cuts in production by certain Union producers and then possible problems such as shortages of supply on the Union market, the largest market for melamine worldwide.

- (121) Based on the above facts and considerations, it is considered that at this stage there are no substantiated elements which show that the impact of the imposition of provisional measures would be disproportionate as regard the activity of the user industry. Hence, it is considered that there are no compelling reasons not to impose provisional measures.

4. Conclusion on Union interest

- (122) In view of the above, it was provisionally concluded that overall, based on the information available concerning the Union interest, there are no compelling reasons against the imposition of provisional measures on imports of melamine originating in the PRC.

G. PROVISIONAL ANTI-DUMPING MEASURES

1. Injury elimination level

- (123) In view of the conclusions reached with regard to dumping, injury, causation and Union interest, provisional anti-dumping measures should be imposed in order to prevent further injury being caused to the Union industry by the dumped imports.
- (124) For the purpose of determining the level of these measures, account was taken of the dumping margins found and the amount of duty necessary to eliminate the injury sustained by the Union industry.
- (125) When calculating the amount of duty necessary to remove the effects of the injurious dumping, it was considered that any measures should allow the Union industry to cover its costs of production and to obtain a profit before tax that could be reasonably achieved by an industry of this type in the sector under normal conditions of competition, i.e. in the absence of dumped imports, on sales of the like product in the Union. It is considered that the profit that could be achieved in the absence of dumped imports should be based on the year 2003 which is the only year where profits were achieved by the Union industry and when Chinese imports were less present on the Union market. It is thus considered that a profit margin of 5 % of turnover could be regarded as an appropriate minimum which the Union industry could have expected to obtain in the absence of injurious dumping.
- (126) On this basis, a non-injurious price was calculated for the Union industry for the like product. The non-injurious price was obtained by adding the abovementioned profit margin of 5 % to the cost of production.
- (127) The necessary price increase was then determined on the basis of a comparison of the weighted average import price of the cooperating exporting producers in the PRC, duly adjusted for importation costs and customs duties with the non-injurious price of the Union industry on the Union market during the IP. Any difference resulting from this comparison was then expressed as a percentage of the average cif import value of the compared types.

2. Provisional measures

- (128) In the light of the foregoing, it is considered that, in accordance with Article 7(2) of the basic Regulation, provisional anti-dumping measures should be imposed in respect of imports originating in the PRC at the level of the lower of the dumping and the injury margins, in accordance with the lesser duty rule.
- (129) The individual company anti-dumping duty rates specified in this Regulation were established on the basis of the findings of the present investigation. Therefore, they reflect the situation found during that investigation with respect to these companies. These duty rates (as opposed to the countrywide duty applicable to 'all other companies') are thus exclusively applicable to imports of products originating in the People's Republic of China and produced by the companies and thus by the specific legal entities mentioned. Imported products produced by any other company not specifically mentioned in the operative part of this Regulation, including entities related to those specifically mentioned, cannot benefit from these rates and shall be subject to the duty rate applicable to 'all other companies'.

- (130) Any claim requesting the application of these individual company anti-dumping duty rates (e.g. following a change in the name of the entity or following the setting up of new production or sales entities) should be addressed to the Commission ⁽¹⁾ forthwith with all relevant information, in particular any modification in the company's activities linked to production, domestic and export sales associated with, for example, that name change or that change in the production and sales entities. If appropriate, the Regulation will accordingly be amended by updating the list of companies benefiting from individual duty rates.
- (131) In order to ensure a proper enforcement of the anti-dumping duty, the residual duty level should not only apply to the non-cooperating exporting producers but also to those producers which did not have any exports to the Union during the IP.
- (132) The dumping and injury margins established are as follows:

Company	Dumping margin	Injury margin
Sichuan Golden Elephant	44,9 %	46,5 %
Shandong Liaherd	47,6 %	47,8 %
Henan Junhua	49,0 %	53,9 %
All other companies	65,6 %	65,2 %

H. DISCLOSURE

- (133) The above provisional findings will be disclosed to all interested parties which will be invited to make their views known in writing and request a hearing. Their comments will be analysed and taken into consideration where warranted before any definitive determinations are made. Furthermore, it should be stated that the findings concerning the imposition of anti-dumping duties made for the purposes of this Regulation are provisional and may have to be reconsidered for the purposes of any definitive findings,

HAS ADOPTED THIS REGULATION:

Article 1

1. A provisional anti-dumping duty is hereby imposed on imports of melamine, currently falling within CN code 2933 61 00 and originating in the People's Republic of China.
2. The rate of the provisional anti-dumping duty applicable to the net, free-at-Union-frontier price, before duty, of the product described in paragraph 1 and manufactured by the companies below shall be:

Company	Duty (%)	TARIC additional code
Sichuan Golden Elephant	44,9	A986
Shandong Liaherd	47,6	A987
Henan Junhua	49,0	A988
All other companies	65,2	A999

3. The release for free circulation in the Union of the product referred to in paragraph 1 shall be subject to the provision of a security equivalent to the amount of the provisional duty.
4. Unless otherwise specified, the provisions in force concerning customs duties shall apply.

Article 2

1. Without prejudice to Article 20 of Council Regulation (EC) No 1225/2009, interested parties may request disclosure of the essential facts and considerations on the basis of which this Regulation was adopted, make their views known in writing and apply to be heard orally by the Commission within one month of the date of entry into force of this Regulation.

⁽¹⁾ European Commission, Directorate-General for Trade, Directorate H, 1049 Brussels, Belgium.

2. Pursuant to Article 21(4) of Council Regulation (EC) No 1225/2009, the parties concerned may comment on the application of this Regulation within one month of the date of its entry into force.

Article 3

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

Article 1 of this Regulation shall apply for a period of 6 months.

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

Done at Brussels, 15 November 2010.

For the Commission

The President

José Manuel BARROSO

COMMISSION REGULATION (EU) No 1036/2010**of 15 November 2010****imposing a provisional anti-dumping duty on imports of zeolite A powder originating in Bosnia and Herzegovina**

THE EUROPEAN COMMISSION,

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

Having regard to Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community ⁽¹⁾ (the 'basic Regulation'), and in particular Article 7 thereof,

After consulting the Advisory Committee,

Whereas:

1. PROCEDURE**1.1. Initiation**

- (1) On 17 February 2010, the European Commission (the 'Commission') announced, by a notice published in the *Official Journal of the European Union* ⁽²⁾ ('Notice of Initiation'), the initiation of an anti-dumping proceeding with regard to imports into the Union of zeolite A powder originating in Bosnia and Herzegovina ('BiH').
- (2) The proceeding was initiated as a result of a complaint lodged on 4 January 2010 by Industrias Quimicas del Ebro SA, MAL Magyar Aluminium, PQ Silicas BV, Silkem d.o.o. and Zeolite Mira Srl Unipersonale (the 'complainants'), representing a major proportion, in this case more than 25 % of the total Union production of zeolite A powder. The complaint contained *prima facie* evidence of dumping of the said product and of material injury resulting therefrom, which was considered sufficient to justify the initiation of an investigation.

1.2. Parties concerned by the proceeding

- (3) The Commission officially advised the complainants, other known Union producers, the exporting producer group in BiH, importers, users, and other parties known to be concerned, and representatives of BiH of the initiation of the proceeding. Interested parties were given an opportunity to make their views known in writing and to request a hearing within the time limit set in the notice of initiation.
- (4) The complainants, Union producers, the exporting producer group in BiH, importers and users made their views known. All interested parties, who so requested and showed that there were particular reasons why they should be heard, were granted a hearing.
- (5) In view of the apparent high number of Union producers and importers, sampling was envisaged in the Notice of initiation, in accordance with Article 17 of the basic Regulation. In order to enable the Commission to decide whether sampling would be necessary and if so, to select a sample, all known Union producers and importers were asked to make themselves known to the Commission and to provide, as specified in the Notice of initiation, basic information on their activities related to the product concerned (as defined in section 2.1. below) during the period from 1 January 2009 to 31 December 2009.
- (6) As explained in recital (16) below, eight Union producers provided the requested information and agreed to be included in a sample. On the basis of the information received from the cooperating Union producers, the Commission selected a sample of four Union producers having the largest volume of production/sales in the Union.

⁽¹⁾ OJ L 343, 22.12.2009, p. 51.

⁽²⁾ OJ C 40, 17.2.2010, p. 5.

- (7) As explained in recital (20) below, only three unrelated importers provided the requested information and agreed to be included in a sample. However one of these importers did not import/purchase the product concerned. Therefore, in view of the limited number of importers, sampling was deemed to be no longer necessary.
- (8) The Commission sent questionnaires to all parties known to be concerned and to all the other companies that made themselves known within the deadlines set out in the Notice of initiation, namely to the exporting producer group in BiH, the four sampled Union producers and three unrelated importers/users.
- (9) Replies were received from the exporting producer group in BiH, including its related companies, from the four sampled Union producers and three Union unrelated importer/users.
- (10) The Commission sought and verified all the information deemed necessary for a provisional determination of dumping, resulting injury and Union interest. Verification visits were carried out at the premises of the following companies:

Producers in the Union

- Industrias Químicas del Ebro SA, Zaragoza, Spain
- MAL Magyar Aluminium, Ajke, Hungary
- PQ Silicas BV, Eijssden, Netherlands
- Zeolite Mira Srl Unipersonale, Mira, Italy

Importers/users in the Union

- Reckitt Benckiser Group, Slough, UK and Mira, Italy
- Henkel AG, Dusseldorf, Germany
- Chemiewerk Bad Kostritz GmbH, Bad Kostritz, Germany

Exporting producers in BiH

- Fabrika Glinice Birac AD, Zvornik
- Alumina d.o.o., Zvornik (related to the above mentioned exporting producer)

Related importer in the Union

- Kauno Tiekimas AB, Kaunas, Lithuania

1.3. Investigation period

- (11) The investigation of dumping and injury covered the period from 1 January 2009 to 31 December 2009 (the 'investigation period' or the 'IP'). The examination of trends relevant for the assessment of injury covered the period from January 2005 to the end of the IP ('period considered').

2. PRODUCT CONCERNED AND LIKE PRODUCT

2.1. Product concerned

- (12) The product concerned is zeolite A powder, also referred to as zeolite NaA powder or zeolite 4A powder (the 'product concerned'), currently falling within CN code ex 2842 10 00.

- (13) The product concerned is destined at end-use applications as a builder, used in the production of dry detergents and water softeners.

2.2. Like product

- (14) The product concerned, the product sold domestically in BiH as well as the one manufactured and sold in the Union by the Union producers were found to have the same basic physical and technical characteristics as well as the same basic uses and are therefore considered to be alike within the meaning of Article 1(4) of the basic Regulation.
- (15) The Bosnian exporting producer group submitted that the product concerned exported by both Fabrika Glinice Birac AD and its related company Alumina d.o.o. ('the Birac group'), has different production costs, production processes and quality than the like product produced by some Union producers. It was also argued that the production process of the Birac group is based on alumina liquor from the alumina production process instead of aluminium trihydrate, while production in the Union is typically based on hydrate crystals which, by heating and adding caustic soda, are brought back to liquid state for the production of the zeolite slurry. With respect to the above arguments it is noted that the information submitted by the Birac group does not put in dispute the established facts that irrespectively of any alleged differences in production processes, costs or quality, the product concerned has the same basic physical and technical characteristics and serves the same purposes as the like product.

3. SAMPLING

3.1. Sampling of Union producers

- (16) Eight Union producers representing around 50 % of the Union producers' sales volume on the market replied to the request for sampling data in the Notice of Initiation. Initially the five largest Union producers were selected to be part of the sample. However, one company decided to terminate its co-operation. Therefore the remaining four Union producers form the sample in this investigation.
- (17) These four producers represented around 37 % of the Union producers' total sales volume on the Union market in the IP and more than 75 % of the sales volume of the eight producers that provided data for the sampling exercise. The four producers selected in the sample were considered to be representative of the overall producers in the Union.
- (18) The Bosnian exporting producer group argued that three Union producers (MAL Magyar Aluminium, Silkem d.o.o. and Industrias Químicas del Ebro SA) should be considered as non-cooperating with the investigation. It was argued that these companies submitted non-confidential replies to deficiency letters some days latter than the dateline set. With respect to the above it is noted that the information provided by the aforesaid parties was submitted in a timely fashion and it did not impede in any way the progress of the investigation or the rights of defence of parties.
- (19) It was also argued that one Union producer (MAL Magyar Aluminium) failed to mention in its reply on sampling that it was related to another Union producer (Silkem d.o.o.). The latter company was not sampled and was not included in MAL Magyar Aluminium's questionnaire reply. It was therefore argued that both these two Union producers should be considered as non-cooperating with the present investigation. To this it is noted that the relationship between these two parties was known to the Commission services at complaint stage and the relationship was stated in the reply on sampling from one of the two parties. Furthermore the relationship was disclosed in MAL Magyar Aluminium's questionnaire response. Finally it should be made clear that Silkem d.o.o. and MAL Magyar Aluminium have fully co-operated with the investigation. In respect of Silkem d.o.o. they submitted data at sampling stage but were not sampled and hence were not requested to complete a questionnaire response. In respect of MAL Magyar Aluminium there was no need for them to submit a consolidated response including Silkem d.o.o. as Silkem d.o.o. is a separate legal entity.

3.2. Sampling of unrelated importers

- (20) Only three unrelated importers replied to the request for information for the sampling exercise in the Notice of Initiation. It was subsequently discovered that one of these companies did not import or purchase the product concerned. Subsequently it was decided that sampling was not necessary for unrelated importers.

4. DUMPING

4.1. Normal value

- (21) In accordance with Article 2(2) of the basic Regulation, the Commission first examined whether the domestic sales of the like product to independent customers by each of the two exporting producers of the Birac group were representative, i.e. whether the total volume of such sales was equal to or greater than 5 % of the total volume of the corresponding export sales to the Union. It was found that the domestic sales were not representative.
- (22) The Commission subsequently examined whether the domestic sales of each exporting producer could be considered as having been made in the ordinary course of trade pursuant to Article 2(4) of the basic Regulation. This was done by establishing the proportion of profitable domestic sales to independent customers.
- (23) Domestic sales transactions were considered profitable where the unit price was equal to or above the cost of production. Cost of production on the domestic market during the IP was therefore determined.
- (24) The above analysis showed that all domestic sales of both exporting producers were profitable, given that the unit net sales price was above the calculated unit cost of production.
- (25) Since the sales on the domestic market were not sold in representative quantities, normal value had to be constructed, in accordance with Article 2(3) of the basic Regulation.
- (26) To construct normal value pursuant to Article 2(3) of the basic Regulation, the selling, general and administrative (SG&A) expenses incurred and the weighted average profit realised by each of the cooperating exporting producers on domestic sales of the like product, in the ordinary course of trade, during the investigation period, was added to their own average cost of production during the investigation period. Where necessary, the costs of production and SG&A expenses were adjusted, before being used in the ordinary course of trade test and in constructing normal values.

4.2. Export price

- (27) Since all exports to the Union were made via a related importer, the export price was constructed on the basis of the resale price to independent customers in accordance with Article 2(9) of the basic Regulation. Adjustments were made in the resale price to the first independent buyer in the Union for all costs including duties and taxes, incurred between importation and resale, as well as a reasonable margin for SG&A and profits. As regards the SG&A, the related importer's own SG&A costs were used. In the absence of cooperation by unrelated importers in the investigation, a reasonable profit margin of 5 % was used, based on information obtained from users who also imported the product concerned in the IP.
- (28) The Birac group claimed that the functions of its related importer were similar to those of an export department rather than an importer, and therefore the export price should not be constructed in accordance with Article 2(9) of the basic Regulation, but rather established in accordance

with Article 2(8) of the basic Regulation, on the basis of export prices actually paid or payable. In this respect, it is noted that, in accordance with Article 2(9) of the basic Regulation, the export price is established on the basis of the resale price to independent customers whenever the product concerned is resold to independent customers by companies related to the exporter in the exporting country. The investigation showed that the related company is located in the Union. It handles, *inter alia*, the customer orders and the invoicing of the product concerned produced by the Birac group. It was further found that the Birac group sells the product concerned to the related company in the Union for resale to EU independent customers. Consequently, the claim has to be rejected. It should be noted that the fact that certain activities are performed by the related company prior to importation does not mean that the export price may not be reconstructed on the basis of the resale price to the first independent customer with the necessary allowances being made pursuant to Article 2(9).

4.3. Comparison

- (29) The comparison between normal value and export price was made on an ex-works basis. For the purpose of ensuring a fair comparison between the normal value and the export price, due allowance in the form of adjustments was made for differences affecting prices and price comparability in accordance with Article 2(10) of the basic Regulation. Appropriate adjustments for transport costs, freight and insurance costs, bank charges, packing costs and credit costs were granted in all cases where they were found to be reasonable, accurate and supported by verified evidence.

4.4. Dumping margin

- (30) According to Article 2(11) of the basic Regulation, the dumping margin for both exporting producers was established based on the comparison of the weighted average normal value with the weighted average export price.
- (31) The individual dumping margins of both exporting producers were weighted based on quantities exported to the Union, resulting in a dumping margin, expressed as a percentage of the CIF Union border price, duty unpaid, of 28,1 % for the Birac group.
- (32) Based on information available from the complaint and the cooperating exporting producer group in BiH, there are no other known producers of the product concerned in BiH. Therefore, the country-wide dumping margin to be established for BiH should be equal to the dumping margin established for the sole cooperating exporting producer group in BiH.

5. INJURY

5.1. Introductory remarks

- (33) It is recalled that in this case there is only one Bosnian exporting producer (the Birac group). Therefore, no precise figures can be given relating to import volumes, import prices, market shares and Union production as well as sales volumes in order to protect business proprietary information. In these circumstances, indicators are given in indexed form or ranges.
- (34) In line with section 3.1 above, the four sampled Union producers constitute the Union industry within the meaning of Article 4(1) and Article 5(4) of the basic Regulation and will be hereafter referred to as the 'Union industry'.

5.2. Union Consumption

- (35) During the provisional stage of the investigation the calculation of Union consumption was based on figures contained in the complaint and supplemented by verified figures established from producers and importer/users involved in the investigation. This data was sent to all interested parties for comment. No comments were provided to dispute the Union consumption data.

- (36) The Union consumption was thus established on the basis of the volume of sales in the Union of the like product produced by the Union industry, the volume of sales in the Union of the like product produced by the other known Union producers and the volume of imports of the product concerned from third countries.

- (37) On this basis the Union consumption developed as follows:

	2005	2006	2007	2008	2009 (IP)
Tonnes	324 395	347 183	371 567	315 642	300 491

Source: Complaint and Questionnaire replies

- (38) The consumption of the product concerned and the like product in the Union fell 7 % over the period considered. This reflects a gradual reduction of the amount of the product concerned incorporated into key products such as laundry detergents by users. It also reflects that more user industry products are becoming zeolite free.

5.3. Imports from the country concerned

5.3.1. Volume, price and market share of dumped imports from the country concerned

- (39) The volume of imports of the product concerned increased by 359 % through the period considered.

	2005	2006	2007	2008	2009 (IP)
Volume of imports	100	73	68	252	459

Index: 2005 = 100

Source: Verified questionnaire reply

- (40) The average import price was stable from 2005 to 2008 and increased by around 10 % in the IP. This was mainly due to an improved situation on the EU market which permitted price increases for all producers of the product concerned.

	2005	2006	2007	2008	2009 (IP)
Average import price (CIF)	100	100	102	99	109

Index: 2005 = 100

Source: Verified questionnaire reply

- (41) The market share of the imports from the country concerned nearly quadrupled in the period considered and represented a market share of between 10-15 % in the IP.

	2005	2006	2007	2008	2009 (IP)
B&H market share	0-5 %	0-5 %	0-5 %	5-10 %	10-15 %
Index: 2005 = 100	100	68	59	259	495

Source: Verified questionnaire reply

5.3.2. Effect of dumped imports on prices

- (42) For the purpose of analysing price undercutting, the import prices of the Bosnian exporting producer were compared to the Union industry prices during the IP, on an average to average basis. The Union industry prices were adjusted to a net ex-works level, and compared to CIF import prices. No customs duties were taken into account as the Bosnian exporting producer was subject to a 0 % preferential rate in the IP.
- (43) The weighted average undercutting margin found, expressed as a percentage of the Union industry's prices is between 20 and 25 %.

5.4. Situation of the Union industry

5.4.1. Preliminary remarks

- (44) Pursuant to Article 3(5) of the basic Regulation, the Commission examined all economic factors and indices having a bearing on the state of the Union industry.
- (45) The indicators referring to macroeconomic elements, such as production, capacity, sales volume, market share etc, are based on data established by the Commission services and sent to interested parties for comment as mentioned above at recital (35). The data for these indicators represent all Union producers. Whenever data relating to the Union producers as a whole are used, the tables below refer to macro data as a source. Other indicators are based on verified data from the sampled producers. These indicators are referred to as micro data. With respect to the macro data the Bosnian exporting producer argued that due to the controversy concerning the appropriate CN code used for classification of the product it is unlikely that these data is reliable. In this respect it is noted that the injury indicators are not in anyway affected by the alleged controversy on CN codes. It is recalled that the definition of the product concerned was provided in the published notice of initiation. This definition is clear leaving out any possibility of misinterpretation. Interested parties were requested to provide information on the basis of the product definition irrespectively of CN codes as the notice of initiation states that the CN code is given for information only. Furthermore it is recalled that the Bosnian exporting producer has not disputed the information concerning Union consumption. Most of the information on imports was directly derived from the Bosnian exporting producer data while the remainder referred to a small volume of imports from other countries. Account taken of the above and of the fact that no concrete evidence was presented to corroborate the claim on unreliable data this argument had to be rejected.

5.4.2. Injury indicators

Production, capacity and capacity utilisation

	2005	2006	2007	2008	2009 (IP)
Production	100	108	114	90	86
Capacity	100	99	104	100	100
Capacity utilisation	72 %	79 %	78 %	65 %	62 %

Index: 2005 = 100

Source: Macro data

- (46) During the period considered, the Union industry's production volume decreased by 14 %. In 2008-2009 an Union producer (Sasol Italy SpA) ceased production altogether. In addition Henkel AG stopped production of its zeolite slurry (this is not the product concerned but is a liquid version which is used as a substitute). To some extent these developments helped the situation of the remaining producers.

- (47) Despite the developments mentioned above capacity was relatively stable across the period considered based on the method of calculation normally employed by the industry. However, the verification of the sampled producers showed that calculation of capacity for this industry can fluctuate depending on the relative fortunes of the market for the product concerned and the market for other products which can be produced using the same facilities.
- (48) The capacity utilisation figures above show a decrease of 14 %. Furthermore at no point did this rate reach 80 % which demonstrates a certain overcapacity. This issue is further discussed under causation.

Stocks

	2005	2006	2007	2008	2009 (IP)
End of year stock	Less than 2 %	Less than 2 %	Less than 2 %	Less than 2 %	Less than 2 %

Index: 2005 = 100
Source: Macro data

- (49) The Union industry's stock level was low and stable throughout the period considered. The production of the like product was planned to match orders and stocks were always kept to the minimum possible level. This was not therefore an important factor in this investigation.

Sales volume and market share

	2005	2006	2007	2008	2009 (IP)
EU sales volume	100	108	116	93	82
Market share	95-100 %	95-100 %	95-100 %	90-95 %	85-90 %
Index of market share	100	101	101	96	89

Index: 2005 = 100
Source: Macro data

- (50) The sales volume of the union industry decreased during the period considered by 18 %.
- (51) The market share of the union industry decreased during the period considered by 11 %.

Sales prices

	2005	2006	2007	2008	2009 (IP)
Average sales price in Euro/tonne	292	306	315	332	354

Source: Micro data

- (52) The average sales price of the Union industry to unrelated parties in the EU increased by 21 % over the period considered. This reflected by and large higher raw material and energy prices and, in isolation, is therefore not considered to be a meaningful indicator.

Profitability

	2005	2006	2007	2008	2009 (IP)
Pre-tax profit margin	3,2 %	0,8 %	1,4 %	– 1,8 %	4,3 %

Source: Micro data

- (53) The profitability of the Union industry was low throughout the period considered. This situation resulted from its inability to raise its prices for the reasons discussed under the 'Causation' section below and in particular the existence of increasing volumes of dumped imports. It also resulted from the low capacity utilisation explained at recital (47).
- (54) From 2005 to 2008 the Union industry's profitability fell substantially and in 2008 became loss-making. It recovered during the IP to the highest level during the period examined but still fell short to the profit of 5,9 % that the industry could have achieved in the absence of dumped imports (see below recital (67)).
- (55) The exporting producer claimed that the profitability of the Union producers was healthy in 2009. This assumption was not backed up by any positive evidence but rather the claim refers to unspecified 'publicly available information'. The sampled producers claimed that the profitability rate achieved in 2009 was a one-off and was not sustainable in the light of the vigorous Bosnian exporting producers' entry to the market in large quantities and low dumped prices. The sampled producers claimed that profitability in 2010 was likely to fall back to 2008 levels.
- (56) The above claims were examined by the Commission services. The examination comprised in particular the development of raw material and sales costs, prices as reflected in the relevant contracts. It was found that the Union industry benefited in 2009 from certain temporary factors which increased its profitability despite the existence of significant volumes of dumped imports:
- (i) The sampled producers benefited to a certain degree from increased production and sales volume following the cessation of production of two other Union producers as mentioned at recital (46).
 - (ii) Although there was a general increase in raw material prices from 2008 some sampled producers benefited from annual raw material contracts which limited the impact of such increases.
 - (iii) One sampled producer benefited from significantly lower finance costs in 2009 due to a restructuring within its group.
- (57) On this basis, the development of the profit margin still pointed to the existence of injury as the profit would have been considerably higher without the dumped imports.

Investments, return on investment, cash flow and the ability to raise capital

	2005	2006	2007	2008	2009 (IP)
Investments (Euro)	577 448	337 865	324 636	1 012 717	366 235
Return on net assets	17 %	6 %	11 %	– 10 %	26 %
Cash flow (Euro)	1 013 223	744 905	905 792	– 930 920	1 638 112

Source: Micro data

- (58) It was claimed by the Bosnian exporting producer that investments were low over the period considered while the Union industry explained that returns on investment were too low to justify substantial investment in the product concerned.
- (59) The return on investment, expressed in terms of net profits of the Union industry and the net book value of its investments follows the trend of profitability shown above. It should be noted that the net assets involved had already been largely depreciated.
- (60) The cash flow situation of the Union industry also follows the trend of profitability shown above. The cash flow situation was serious in 2008 as losses in sale volume were compounded by the producers having to continue to meet their contractual obligations to purchase raw materials.
- (61) Ability to raise capital was not raised as an issue by the Union industry.

Employment, productivity and wages

	2005	2006	2007	2008	2009 (IP)
Employment (FTE)	241	241	253	244	221
Average labour cost per worker (Euro)	36 574	39 644	40 207	39 130	40 225
Productivity per worker	1 423	1 529	1 535	1 296	1 223

Source: Micro data except Employment – macro data

- (62) The number of employees of all Union producers involved with the like product decreased during the period considered in line with reductions in production and sales volume. The average labour cost per worker increased reflecting inflation rises.
- (63) Productivity, expressed in terms of output per worker, decreased by 14 % over the period considered as the sales volume decreased more than employment. This negative development is likely to lead to further job losses in the future.

5.4.3. Magnitude of dumping

- (64) Given the volume and the prices of dumped imports from the country concerned the impact on the EU market of the actual margin of dumping cannot be considered to be negligible.

5.5. Conclusion on injury

- (65) During the period considered the Union producers suffered substantial volume injury which is clearly evident from the above analysis of its production, capacity utilisation, sales volume, market share, employment and productivity trends.
- (66) In terms of prices and profitability an injurious picture is also present. However this analysis is complicated by raw material and energy price increases which have impacted on prices of the product concerned. Profitability, cash flow, and return on investment all deteriorated over the period 2005-2008. 2008 was a particularly serious year for the industry mainly because the companies were locked into raw material contracts but lost more than 20 % of its sales volume.

- (67) In 2009 the market situation eased and price increases enabled an improved profitability situation but as explained above at recital (56) it was clear that this was a temporary respite and that the 2009 market situation is unlikely to be repeated. However, it should be noted that even in 2009 the profitability rate did not reach the 5,9 % deemed as a normal profit for this industry.
- (68) Injury was assessed for the whole Union industry (macro-economic indicators) although for some indicators only the sampled producers were assessed (micro-economic indicators). No significant differences were identified between the micro and macro indicators.
- (69) In the light of the foregoing, it is provisionally established that a major proportion of the Union industry has suffered injury within the meaning of Article 3(5) of the basic Regulation.

6. CAUSATION

6.1. Introduction

- (70) In accordance with Articles 3(6) and (7) of the basic Regulation, the Commission examined whether the dumped imports from the country concerned had caused injury to the Union industry to a degree sufficient to be considered as material. Known factors other than the dumped imports, which could at the same time have injured the Union industry, were also examined in order to ensure that possible injury caused by these other factors was not attributed to the dumped imports.

6.2. Effects of the dumped imports

- (71) Over the period considered imports from the country concerned increased by nearly 400 % and gained a substantial market, i.e. they increased from below 5 % to between 10 and 15 %. In parallel there was a direct and comparable deterioration of the economic situation of the Union industry being the only other significant player on the EU market as imports from other sources are negligible.
- (72) The market share increases of the dumped imports occurred against the backdrop of a fall in EU consumption of 7 % over the period considered.
- (73) The dumped imports of increasing volume undercut the prices of the Union industry by between 20-25 % in the IP. It can be reasonably concluded that such increasing imports in a contracting market were responsible for price suppression in 2008 and 2009. This effect of the dumped imports on prices was magnified by the fact that most sales were made on the basis of annual contracts. Thus, the dumped Bosnian imports could be used to suppress price increases for large volumes of sales despite increases in raw material prices. In 2009 there was an easing of this effect but not enough to enable the industry as a whole to reach the normal profit level of 5,9 %.
- (74) In view of the clearly established coincidence in time between, on the one hand, the surge of dumped imports at prices undercutting the Union industry's prices and, on the other hand, the Union industry's loss of sales and production volume, decrease in market shares and price suppression, it is provisionally concluded that the dumped imports played a major role in the injurious situation of the Union industry.

6.3. Effects of other factors

6.3.1. Export performance of the Union producers

	2005	2006	2007	2008	2009 (IP)
Export sales of Union production	100	108	90	57	121

Index: 2005 = 100

Source: Macro data

- (75) The export volume of all the Union producers increased during the period considered but represented on average only about 10 % of production. The exports of the sampled producers increased and partially compensated for lost EU sales volumes.
- (76) Therefore, the export performance of the Union producers helped sustain its business and did not contribute to the material injury suffered.

6.3.2. Imports from third countries

- (77) Imports from third countries were negligible during the period considered and could not have contributed to the injury suffered by the Union industry. The Bosnian exporting producer argued that market share of Union producers has been lost to imports from China and Korea but this claim is not supported by the actual facts as imports from these countries were marginal.

6.3.3. Impact of a fall in consumption

	2005	2006	2007	2008	2009 (IP)
EU Consumption in tonnes	324 395	347 183	371 567	315 642	300 491

Source: Macro data

- (78) Over the period considered consumption fell by around 24 000 tonnes (7 %) reflecting the fact that the laundry detergent industry was gradually using more alternative products in their formulas to replace the product concerned. It was claimed by the exporting producer that this led to 'saturated stocks, cancellations of orders and lower profits'.
- (79) It should be said that two producers in the EU market have ceased production towards the end of the period considered and therefore an adjustment of capacity has taken place to compensate for the decrease in consumption. Furthermore, as explained at recital (49) stock levels have remained low and stable meaning that production has adjusted to the lower consumption levels.
- (80) Therefore whilst it cannot be excluded that the fall in consumption has contributed to the injury suffered by the Union producers, it appears that this impact is not important.

6.3.4. Impact of investments

- (81) It was claimed by the exporting producer that compliance with REACH legislation caused the injury. However, as explained at recital (58) given the level of investments in the product concerned throughout the period considered this could not have contributed to the injury suffered to any significant degree. Furthermore, the costs associated with REACH have been moderate.

6.3.5. Impact of increases in raw material and energy costs

- (82) It was claimed by certain parties that increased raw material and energy costs contributed to the injury. The increases in these costs were indeed significant and took place mainly in 2008. This no doubt had some impact on profitability in that year because they occurred at a time of falling sales volume. However, to a certain degree increases in energy costs were reflected in increases in sales prices as shown at recital (52) although the price depression effect of the dumped imports has prevented adequate increase levels.

- (83) Therefore it is considered that the increase in raw material and energy costs has not contributed to the injury suffered.

6.3.6. Impact of capacity issues

- (84) The issues of overcapacity and low capacity utilisation were discussed at recital (46). The effect of the capacity issues on profitability has to be looked at in view of both the structural characteristics of this industry and the existence of dumped imports. The effect on profitability is because of the substantial fixed costs which would be recovered if utilisation rates were higher.
- (85) However, the overcapacity and low capacity utilisation issues can partially explain some of the negative injury indicators suffered by the Union producers but do not explain the large declines in production, sales volume and market share in 2009. They clearly therefore do not break the causal link between the big increase in imports at dumped prices and the injury suffered by the Union producers.

6.3.7. Impact of global credit crisis/general economic crisis

- (86) It was claimed by certain interested parties that the global credit crisis and the general economic crisis contributed to the injury. In fact consumption of the product concerned did fall in 2008/2009 when these crises occurred.
- (87) However, these issues cannot explain why the market share of the Union producers fell substantially in 2009 while the market share held by Bosnian imports increased and undercut the EU prices by over 20 %. Therefore whilst the decline in consumption in 2008/2009 would in itself have affected the Union industry, the significant rise of imports from BiH had a much more significant impact on sales volumes of the Union industry and, in view of the undercutting, on prices. Thus, the crisis did not break the causal link between the big increase in imports at dumped prices and the injury suffered by the Union producers.

6.3.8. Impact of consolidated user industry

- (88) Although more than 10 companies manufactured the product concerned in the IP the main user industry (laundry detergent and water softener producers) consisted essentially of 4 big groups (Reckitt Benckiser, Henkel, Procter & Gamble and Unilever). In fact the two main co-operating users represented nearly 40 % of purchases of the product concerned in the EU. Using centralised purchasing these 4 groups are indeed able to keep prices of the product concerned low.
- (89) However, this issue is not a new phenomenon but has existed for many years. Therefore, it again cannot explain the large declines in production, sales volume and market share in 2009. It clearly therefore does not break the causal link between the big increase in imports at dumped prices and the injury suffered by the Union producers.

6.4. Conclusion of causation

- (90) Based in the above, it is provisionally concluded that the material injury to the Union industry was caused by the dumped imports concerned.
- (91) A number of factors other than the dumped imports were examined but none of these could explain the serious losses in market share, production and sales volume which occurred in 2008 and 2009 which coincides with the increases in volumes of dumped imports.
- (92) Given the above analysis which has properly distinguished and separated the effects of all the known factors on the situation of the Union industry from the injurious effects of the dumped imports, it is provisionally concluded that the imports from BiH have caused material injury to the Union industry within the meaning of Article 3(6) of the basic Regulation.

7. UNION INTEREST

7.1. General remarks

- (93) The Commission examined whether, despite the provisional conclusion on the existence of injurious dumping, compelling reasons existed that could lead to the conclusion that it is not in the Union interest to adopt measures in this particular case. For this purpose, and in accordance with Article 21(1) of the basic Regulation, the impact of possible measures on all parties involved in this proceeding and also the consequences of not taking measures were considered on the basis of all evidence submitted.

7.2. Interest of the Union industry

- (94) The injury analysis has clearly demonstrated that the Union industry has suffered from the dumped imports. The increased presence of dumped imports in recent years caused a suppression of sales in the Union market and a loss of market share for the Union industry. This prevented the Union industry from achieving profitability levels similar to those achieved for other products.
- (95) The investigation has shown that any increase in the market share of the dumped imports from the country concerned is gained at the direct expense of the Union industry. Despite the restructuring that occurred with respect to the Union producers (two companies stopped production) the situation has not ameliorated. In this respect it is noted that zeolite A powder is an important product in terms of the turnover of the sampled companies being up to 30 % of their sales turnover. Without the imposition of measures the Union industry situation would clearly deteriorate further. The imposition of measures will restore the import price to non-injurious levels, allowing the Union industry to compete under fair trade circumstances.
- (96) It is therefore provisionally concluded that imposing measures would clearly be in the interest of the Union industry.

7.3. Interest of importers

- (97) The likely impact of measures on importers has been considered in accordance with Article 21 (2) of the basic Regulation. In this respect it is noted that the unrelated importers that made themselves known were also users. Thus the analysis referring to them is presented under the relevant section on interest of users.

7.4. Interest of users and consumers

- (98) No representations were received from consumers' organisations following the publication of the notice of initiation of this proceeding. Therefore, the analysis has been limited to the effect of measures on users.
- (99) Questionnaires were sent to 8 known users. However, meaningful comments were received from only two of them. Therefore, the Union interest analysis is based on the responses of two rather large users, which together represent almost 40 % of Union consumption.
- (100) The two co-operating Union users represent major players in the Union laundry detergent and water softener industry. They both objected to the imposition of measures.
- (101) The investigation established that with respect to the co-operating Union users' consumption less than 1/3 of it is imported from the Bosnian exporting producer. The remaining part is covered by procurements from the Union producers which remain the prime supply source of the co-operating users. Account taken of the low capacity utilisation rate of the Union producers, as explained above at recitals (47) and (48), it is clear that any imposition of measures is not expected to lead to any shortages in supply or consequent increase of prices.

- (102) Further to the above it appears that the Union user industry has already started exploring the possibility of imports from China. The fact that such option exists and is considered reliable demonstrates that any imposition of measures will not in any way lead to a shortage of the product concerned.
- (103) The percentage in turnover of the final products incorporating the product concerned was also looked at. To this respect it is noted that in both cases the relevant products represent less than 10 % of their turnovers.
- (104) The percentages of the product concerned being incorporated into the final products was also investigated. The investigation established that in general these percentages are extremely small (on average less than 5 % on the total cost), and therefore the product concerned does not represent a very significant cost element in the finished products.
- (105) The Commission examined also if the imposition of measures would have any significant negative financial impact on the situation of these two users. The Commission established two scenarios, i.e. worst case scenario and a more realistic scenario.
- (106) The worst case scenario assumes that both the import and Union prices increased by the level of the duty. This would increase on average the costs of the users by less than 2 %.
- (107) The above situation has to be compared with the profitability rates of the co-operating Union users. The users' profitability on products incorporating the product concerned is around 11 % and for all their products was over 20 %. Account taken of such profitability rates even a full pass of measures to both import and Union prices would not have a disproportionate effect on these parties' financial situation.
- (108) In fact a much more realistic scenario is that the imposition of measures would lead to a situation where only import prices from BiH increase while the Union industry benefits from increased economies of scale. Indeed, as explained above, the supply situation of the product concerned within the EU is fully sufficient, since most Union producers operate at far from full capacity.
- (109) It should also be noted that the investigation established that there are products that could be substituted for the product concerned. Indeed, it is clear that both the co-operating and non co-operating users also produce laundry detergents without the product concerned. In this more realistic scenario, the costs of the cooperating users will only increase by a fraction of one percent. In other words, in light of the profitability figures the imposition of measures will only have negligible consequences for users.
- (110) Account taken of the above it is clear that the imposition of measures would not lead to any significant impact to users and thus it is highly unlikely that there would even be any increase in price to the consumers.

7.5. Conclusion on Union interest

- (111) Overall, it is expected that the Union industry would clearly be in a position to benefit from measures. Indeed, they could in the first place benefit from increased economies of scale because of a higher capacity utilization due to an increase in production and sales.
- (112) Account taken of the above it is provisionally concluded that the imposition of measures on dumped imports of the product concerned from Bosnia and Herzegovina will not affect the Union users significantly and that overall it is in the Union interest.

8. PROPOSAL FOR PROVISIONAL ANTI-DUMPING MEASURES

- (113) In view of the conclusions reached above with regard to dumping, resulting injury and Union interest, provisional measures on imports of the product concerned from Bosnia and Herzegovina should be imposed in order to prevent further injury being caused to the Union industry by dumped imports.

8.1. Injury elimination level

- (114) The level of the provisional anti-dumping measures should be sufficient to eliminate the injury to the Union industry caused by the dumped imports, without exceeding the dumping margins found.
- (115) When calculating the amount of duty necessary to remove the effects of the injurious dumping, it was considered that any measures should allow the Union industry to cover its costs and obtain a profit before tax that could be reasonably achieved under normal conditions of competition, i.e. in the absence of dumped imports. The pre-tax profit margin used for this calculation was 5,9 % of turnover. This was the profit level achieved by the Union industry in the IP for all its products including the product concerned. Bearing in mind that the profitability for the product concerned was affected by dumped imports it is clear that this level of profit is prudent and not excessive. It was also considered whether the profit rates achieved by the Union industry in 2005-2007 should be used but the profit rates were low in terms of profitability achieved by the companies for similar products and were not considered to be representative for a viable industry. This is because the Bosnian imports undercut those of the Union industry by between 10-20 % during these 3 years and such differences would have played a significant role in annual contract negotiations. Thus these profit margins could not be considered representative of a normal situation in the EU market. On the basis mentioned above, a non-injurious price was calculated for the Union industry of the like product. The non-injurious price has been obtained by adding the above mentioned profit margin to the cost of production.
- (116) The necessary price increase was then determined on the basis of a comparison of the weighted average import price, as established for the undercutting calculations, with the average non-injurious price of products sold by the Union industry on the EU market. The difference resulting from this comparison was then expressed as a percentage of the average import CIF value. The underselling margin thereby calculated was 31,5 %.

8.2. Provisional measures

- (117) In the light of the foregoing, and in accordance with Article 7(2) of the basic Regulation, it is considered that provisional anti-dumping measures should be imposed on imports originating in the Bosnia and Herzegovina at the level of the dumping margin found.
- (118) On the basis of the above, the rate of the provisional anti-dumping duty for Bosnia and Herzegovina is 28,1 %.

9. DISCLOSURE

- (119) In the interest of sound administration, a period should be fixed within which the interested parties which made themselves known within the time limit specified in the notice of initiation may make their views known in writing and request a hearing. Furthermore, it should be stated that the findings concerning the imposition of duties made for the purpose of this Regulation are provisional and may have to be reconsidered for the purpose of any definitive duty,

HAS ADOPTED THIS REGULATION:

Article 1

1. A provisional anti-dumping duty is hereby imposed on imports of zeolite A powder, also referred to as Zeolite NaA or Zeolite 4A powder, currently falling within CN code ex 2842 10 00 (TARIC code 2842 10 00 30) and originating in Bosnia and Herzegovina.
2. The rate of the provisional anti-dumping duty applicable to the net, free-at-Union-frontier price, before duty, of the product described in paragraph 1 shall be 28,1 %.
3. The release for free circulation in the Union of the product referred to in paragraph 1 shall be subject to the provision of a security, equivalent to the amount of the provisional duty.

4. Unless otherwise specified, the provisions in force concerning customs duties shall apply.

Article 2

1. Without prejudice to Article 20 of Council Regulation (EC) No 1225/2009, interested parties may request disclosure of the essential facts and considerations on the basis of which this Regulation was adopted, make their views known in writing and apply to be heard orally by the Commission within one month of the date of entry into force of this Regulation.

2. Pursuant to Article 21(4) of Council Regulation (EC) No 1225/2009, the parties concerned may comment on the application of this Regulation within one month of the date of its entry into force.

Article 3

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

Article 1 of this Regulation shall apply for a period of six months.

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

Done at Brussels, 15 November 2010.

For the Commission

The President

José Manuel BARROSO

COMMISSION REGULATION (EU) No 1037/2010**of 15 November 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 16 November 2010.

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

Done at Brussels, 15 November 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	AL	39,6
	MA	72,3
	MK	61,3
	ZZ	57,7
0707 00 05	AL	68,6
	EG	161,4
	TR	136,0
	ZZ	122,0
0709 90 70	MA	87,2
	TR	137,5
	ZZ	112,4
0805 20 10	MA	62,2
	ZA	145,6
	ZZ	103,9
0805 20 30, 0805 20 50, 0805 20 70, 0805 20 90	HR	45,5
	TR	59,9
	UY	55,0
	ZZ	53,5
0805 50 10	AR	42,7
	TR	67,8
	UY	57,1
	ZA	109,5
	ZZ	69,3
0806 10 10	BR	258,3
	TR	146,2
	US	260,4
	ZA	79,2
	ZZ	186,0
0808 10 80	AR	75,7
	CL	84,2
	MK	27,2
	NZ	75,7
	US	96,5
	ZA	96,2
0808 20 50	ZZ	75,9
	CN	54,9
	ZZ	54,9

⁽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 1038/2010**of 15 November 2010****fixing the import duties in the cereals sector applicable from 16 November 2010**

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 (EU) No 642/2010 of 20 July 2010 laying down detailed rules for the application of Council Regulation (EC) No 1234/2007 in respect of import duties in the cereals sector ⁽²⁾, and in particular Article 2(1) thereof,

Whereas:

- (1) Article 136(1) of Regulation (EC) No 1234/2007 states that the import duty on products falling within CN codes 1001 10 00, 1001 90 91, ex 1001 90 99 (high quality common wheat), 1002, ex 1005 other than hybrid seed, and ex 1007 other than hybrids for sowing, is to be equal to the intervention price valid for such products on importation increased by 55 %, minus the cif import price applicable to the consignment in question. However, that duty may not exceed the rate of duty in the Common Customs Tariff.

- (2) Article 136(2) of Regulation (EC) No 1234/2007 lays down that, for the purposes of calculating the import duty referred to in paragraph 1 of that Article, representative cif import prices are to be established on a regular basis for the products in question.

- (3) Under Article 2(2) of Regulation (EU) No 642/2010, the price to be used for the calculation of the import duty on products of CN codes 1001 10 00, 1001 90 91, ex 1001 90 99 (high quality common wheat), 1002 00, 1005 10 90, 1005 90 00 and 1007 00 90 is the daily cif representative import price determined as specified in Article 5 of that Regulation.

- (4) Import duties should be fixed for the period from 16 November 2010 and should apply until new import duties are fixed and enter into force,

HAS ADOPTED THIS REGULATION:

Article 1

From 16 November 2010, the import duties in the cereals sector referred to in Article 136(1) of Regulation (EC) No 1234/2007 shall be those fixed in Annex I to this Regulation on the basis of the information contained in Annex II.

Article 2

This Regulation shall enter into force on 16 November 2010.

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

Done at Brussels, 15 November 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 187, 21.7.2010, p. 5.

ANNEX I

Import duties on the products referred to in Article 136(1) of Regulation (EC) No 1234/2007 applicable from 16 November 2010

CN code	Description	Import duties ⁽¹⁾ (EUR/t)
1001 10 00	Durum wheat, high quality	0,00
	medium quality	0,00
	low quality	0,00
1001 90 91	Common wheat seed	0,00
ex 1001 90 99	High quality common wheat, other than for sowing	0,00
1002 00 00	Rye	0,00
1005 10 90	Maize seed other than hybrid	0,00
1005 90 00	Maize, other than seed ⁽²⁾	0,00
1007 00 90	Grain sorghum other than hybrids for sowing	0,00

⁽¹⁾ For goods arriving in the Union via the Atlantic Ocean or via the Suez Canal the importer may benefit, under Article 2(4) of Regulation (EU) No 642/2010, from a reduction in the duty of:

- 3 EUR/t, where the port of unloading is on the Mediterranean Sea, or on the Black Sea,
- 2 EUR/t, where the port of unloading is in Denmark, Estonia, Ireland, Latvia, Lithuania, Poland, Finland, Sweden, the United Kingdom or the Atlantic coast of the Iberian peninsula.

⁽²⁾ The importer may benefit from a flatrate reduction of EUR 24 per tonne where the conditions laid down in Article 3 of Regulation (EU) No 642/2010 are met.

ANNEX II

Factors for calculating the duties laid down in Annex I

2.11.2010-12.11.2010

1. Averages over the reference period referred to in Article 2(2) of Regulation (EU) No 642/2010:

(EUR/t)

	Common wheat ⁽¹⁾	Maize	Durum wheat, high quality	Durum wheat, medium quality ⁽²⁾	Durum wheat, low quality ⁽³⁾	Barley
Exchange	Minneapolis	Chicago	—	—	—	—
Quotation	219,39	161,99	—	—	—	—
Fob price USA	—	—	208,44	198,44	178,44	123,34
Gulf of Mexico premium	—	17,04	—	—	—	—
Great Lakes premium	20,14	—	—	—	—	—

⁽¹⁾ Premium of 14 EUR/t incorporated (Article 5(3) of Regulation (EU) No 642/2010).⁽²⁾ Discount of 10 EUR/t (Article 5(3) of Regulation (EU) No 642/2010).⁽³⁾ Discount of 30 EUR/t (Article 5(3) of Regulation (EU) No 642/2010).

2. Averages over the reference period referred to in Article 2(2) of Regulation (EU) No 642/2010:

Freight costs: Gulf of Mexico–Rotterdam: 18,20 EUR/t

Freight costs: Great Lakes–Rotterdam: 46,32 EUR/t

COMMISSION REGULATION (EU) No 1039/2010**of 15 November 2010****amending the representative prices and additional import duties for certain products in the sugar sector fixed by Regulation (EU) No 867/2010 for the 2010/11 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 2010/11 marketing year are fixed by Commission Regulation (EU) No 867/2010 ⁽³⁾. These prices and duties have been last amended by Commission Regulation (EU) No 1029/2010 ⁽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 (EU) No 867/2010 for the 2010/11, marketing year, are hereby amended as set out in the Annex hereto.

Article 2

This Regulation shall enter into force on 16 November 2010.

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

Done at Brussels, 15 November 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 259, 1.10.2010, p. 3.

⁽⁴⁾ OJ L 296, 13.11.2010, p. 17.

ANNEX

Amended representative prices and additional import duties applicable to white sugar, raw sugar and products covered by CN code 1702 90 95 from 16 November 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⁾	55,54	0,00
1701 11 90 ⁽¹⁾	55,54	0,00
1701 12 10 ⁽¹⁾	55,54	0,00
1701 12 90 ⁽¹⁾	55,54	0,00
1701 91 00 ⁽²⁾	51,75	1,94
1701 99 10 ⁽²⁾	51,75	0,00
1701 99 90 ⁽²⁾	51,75	0,00
1702 90 95 ⁽³⁾	0,52	0,21

⁽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

COMMISSION DECISION

of 4 August 2010

on State aid C 40/08 (ex N 163/08) implemented by Poland for PZL Hydral S.A.

(notified under document C(2010) 5406)

(Only the Polish version is authentic)

(Text with EEA relevance)

(2010/690/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 regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having regard to decision C(2008) 4753 final ⁽¹⁾ by which the Commission decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union and decision C(2008) 6371 final ⁽²⁾ extending the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union in respect of aid C 40/08 (ex N 163/08),

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

Whereas:

I. PROCEDURE

- (1) By letter of 27 March 2008, the Polish authorities gave notification of a restructuring plan for PZL Hydral S.A. ('PZL Hydral'). The Commission requested additional information by letter of 6 May 2008. By letter of 4 June 2008, the Polish authorities requested that the deadline for replying be extended until 27 June 2008; the Commission agreed by letter of 10 June 2008. The Polish authorities provided additional information concerning the restructuring plan by letter of 7 July 2008.
- (2) Proceedings under Article 108(2) of the Treaty on the Functioning of the European Union (the formal investigation procedure) were opened on 10 September

2008. The formal investigation procedure was subsequently extended by a decision adopted on 12 November 2008.

- (3) Poland submitted its observations on 14 October and 22 December 2008 and additional information on 7 April 2009. The Commission received no comments from third parties.
- (4) Meetings with the Polish authorities took place on 27 April and 14 October 2009 and 12 February 2010. On 18 December 2009 the Commission requested further information. Various exchanges of emails took place between the Commission and the Polish authorities and additional information was submitted by the Polish authorities by email on the following dates: 20 October 2009, 23 November 2009, 15 December 2009, 13 January 2010, 16 January 2010, 9 February 2010, 10 February 2010, 26 February 2010, 1 March 2010, 3 March 2010, 4 March 2010, 19 March 2010, 5 May 2010, 12 May 2010, 20 May 2010, 28 May 2010, 3 June 2010, 4 June 2010, 7 June 2010, 8 June 2010, 9 June 2010, 17 June 2010, 23 June 2010, 24 June 2010, 28 June 2010, 7 July 2010, 8 July 2010, 9 July 2010, 12 July 2010 and 13 July 2010.

II. DESCRIPTION

II.1. The beneficiaries: PZL Hydral and PZL Wrocław

PZL Hydral

- (5) PZL Hydral was established in 1946 as a State enterprise. It is now a large company which until 2008 specialised in the production of civil and military industrial hydraulics, the design, manufacture and service of electronic hydromechanic fuel-regulating systems for aviation engines of all types, hydraulic control systems for aircraft and power hydraulics for helicopters. Since 2008 PZL Hydral has operated as the parent company of a group and no longer has any industrial activities of its own.

⁽¹⁾ OJ C 324, 19.12.2008, p. 17.

⁽²⁾ OJ C 158, 18.6.2010, p. 9.

- (6) In 2003 the state-owned Industrial Development Agency ('the IDA') acquired 80,94 % of shares in PZL Hydral (1 284 686 shares) from the Treasury. Further transfers of shares from the Treasury to the IDA took place in 2005 (499 103 shares), increasing the IDA's shareholding to 87,39 %, in 2007 (64 374 shares), increasing the shareholding to 90,54 %, and on 12 January 2010 (38 399 shares), increasing the shareholding to 92,42 %. Each of these transactions was effected at the symbolic price of PLN 1. Since 12 January 2010 the IDA has held 18 886 562 shares with a nominal value of PLN 18 865 620. The remaining shares (7,58 %), with a nominal value of 1 547 210, are currently held by the employees.
- (7) In 2007 PZL Hydral controlled the following subsidiaries: Zakład Odlewniczy 'Hydral' Sp. z o.o., whose main activity is casting, founding, processing and treating steel parts; Zakład Ciepłowniczy Term 'Hydral' Sp. z o.o., which produces and sells thermal energy; Przedsiębiorstwo Usługowo Handlowe Zakład Produkcji Hydrauliki 'Hydral' Sp. z o.o., which produces valves and hydraulic distributors, processes metal equipment and provides repair services for hydraulic machinery and equipment, and PZL Wrocław Sp. z o.o. ('PZL Wrocław'). In addition, PZL Hydral controlled two other companies, now in the process of liquidation. At end-2006 the group as a whole had 795 employees.
- PZL Wrocław*
- (8) PZL Wrocław was founded as a fully-owned subsidiary of PZL Hydral in 2004 in order to create an operating company which would take over the operational arm of PZL Hydral, thereby allowing the latter to act as holding company and manage the restructuring process of the PZL Hydral group.
- (9) A part of PZL Wrocław's assets was transferred from PZL Hydral to PZL Wrocław either by way of an in-kind contribution to the capital of PZL Wrocław or a sale at the book value in the books of PZL Hydral as of 2004, as shown in Table 1.

Table 1

Transfer of assets by way of an in-kind contribution or sale (in PLN)

Date of transfer	Type of assets	Method of transfer (sale/in-kind contribution)	Book value of assets
30.12.2004	fixed assets - movable	in-kind contribution	3 917 321,0
30.12.2004	intangible assets	in-kind contribution	801 332,0
30.12.2004	work in progress	in-kind contribution	1 251 352,0
30.12.2004	materials	in-kind contribution	251 719,0
30.11.2006	fixed assets - movable	in-kind contribution	138 516,44
30.11.2006	materials	in-kind contribution	679 915,73
30.11.2006	fixed assets - movable	in-kind contribution	1 186 803,54
30.11.2006	intangible assets	in-kind contribution	290 268,95
20.6.2007	fixed assets - movable	sale	1 250 000,0
30.12.2007	fixed assets - movable	in-kind contribution	1 293 600,0
21/23.12.2008	work in progress	sale	5 230 644,91
27.3.2008	materials	sale	2 985 631,15
10.3.2009	materials	sale	304 294,33

- (10) The tangible fixed assets which PZL Wrocław acquired from PZL Hydral were transferred either as an in-kind contribution to the capital of PZL Wrocław or by way of a sale, as shown in Table 2. In both cases the value of the transaction was based on the assessment of an independent expert. When these fixed assets were transferred they had already been encumbered with mortgages on real estate in favour of the following public creditors: the Social Security Office, the Lower Silesia Region Tax Office and Wrocław City Council in an amount of PLN 142,558 million.

Table 2

Transfer of real estate (in PLN)

Date of transfer	Type of assets	Method of transfer (sale/in-kind contribution)	Book value of assets
30.12.2007	fixed assets – real estate	in-kind contribution	8 337 000,0
30.12.2007	fixed assets – real estate	sale	10 309 508,56

- (11) On 31 December 2007, PZL Hydral transferred to PZL Wrocław funds with a nominal value of PLN 918 900 by way of a contribution to the capital of PZL Wrocław.
- (12) The rest of the assets transferred from PZL Hydral to PZL Wrocław between 17 January 2006 and 27 April 2010 were sold at their book value and consisted of numerous transfers of assets under construction which were free of any pledges or mortgages.
- (13) The overall value of the assets transferred from PZL Hydral to PZL Wrocław between 2004 and 2010 amounted to PLN 44 708 791,02.
- (14) 559 employees were transferred from PZL Hydral to PZL Wrocław in 2008 and 37 employees were transferred in 2009.
- (15) PZL Wrocław produces components for aircraft used by the Polish armed forces (until end-2007 this production was carried out by PZL Hydral) and provides services comprising the maintenance and repair of equipment used by the Polish army. Military products undergo certification specific to the product type in accordance with the technical requirements of the Polish armed forces. Individual documentation is provided at each stage and these products (and the associated maintenance services) are supervised by a resident military representative.
- (16) PZL Wrocław currently operates on the basis of Permit No B-007/2007 issued by the Minister for Internal Affairs and Administration on 17 January 2007 for the performance of business activities in the area of:
- production and marketing of devices to shoot off alarm, signal and gas munitions as defined in paragraph 8 (Types of arms and ammunition) of Appendix No 1 to the Cabinet Regulation dated 3 December 2001 on types of arms and ammunition and a list of military and police products and technologies for the production and marketing of which a permit is required ⁽¹⁾,
 - production and marketing of military or police products as defined under heading 'WT V' and components and constituents of products as defined under heading 'WT II', 'WT III' and 'WT XIV' (Paragraphs 1-4 and 7-10) of Appendix No 2 (List of military and police products and technologies for the production and marketing of which a permit is required) to the above-mentioned Cabinet Regulation,

⁽¹⁾ Journal of Laws No 145, item 1625, as amended.

— production and marketing of equipment for the manufacture of military or police products and marketing of technology for the manufacture of products intended for that purpose as defined under heading 'WT XIII' of Appendix No 2 (List of military and police products and technologies for the production and marketing of which a permit is required) to the above-mentioned Cabinet Regulation.

(17) PZL Wrocław holds the following certificates:

— certificate of compliance with the requirements of ISO 9001:2000 awarded by Bureau Veritas Certification,

— certificate of compliance with the requirements of AS9100-B awarded by Bureau Veritas Certification,

— certificate authorizing the production of aviation accessories meeting the requirements of the PART 21 aviation regulations awarded by the Polish Civil Aviation Office,

— certificate for performance of the technical servicing of products meeting the requirements of the PART 145 aviation regulations awarded by the Polish Civil Aviation Office,

— NADCAP certificate awarded by the Performance Review Institute for selected special process: heat treatment (HT), non-destructive testing (NDT), chemical processes (CHP) and electro-discharge machining (EDM).

The role of PZL Hydral in the economic development plan

(18) The Polish authorities informed the Commission that the product line of PZL Hydral (and now PZL Wrocław) is an important part of the economic development plan launched by the Polish Government in 1995 for 1996-2000 and in 2000 for 2001-2006.

(19) Moreover, explicit reference is made to PZL Hydral or to its business activities in a number of implementing measures and governmental guidelines for the economic development plan, such as:

— guidelines of the Minister/Head of the Central Planning Office dated 30 January 1995 on the economic development plan for 1996-2000,

— guidelines of the Minister for Economic Affairs of July 2000 on the central economic development plan for 2001-2006,

— Organisation of Work Implemented by Companies for the Purposes of National Defence Act of 23 August 2001 ⁽¹⁾,

— Cabinet Regulation of 24 June 2003 on facilities of particular significance to the security and defence of the state and special protection thereof ⁽²⁾,

— Cabinet Regulation of 20 August 2004 listing companies of particular economic and defence significance ⁽³⁾,

— Cabinet Regulation of 9 November 2007 listing companies of particular economic and defence significance ⁽⁴⁾.

(20) Companies entered on lists of this type are required to provide detailed annual reports on their defence production capacity (quantities, profile, values) in order to enable the Ministry to ensure that the military tasks are performed.

(21) The Polish authorities informed the Commission that the relevant permits and certificates (points 16 and 17) enable goods and services of specific quality to be supplied to special customers (enterprises of particular significance to the defence of the state and the Ministry of Defence). PZL Wrocław (PZL Hydral in the past) does not just supply components of hydraulic systems, fuel systems and control systems; repairs to installed sub-assemblies are crucial to the functioning of the aircraft operated by the Polish armed forces (W-3, Mi-2, M28 Bryza and PZL 130 Orlik); the Polish authorities also emphasised that the W-3 and Mi-2 are the main helicopters used by the Polish army.

(22) The goods produced by PZL Hydral for the use of the armed forces have the corresponding NATO code under the NATO Standardisation Agreement and the company itself has a NATO code.

Financial relationships between PZL Hydral and PZL Wrocław

(23) As explained above in point 9 et seq., as of December 2004 PZL Hydral transferred assets to PZL Wrocław. Only the assets transferred on 30 December 2007 (real estate) were encumbered by mortgages in favour of public creditors.

(24) The Polish authorities confirmed that since it started operating PZL Wrocław has settled all its liabilities vis-à-vis public creditors on time, including social security contributions and taxes for its employees.

⁽¹⁾ Journal of Laws No 122, item 1320, as amended.

⁽²⁾ Journal of Laws No 116, item 1090, as amended.

⁽³⁾ Journal of Laws No 192, item 1965, as amended.

⁽⁴⁾ Journal of Laws No 214, item 1571, as amended.

II.2. Financial difficulties of PZL Hydral

- (25) PZL Hydral started to have difficulties in repaying liabilities to both its private and public creditors in 1998.

Liabilities vis-à-vis private creditors

- (26) At the end of 1998, PZL Hydral's private liabilities vis-à-vis banks and suppliers amounted to PLN 90,4 million. The bulk of these debts were owed to two banks: Bank [...] (*) and Bank [...].
- (27) PZL Hydral owed Bank [...] PLN 54 million at the end of 1998 and PLN 86,4 million by November 2006, when a settlement agreement was signed, and its claim was finally settled in 2007. PZL Hydral owed Bank [...] PLN 23 million at the end of 1998 and PLN 55,6 million by October 2003, and its claim was finally settled in 2004.

Table 3

Changes in the total amount owed by PZL Hydral to [...] (PLN thousand)

	31.12. 1998	31.12. 1999	31.12. 2000	31.12. 2001	31.12. 2002	31.12. 2003	31.12. 2004	31.12. 2005	31.12. 2006
Principal	44 447	48 424	51 605	49 628	37 416	39 041	38 741	38 291	35 377
Interest	9 583	17 683	26 194	34 449	29 157	38 184	40 920	43 776	51 018
Total	54 030	66 107	77 798	84 077	66 573	77 225	79 721	82 067	86 395

Table 4

Changes in the total amount owed by PZL Hydral to [...] (PLN thousand)

	31.12. 1998	31.12. 1999	31.12. 2000	31.12. 2001	31.12. 2002	31.12. 2003	31.12. 2004	31.12. 2005	31.12. 2006
Principal	18 571	21 986	21 959	21 127	20 741	19 825	4 000	0	0
Interest	4 572	5 983	10 842	16 759	23 975	35 773	0	0	0
Total	23 143	27 969	32 801	37 886	44 716	55 598	4 000	0	0

- (28) These private banks had first-rank collateral (see detailed description in points 32 and 34 below) and could have easily enforced their claims on the basis of bank enforcement orders. Under the 1997 Banking Act ⁽¹⁾, banks can issue bank enforcement orders on the basis of their records or other documents relating to banking transactions. A bank enforcement order can serve as a basis for enforcement after the court has attached an enforceability clause to it. This is a much quicker way than is the case for other creditors, who must apply to the competent court prior to enforcement for a decision to be handed down. Despite this, the private creditors have not taken any forced enforcement action; in other words, they have not applied for bankruptcy proceedings to be instituted against PZL Hydral and nor have they taken any other action to enforce their claims against the assets.
- (29) When PZL Hydral experienced difficulties in repaying its loans in 1998-2006, the banks could, under the Civil Code, have charged it statutory interest at a rate determined by the Cabinet, as shown in Table 7. However, instead of charging this interest systematically, at times they merely charged interest at the rates shown in Table 5 and Table 6.

(*) Confidential information.

⁽¹⁾ Journal of Laws 1997/140, item 939, as amended.

Table 5

Interest rates charged by Bank [...] (USD loans based on LIBOR)

Year	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
%	8,53	8,71	9,87	8,50	8,50	8,50	8,50	8,50	8,50	8,50

Table 6

Interest rates charged by [...] (USD loans based on LIBOR)

Year	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
%	7,78	7,96	9,12	6,08	4,45	3,62	4,37	6,26	7,63	7,37

Table 7

Statutory interest rates

Rok	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
%	34	23	23	30	18	13	12	13	11,5	11,5

- (30) The Polish authorities argue that these banks thought that they would receive a higher return if they contributed to the restructuring process of PZL Hydral. They closely followed negotiations with the first company that showed an interest in acquiring PZL Wrocław, namely [...] (see point 57 et seq.). The banks regularly monitored the economic situation of PZL Hydral on the basis of its financial reports, visits to its premises and market analysis.
- (31) Bank [...] finally settled its liabilities by way of a settlement agreement concluded in April 2003. It wrote off PLN 51,6 million and accepted the repayment of only PLN 4 million (7 %). The write-offs resulting from the settlement agreement were entered in PZL Hydral's books for the 2004 financial year.
- (32) Bank [...] agreed to settle on the basis of its own economic assessment despite holding first-rank priority mortgages. In particular, the bank secured its credit by establishing collateral of PLN 13,7 million on real estate, assigning all licence and commercial rights under the licence agreement concluded with [...] regarding the production of air conditioning equipment to a value of USD 1,2 million (PLN 3 968 000 approx.) ⁽¹⁾, transferring machines and equipment supplied by [...] under the licence agreement to a value of USD 2,4 million (PLN 7 938 000 approx.) and assigning receivables from the sale of air conditioners to a value of at least USD 8 million annually (PLN 26,5 million approx.) ⁽²⁾.
- (33) In November 2006 Bank [...] agreed in a settlement agreement to write off PLN 86,4 million and accepted the repayment of only PLN 11,5 million. As such, only 13 % of the liability was eventually repaid by PZL Hydral. The rest, i.e. PLN 74,9 million, was written off.
- (34) Bank [...] accepted this low amount despite the fact that it had first-rank collateral on the most significant real estate on which most of the production depended and the administrative structures were located. This collateral consisted in particular of first-rank mortgages on two real properties for a total amount of PLN 19,75 million, a first-rank pledge on a technological line for the production of compressors in an amount of PLN 20 million, a first-rank assignment of receivables under sales agreements concluded for compressors worth PLN 20 million, a first-rank registered pledge on

⁽¹⁾ USD 1 = PLN 3,3 as at 22 June 2010. The exchange rate on that day has been used for all amounts converted from USD into PLN in this decision; these amounts are provided as a basis of comparison with the PLN for guidance only.

⁽²⁾ The actual amounts depend on the volume of sales achieved.

machinery and equipment with a total value of PLN 2,8 million and first-rank transfer agreements for movables worth PLN 2,65 million, PLN 2,4 million, PLN 0,56 million and PLN 1,1 million respectively. Moreover, the nature of the collateral would enable any potential buyer to continue production after purchase; would also be possible to transport the machines either as a whole or as sub-assemblies without dismantling them, should any potential buyer decide to move them.

- (35) After the agreements with the banks, the collateral on the fixed assets was released. As a result, the public creditors' position in respect of this collateral improved, i.e. they received a higher mortgage ranking ⁽¹⁾.

Liabilities vis-à-vis public creditors

- (36) In 1998, the company's liabilities vis-à-vis public creditors based on claims arising under public law (i.e. claims from the Social Insurance Office, the Lower Silesia Region Tax Office, Wrocław Psie Pole Tax Office, Lower Silesia Regional Office, Wrocław City Council, the State Fund for the Rehabilitation of the Disabled) amounted to PLN 29 million. In addition, the Ministry of Finance had civil-law claims of PLN 9,4 million. These liabilities to individual public creditors evolved as shown in Tables 8, 9, 10, 11, 12, 13 and 14.

Table 8

Liabilities of PLZ Hydral vis-à-vis the Social Insurance Office (PLN thousand)

	31.12. 1998	31.12. 1999	31.12. 2000	31.12. 2001	31.12. 2002	31.12. 2003	31.12. 2004	31.12. 2005	31.12. 2006	31.12. 2007
Principal	20 028	27 477	35 107	42 963	47 695	55 935	62 395	69 296	74 187	74 903
Interest	9 219	20 000	32 651	46 100	60 810	68 421	76 653	84 040	88 835	102 223
Total	29 247	47 477	67 758	89 063	108 505	124 356	139 048	153 336	163 022	177 126

Table 9

Liabilities of PLZ Hydral vis-à-vis Lower Silesia Regional Tax Office (PLN thousand)

	31.12. 1998	31.12. 1999	31.12. 2000	31.12. 2001	31.12. 2002	31.12. 2003	31.12. 2004	31.12. 2005	31.12. 2006	31.12. 2007
Principal	1 700	2 700	3 656	4 750	6 198	10 928	12 471	18 655	20 769	38 946
Interest	750	1 100	1 500	1 950	2 900	3 200	3 800	5 347	8 450	10 553
Total	2 450	3 800	5 156	6 700	9 098	14 128	16 271	24 002	29 219	49 499

Table 10

Liabilities of PLZ Hydral vis-à-vis Wrocław Psie Pole Tax Office (PLN thousand)

	31.12. 1998	31.12. 1999	31.12. 2000	31.12. 2001	31.12. 2002	31.12. 2003	31.12. 2004	31.12. 2005	31.12. 2006	31.12. 2007
Principal	0	0	0	0	0	0	0	0	0	0
Interest (*)	0	0	0	0	0	0	532	532	532	532
Total	0	0	0	0	0	0	532	532	532	532

(*) This amount represents the recovery costs calculated by Wrocław Psie Pole Tax Office.

⁽¹⁾ Under Polish law, the rule that a lower mortgage ranking is automatically changed to a higher ranking is enshrined in Article 12 of the Land Register and Mortgages Act, Journal of Laws No 19, item 147.

Table 11

Liabilities of PLZ Hydral vis-à-vis Wrocław City Council (PLN thousand)

	31.12. 1998	31.12. 1999	31.12. 2000	31.12. 2001	31.12. 2002	31.12. 2003	31.12. 2004	31.12. 2005	31.12. 2006	31.12. 2007
Principal	1 682	3 058	4 510	5 972	7 556	9 404	11 299	13 180	14 465	16 389
Interest	1 800	2 200	3 500	5 500	7 100	7 950	8 500	9 065	9 951	10 698
Total	3 482	5 258	8 010	11 472	14 656	17 354	19 799	22 245	24 416	27 087

Table 12

Liabilities of PLZ Hydral vis-à-vis Lower Silesia Regional Office (PLN thousand)

	31.12. 1998	31.12. 1999	31.12. 2000	31.12. 2001	31.12. 2002	31.12. 2003	31.12. 2004	31.12. 2005	31.12. 2006	31.12. 2007
Principal	0	15	37	57	76	90	90	90	567	935
Interest	0	2	8	14	21	29	35	40	75	136
Total	0	17	45	71	97	119	125	130	642	1 071

Table 13

Liabilities of PLZ Hydral vis-à-vis the State Fund for the Rehabilitation of the Disabled (PLN thousand)

	31.12. 1998	31.12. 1999	31.12. 2000	31.12. 2001	31.12. 2002	31.12. 2003	31.12. 2004	31.12. 2005	31.12. 2006	31.12. 2007
Principal	2 446	2 937	3 457	3 394	4 313	4 771	4 927	5 510	5 577	5 639
Interest	3 550	3 900	4 100	4 308	4 807	5 080	5 518	6 040	6 898	7 245
Total	5 996	6 837	7 557	7 702	9 120	9 851	10 445	11 550	12 476	12 884

Table 14

Liabilities of PLZ Hydral vis-à-vis the Ministry of Finance (PLN thousand)

	31.12. 1998	31.12. 1999	31.12. 2000	31.12. 2001	31.12. 2002	31.12. 2003	31.12. 2004	31.12. 2005	31.12. 2006	31.12. 2007
Principal	8 018,8	14 395,5	64 717,1	64 717,1	19 687,7	19 646,5	19 422,5	18 773,1	18 260,3	18 260,3
Interest	1 372,9	2 639,2	9 627,6	28 741,3	0	0	0	0	193,7	1 117,1
Total	9 391,7	17 034,7	74 344,7	93 458,4	19 687,7	19 646,5	19 422,5	18 773,1	18 454,0	19 377,4

- (37) The public creditors charged the interest rates on arrears shown in Table 15. It is important to note that Tables 8 to 14 take into account partial repayments of sums and show the level at the year-end; therefore, the interest due in any given year is not directly related to the principal, which can fluctuate.

Table 15

Interest on tax arrears ⁽¹⁾

Year	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
%	50	35	44	40	23	15	15	14	11	12	14	11	10

- (38) Apart from charging the appropriate interest on tax arrears, the Social Security Office, the Lower Silesia Region Tax Office, Wrocław Psie Pole Tax Office, Wrocław City Council and the Lower Silesian Regional Office secured their claims vis-à-vis PZL Hydral by registering mortgages on its immovable assets. Tables 16, 17, 18, 19 and 20 show changes in the mortgages on PZL Hydral's assets held by these public creditors.

Table 16

Collateral on PZL Hydral assets held by the Social Security Office

	Year	Amount	Comments
1	1998	PLN 21 996 411,92	total amount of mortgages
2	1999	PLN 21 996 411,92	total amount of mortgages
3	2000	PLN 21 996 411,92	total amount of mortgages
4	2001	PLN 28 660 990,95	total amount of mortgages a mortgage of PLN 6 664 579,03 was added
5	2002	PLN 29 602 956,07	total amount of mortgages a mortgage of PLN 941 965,12 was added
6	2003	PLN 37 315 430,58	total amount of mortgages a mortgage of PLN 7 712 474,51 was added
7	2004	PLN 68 984 278,13	total amount of mortgages a mortgage of PLN 31 668 847,55 was added
8	2005	PLN 82 625 551,83	total amount of mortgages a mortgage of PLN 1 364 127,70 was added
9	2006	PLN 91 511 663,94	total amount of mortgages a mortgage of PLN 8 886 112,11 was added
10	2007	PLN 96 153 021,00	total amount of mortgages a mortgage of PLN 4 641 357,06 was added

⁽¹⁾ Interest on tax arrears applies to all public-law receivables falling to tax authorities and public bodies. While authorities such as the Social Insurance Fund have their own legal provisions requiring the recovery of contributions not paid in time, as regards the rules governing the calculation on interest on these amounts, the legal provisions refer to the Tax Code of 29 August 1997. The table shows the annual interest rates as these are subject to frequent changes. This follows from the obligation incumbent on the Minister for Finance under Article 56 of the Tax Code to set and publish current interest rates on tax arrears in line with market developments and the rates charged by the National Bank of Poland. The detailed rules governing the calculation of interest charged on tax arrears are set out in the Regulation of the Minister for Finance of 22 August 2005 (Journal of Laws No 165, item 1373) and previously in the 1997, 2001 and 2002 Regulations of the Minister for Finance. Changes in liabilities vis-à-vis public-law creditors take account of any partial repayments of the amounts owed.

Table 17

Collateral on PZL Hydral assets held by the Lower Silesia Region Tax Office

	Year	Amount	Comments
1	1998	—	—
2	1999	—	—
3	2000	—	—
4	2001	—	—
5	2002	—	—
6	2003	—	—
7	2004	—	—
8	2005	PLN 5 692 649,25	total amount of mortgages
9	2006	PLN 5 692 649,25	total amount of mortgages
10	2007	PLN 5 692 649,25	total amount of mortgages

Table 18

Collateral on PZL Hydral assets held by Wrocław Psie Pole Tax Office

	Year	Amount	Comments
1	1998	—	—
2	1999	—	—
3	2000	PLN 112 759,61	total amount of mortgages
4	2001	PLN 212 138,61	total amount of mortgages a mortgage of PLN 99 379,00 was added
5	2002	PLN 212 138,61	total amount of mortgages
6	2003	PLN 212 138,61	total amount of mortgages
7	2004	PLN 212 138,61	total amount of mortgages
8	2005	PLN 212 138,61	total amount of mortgages
9	2006	PLN 212 138,61	total amount of mortgages
10	2007	PLN 212 138,61	total amount of mortgages

Table 19

Collateral on PZL Hydral assets held by Wrocław City Council

	Year	Amount	Comments
1	1998	PLN 710 074,30	total amount of mortgages
2	1999	PLN 710 074,30	total amount of mortgages
3	2000	PLN 710 074,30	total amount of mortgages
4	2001	PLN 945 962,80	total amount of mortgages a mortgage of PLN 235 888,50 was added
5	2002	PLN 2 119 622,40	total amount of mortgages a mortgage of PLN 1 173 659,60 was added
6	2003	PLN 2 119 622,40	total amount of mortgages
7	2004	PLN 11 217 294,85	total amount of mortgages a mortgage of PLN 9 097 672,45 was added
8	2005	PLN 11 217 294,85	total amount of mortgages
9	2006	PLN 12 589 452,85	total amount of mortgages a mortgage of PLN 3 538 324,00 was added
10	2007	PLN 15 379 758,25	total amount of mortgages a mortgage of PLN 2 790 305,40 was added

Table 20

Collateral on PZL Hydral assets held by Lower Silesia Regional Office

	Year	Amount	Comments
1	1998	—	—
2	1999	—	—
3	2000	—	—
4	2001	—	—
5	2002	PLN 634 594,10	total amount of mortgages
6	2003	PLN 634 594,10	total amount of mortgages
7	2004	PLN 634 594,10	total amount of mortgages
8	2005	PLN 634 594,10	total amount of mortgages
9	2006	PLN 634 594,10	total amount of mortgages
10	2007	PLN 634 594,10	total amount of mortgages

- (39) The Polish authorities also noted that public creditors had taken into consideration the considerable increase in value of industrial real estate in Wrocław from 2003 to 2008. Real estate prices increased by 100 % overall and the value of PZL Hydral's real estate increased by 300 %. Public creditors with mortgages on PZL Hydral's assets therefore experienced a *de facto* increase in the value of their collateral.
- (40) The Polish authorities informed the Commission that the State Fund for the Rehabilitation of the Disabled and the Ministry of Finance did not hold any collateral (mortgages) on PZL Hydral's assets. However, the Ministry of Finance enforced part of its claims by way of an agreement with PZL Hydral concluded on 20 May 2002, under which PZL Hydral was to repay a substantial part of its liabilities by end-2002, as shown in Table 14.
- (41) According to the Polish authorities, public creditors – contrary to private creditors – undertook forced enforcement action through a court enforcement officer. Between 1998 and 2007 the Social Security Office issued enforcement titles for an amount of PLN 119,95 million, the Lower Silesia Region Tax Office for an amount of PLN 43,8 million and the State Fund for the Rehabilitation of the Disabled for an amount of PLN 2,1 million, but the amount actually obtained from enforcement did not reach the level of the liabilities indicated in the enforcement titles. The Polish authorities stressed that alternative options, such as taking possession of assets, were not deemed reasonable by the court enforcement officer to execute and made no economic sense. Other public creditors did not take any enforcement action but they observed the privatisation and restructuring process which, they believed, would provide them with a higher return than direct execution of their claims.

Table 21

Summary of public creditor enforcement action vis-à-vis PZL Hydral (1997-2009)

	Year	Repaid public liabilities
1	1998	PLN 206 349,90
2	1999	PLN 0,00
3	2000	PLN 674 100,75
4	2001	PLN 4 922 525,14
5	2002	PLN 3 209 042,05
6	2003	PLN 223 928,70
7	2004	PLN 1 960 765,69
8	2005	PLN 3 641 223,35
9	2006	PLN 4 472 476,92
10	2007	PLN 9 455 133,89
11	2008	PLN 54 590 790,45
12	2009	PLN 4 500 000
Total		PLN 87 846 336,84

- (42) Between 1998 and 2009 public liabilities of PLN 87,846 million (26 %) were repaid.

- (43) There has been a considerable increase in repayment of PZL Hydral's public liabilities since 2003.

II.3. PZL Hydral as a company in difficulty

- (44) Table 22 shows the financial data of PZL Hydral for 1998-2009.

Table 22

Selected data from PZL Hydral's financial reports (PLN thousand)

	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Revenue from net sales	44 088	46 403	45 691	37 933	35 500	37 111	34 651	47 560	48 618	55 741	32 757	11 870
Profit (loss) on sales	(10 839)	(1 546)	2 004	(8 772)	(10 005)	(9 420)	(6 857)	972	49	3 641	(6 454)	(165 020)
Net profit (loss) (*)	(13 661)	(13 354)	217	18,473	49,346	(177 982)	(48 151)	(14 927)	(1 076)	61 578	23 902	46
Total assets	203 936	212 834	228 344	250 115	192 013	113 255	86 966	92 011	76 986	111 051	35 661	30 617
Shareholder's (negative) equity	9 707	3 078	268	18 440	15 074	(166 664)	(214 815)	(229 743)	(250 500)	(188 922)	(165 020)	(164 974)
Long term liabilities and reserves	194 231	209 756	228 075	231 675	176 939	279 920	301 781	321 753	327 486	299 973	200 681	195 592

(*) Net profit is defined here and for the remainder of this decision as pre-tax profit.

- (45) From 1998 until 2002, PZL Hydral had positive equity. As of 2003, it had negative equity and recorded systematic net losses until 2007. From 2007 until 2009, PZL Hydral made a profit. The value of PZL Hydral's assets decreased from PLN 203,936 million in 1998 to PLN 76,986 million in 2006. Long-term liabilities consistently increased from 1998 to 2001 and from 2003 to 2006, when they reached PLN 327,486 million.
- (46) As explained above, from 2008 onwards PZL Hydral derived its income predominantly from selling services and stock produced in previous years and, to a limited extent, from its subsidiaries.

II.4. PZL Wrocław as a company in difficulty

- (47) As regards the financial situation of PZL Wrocław, neither in 2007, 2008 nor 2009 did PZL Wrocław lose more than 50 % of its capital and nor did it meet the eligibility requirements for insolvency proceedings under Polish law. PZL Wrocław's turnover amounted to PLN 5,3 million in 2006, PLN 23 million in 2007 and PLN 60 million in 2008. The net loss in 2006 was PLN 1 million, while in 2007 the net profit was PLN 0,04 million, increasing sharply to PLN 8,7 million in 2008.
- (48) According to PZL Wrocław's financial reports, the value of its non current assets increased from PLN 4,8 million in 2006 to PLN 25,7 million in 2007, PLN 27 million in 2008 and PLN 29 million in 2009. Under the Polish Budget Act, financial resources for military purchases are allocated annually by the Ministry of Defence. In 2008 PZL Wrocław received contracts for and sold military goods (e.g. hydraulic systems, pneumatic components for fuel control systems) to an amount of [...] and provided the Ministry of Defence with maintenance services worth [...], i.e. an overall amount of [...].
- (49) The Polish authorities also maintain that, until end-2008, the market on which PZL Wrocław operated, i.e. the aviation and defence market, did not show any signs of slowing down.

- (50) In 2009, however, PZL Wrocław experienced financial difficulties as a result of a sharp fall in orders by the Ministry of Defence due to the economic crisis. In 2009, the value of ordered and sold military goods (e.g. hydraulic systems, pneumatic components for fuel control systems) fell to [...], and the value of maintenance services provided fell to [...]. As a result, sales of military goods decreased by [...] % compared with 2008. Consequently, PZL Wrocław recorded a net loss of PLN 8,3 million in 2009. Its turnover decreased from PLN 60 million in 2008 to PLN 41 million in 2009.
- (51) The liabilities of the company increased from PLN 31 million in 2008 to PLN 35 million in 2009. Liabilities amounted to PLN 7 million in 2006 and to PLN 18,4 million in 2007.
- (52) The Polish authorities informed the Commission that under Polish law ⁽¹⁾ PZL Wrocław was not yet eligible for bankruptcy proceedings. However, should the ongoing restructuring process of the Hydral Group based on the assumptions underpinning the restructuring plan for public-law liabilities and the framework agreement with the investor be unsuccessful, PZL Wrocław will have to lodge an application for bankruptcy.

II.5. The restructuring plan and the privatisation process

- (53) The restructuring plan for PZL Hydral and PZL Wrocław ('the Plan') has to be seen in the context of Poland's attempts to privatise the viable parts of the business, particularly in the aviation and defence field.
- (54) In 1998 a private consulting group, Business Management Finance S.A, prepared a strategy for restructuring PZL Hydral. The strategy comprised a diagnosis of the current financial status of PZL Hydral along with an analysis of costs and restructuring activities. It indicates that it would be reasonable to isolate some of PZL Hydral's assets and sell them to a private investor in order to restructure PZL Hydral's liabilities.
- (55) The shareholders of PZL Hydral and, following its incorporation in 2004, of PZL Wrocław, met regularly to consider privatising the group or parts thereof (PZL Wrocław) and negotiated the terms of the transaction with the interested parties.
- (56) Consequently, the Polish authorities entered into negotiations with potential investors, which were closely followed by private (only for the first privatisation attempt with [...]) and public creditors. The negotiations

took place with the following companies: [...] (2002-2006), [...] (2007-2008), [...] (2008) and, as of 2009, with the current investor, [...] ('[...] or 'the investor').

Negotiations with [...] for the privatisation of PZL Hydral

- (57) In 2002, as a result of industrial cooperation, talks on the sale of PZL Hydral commenced with [...], a global producer of aviation components with annual turnover in 2009 of [...]. On 25 November 2002 [...] and PZL Hydral concluded an agreement regarding non-disclosure of information. On 22 April 2003 [...] sent a letter of intent to PZL Hydral in which it expressed its interest in the potential purchase of PZL Hydral's shares and its willingness to carry out a due diligence study. The due diligence study was performed in May 2003. In April 2005 [...] extended the scope of the due diligence with a view to the potential purchase of PZL Wrocław, which had been incorporated in 2004. In June 2005 the documentation was given to [...]. In the second half of 2005 and the first half of 2006, numerous meetings were held with the representatives of [...]. However, [...] has not taken action to complete the transaction since November 2006.
- (58) According to the Polish authorities, [...] withdrew from the negotiations because no solution had been found to the issue of the company's debt.

- (59) During these negotiations, the public and private creditors were regularly updated, sometimes on a weekly basis, on their progress.

Preparations for a second privatisation attempt, establishment of the 2007-2010 restructuring plan and the 2007 loan

- (60) The Polish authorities pursued a new privatisation strategy, which focused on making PZL Wrocław a viable business to be sold and winding up PZL Hydral afterwards with the proceeds of the sale of PZL Wrocław and its other subsidiaries and assets. This strategy was agreed by the IDA, PZL Hydral and the public creditors of PZL Hydral and was formalised as the 2007-2010 restructuring plan ('the Plan') in the fourth quarter of 2007.
- (61) According to the Plan, the public creditors were to be repaid from the proceeds of the sale of PZL Hydral's assets, shown as follows: Zakład Ciepłowniczy 'Term-Hydral' Sp. z o.o. - PLN 1 million, Zakład Produkcji Hydrauliki 'Hydral' Sp. z o.o. - PLN 3 million. The sale of PZL Wrocław was supposed to bring PLN 65,9 million (including the casting plant). The sale of the other financial assets was expected to yield PLN 0,5 million and a real estate asset called the BBCenter PLN 47,5 million, a car park PLN 2 million and a power station (GSZ) PLN 0,9 million. The Plan was therefore based on an assumption that the asset sale would generate total revenue of at least PLN 120,8 million.

⁽¹⁾ Bankruptcy and Restructuring Act of 28 February 2003, Journal of Laws No 60, item 535, as amended.

(62) The Plan also provided for a capital injection of PLN 36 million to guarantee the repayment of PLN 156,8 million to public creditors. It also anticipated the possibility of the IDA granting an additional capital injection of PLN 77,4 million to repay the Social Security Office's liabilities for 1996-1998.

(63) Subsequently, in January 2007, PZL Wrocław acquired military certificates and permits to trade in arms (see point 16). In the course of 2007 it acquired more assets, machinery, equipment and know-how. This acquisition was financed by a loan of PLN 12,5 million, which the IDA granted to PZL Wrocław on 24 May 2007 ('the 2007 loan'), and through an in-kind contribution to the capital of PZL Wrocław by the parent company, PZL Hydral, in the form of an asset transfer in December 2007.

(64) The Polish authorities also emphasised that the 2007 loan had been granted with a view to the IDA obtaining a share of approximately [...] % in PZL Wrocław (corresponding to a debt-for-equity swap) and that the IDA would realise an adequate return on the capital invested after it sold its shares in PZL Wrocław, whereas PZL Hydral would use its shareholding to satisfy the public creditors.

(65) The 2007 loan was granted at a variable 3M WIBOR plus 200 basis points, at that time 6,45 % for an initial duration until 2007 and was based on the understanding that it would be extended until the debt-for-equity swap took place prior to the sale of PZL Wrocław. The loan was secured by the following collateral:

— a registered pledge⁽¹⁾ on the fixed assets of PZL Wrocław (machinery) of PLN 5,5 million which was entered in the register of pledges,

— an ordinary pledge⁽²⁾ on 66 850 shares, representing 100 % of the company at the time of the transaction in May 2007 and [...] % at end-2007.

(66) The Polish authorities informed the Commission that the value of PZL Wrocław had been assessed at the request

of the IDA in March 2007 by consultants Realizacja Inwestycji Techniczno-Ekonomicznych, acting as an independent expert. Three valuation methods were used: revenue method based on the discounted net profit (method 1), revenue method based on the discounted net profit plus depreciation (method 2) and discounted cash-flow method (method 3)⁽³⁾, including a sensitivity analysis (moderate, optimistic and pessimistic scenarios).

(67) Using these three methods, the value of PZL Wrocław was estimated at:

Method 1:

(a) under the moderate scenario the value is estimated at [...];

(b) under the optimistic scenario the value is estimated at [...];

(c) under the pessimistic scenario the value is estimated at [...].

Method 2:

(a) under the moderate scenario the value is estimated at [...];

(b) under the optimistic scenario the value is estimated at [...];

(c) under the pessimistic scenario the value is estimated at [...].

Method 3:

(a) under the moderate scenario the value is estimated at [...];

(b) under the optimistic scenario the value is estimated at [...];

(c) under the pessimistic scenario the value is estimated at [...].

(68) The following three elements were used for the valuation of PZL Wrocław:

— the company's financial forecasts, including cash flow, net profit and depreciation for 2007-2011 with a sensitivity analysis (moderate, optimistic and pessimistic scenarios); see Table 23 below,

⁽¹⁾ Registered pledges are governed by the Registered Pledge and Register of Pledges Act (Journal of Laws of 6 December 1996 No 149, item 703, as amended). A registered pledge requires a written contract between the creditor and the person authorised to dispose of the object of the pledge and an entry in the register of pledges kept by the district courts. The property in question may remain in the possession of the owner, who continues to be entitled to dispose of it, or may be held by a third party, subject to that party's agreement.

⁽²⁾ Ordinary pledges are governed by the Civil Code. The pledge is established by virtue of a contract between the owner and the creditor and, except where otherwise stipulated in law, the object of the pledge must be released to the creditor or a third party.

⁽³⁾ All three methods are revenue methods in which either the forecast net profit, forecast net cash flow or forecast net profit plus depreciation are used as to evaluate future revenue. The net profit plus depreciation is the first step in the process of obtaining an analysis of cash flow in the financial accounting system.

- the discount rate based on the Weighted Average Cost Of Capital (WACC) equal to 10,25 %, and
- the assumption that cash flow becomes constant after 2007-2011.

Table 23

The different scenarios incorporated into the 2007 study (PLN thousand)

Year	2007	2008	2009	2010	2011
Moderate scenario					
Cash flow	[...]	[...]	[...]	[...]	[...]
Net profit	[...]	[...]	[...]	[...]	[...]
Depreciation	[...]	[...]	[...]	[...]	[...]
Net profit + depreciation	[...]	[...]	[...]	[...]	[...]
Optimistic scenario					
Cash flow	[...]	[...]	[...]	[...]	[...]
Net profit	[...]	[...]	[...]	[...]	[...]
Depreciation	[...]	[...]	[...]	[...]	[...]
Net profit + depreciation	[...]	[...]	[...]	[...]	[...]
Pessimistic scenario					
Cash flow	[...]	[...]	[...]	[...]	[...]
Net profit	[...]	[...]	[...]	[...]	[...]
Depreciation	[...]	[...]	[...]	[...]	[...]
Net profit + depreciation	[...]	[...]	[...]	[...]	[...]

- (69) The discount rate for all three methods of evaluation is based on Weighted Average Cost of Capital equal to 10,25 %⁽¹⁾. The company's financial forecast, including cash flow, net profit and depreciation for 2007-2011 with a sensitivity analysis (moderate, optimistic and pessimistic scenarios for 2007-2011) is based on data supplied by PZL Wrocław. According to the study these data are to a large extent based on forecast orders by the Ministry of Defence.
- (70) On the basis of this assessment, when determining of the value of the company's shares, the Polish authorities relied on the pessimistic scenario, which produced the lowest result. On that basis they assumed that the collateral in the form of the ordinary pledge on PZL Wrocław's shares had a market value of at least PLN 20,3 million⁽²⁾. Therefore, taken together with the pledge on machinery, which at the time had a value of PLN 5,5 million, the Polish authorities consider that the value of the collateral at that time exceeded the value of the loan.
- (71) Moreover, on the basis of the expert study the IDA took the view in 2007 that it would be reasonable to rely on a value of PZL Wrocław at end-2007 of [...] and to take the moderate scenario into consideration. The IDA also took the view that it would realise a return on its investment. The direct return that the IDA could obtain, on the basis that it would carry out a debt-for-equity swap before the sale and would hold [...] % of shares (which is an approximate percentage and was the working assumption used by the IDA) would be at least PLN 48,5 million.

⁽¹⁾ WACC is defined in economic literature as a calculation of the total cost of the firm's capital in which each category of capital (whether it be equity or debt) is proportionately weighted. All capital sources - common stock, preferred stock, bonds and other long-term debt - are included in the WACC calculation. The WACC is the weighted average cost of individual capital components. Hence the calculation of the WACC cannot be disputed as it is a result of an applied mathematical formula.

⁽²⁾ The Polish authorities regarded it as reasonable to assume that the value of PZL Wrocław was at least [...]. On that basis, [...] % of PZL Wrocław's shares had a value of PLN 20,3 million.

- (72) Accordingly, the Polish authorities claimed that, as regards the 2007 loan, the IDA acted as an investor within the framework of the sale of PZL Wrocław. The Polish authorities also pointed out that the 2007 loan had not therefore been granted to PZL Hydral as stated in the opening decision.

Negotiations with [...]

- (73) Based on the new privatisation strategy and the 2007-2010 restructuring plan, [...], a [...] leading global supplier of systems and services to the aviation, space and defence industry which had revenue of [...] in 2009 entered into negotiations for the sale of PZL Wrocław in the first quarter of 2007 and carried out a due diligence study for PZL Wrocław in July/August 2007 and February 2008. These negotiations were the result of existing industrial cooperation.
- (74) On 31 January 2008, [...] made an offer for PZL Wrocław's shares which it increased for the first time on 14 February 2008. On 17-18 March 2008 [...] representatives held a meeting with the IDA. On 2 April 2008 [...] increased its offer for the second time. The price offered for the shares on 2 April 2008 was [...] (which reflected the value of PZL Wrocław on 31 December 2007), plus changes to current assets calculated according to a specific formula. The Polish authorities informed the Commission that application of the formula to reflect the growth in profit would result in a price increase of [...].

- (75) This offer was in line with an independent expert valuation commissioned by the IDA. This valuation, carried out by Doradztwo Ekonomiczne Dariusz Zarzecki, concluded that the value of PZL Wrocław in March 2008 was [...] on the basis of the net asset value method ('the NAV method'). This method takes an asset-oriented approach to the valuation and takes into account the value of assets and the credit and debit side both on and off balance sheet. At the same time, the value of PZL Hydral on the basis of the discounted cash-flow method ('the DCF method'), which takes into account future revenue not only from the material but also the immaterial assets in the possession of PZL Wrocław. The study does not have any sensitivity analysis (i.e. it does not describe different scenarios).

- (76) Under the DCF method cash-flow forecasts for 2008 onwards are based on PZL Wrocław's financial plan for 2007-2013, which assumes that inflation will be the same as predicted by the Polish National Bank in February 2008 for the period in question. The cost of capital is evaluated at 16,65 %, incorporating the risk free rate (4,70 %), the market risk premium (7,17 %), the sector risk premium (1,78 %) and the market size premium (3 %) and enabling account to be taken of

the size of PZL Wrocław in comparison with its competitors (such as [...] or [...]). From 2014 onwards the study assumes that cash flow will increase by 3 % per annum (on the basis of 2 % inflation).

Table 24

PZL Wrocław's future cash flow estimates (PLN thousand)

Year	2008	2009	2010	2011	2012	2013
Cost of own capital (%)	16,65	16,65	16,65	16,65	16,65	16,65
Future cash flow estimates	[...]	[...]	[...]	[...]	[...]	[...]
Discounted future cash flow estimates	[...]	[...]	[...]	[...]	[...]	[...]

- (77) The adjusted net assets value method is a way of valuing a 'going concern' by adjusting the value of all assets and liabilities to the fair market value⁽¹⁾. The adjustment of liabilities with a book value of PLN 18,35 million to a net asset value of [...] was realised on the basis of the planned 2007 debt-for-equity swap. The last adjustment took off-balance sheet assets into consideration.

Table 25

PZL Wrocław - adjusted NAV method (PLN thousand)⁽²⁾

	Book value	Net asset value
Fixed assets	25 710	[...]
Current assets	9 945	[...]
Liabilities	18 350	[...]
Off-balance sheet assets	0	[...]
Total	17 305	[...]

⁽¹⁾ The fair market value is defined in economic literature as the price at which a business or assets would change hands between a willing buyer and a willing seller, neither of whom are compelled to buy or sell and both of whom have a reasonable knowledge of all relevant facts at the time.

⁽²⁾ The adjusted net assets value method is a way of valuing a 'going concern' by adjusting the value of all assets and liabilities to the fair market value. The fair market value is defined in economic literature as the price at which a business or assets would change hands between a willing buyer and a willing seller, neither of whom are compelled to buy or sell and both of whom have a reasonable knowledge of all relevant facts at the time.

- (78) The adjusted net value of the fixed assets is [...], whereas their book value amounts to PLN 25,710 million. The adjustment is essentially made by computing the fair market value of all the assets on the basis of a study prepared on 29 March 2007 and submitted to the Commission by an independent expert, Realizacja Inwestycji Techniczno-ekonomicznych. The study basically assesses the value of real estate such as buildings and land. The value of buildings was assessed on the basis of the following formula:

$$V = Cn(1-Lu/100) \times R$$

'Cn' is the cost of constructing a new building; 'Lu' is the level of use of the building and 'R' is a coefficient which factors in price differences between different regions. The value of land is determined on the basis of a comparative approach which considers the price of land to be equal to the price obtained for a similar plot of land, adjusted to reflect inflation differentials.

- (79) The adjustment of liabilities with a book value of PLN 18,350 million to a net asset value of [...] was realised on the basis of the planned 2007 debt-for-equity swap.
- (80) The last adjustment took off-balance sheet assets into consideration. The items which do not appear in the balance sheet but which should appear in the valuation according to the authors of the study are: 'organisation of human resources' and 'organisation of the production process', taking into account the non-quantifiable aspects in the evaluation linked to the value of the company's management.
- (81) Following the offer from [...], the Polish authorities provided the Commission with notification of the Plan as restructuring aid to PZL Hydral in March 2008, assuming that PZL Wrocław would be sold for [...]. They also included the 2007 loan and an additional loan of PLN 4 million to be granted to PZL Wrocław as part of measures to finalise negotiations with [...].
- (82) The additional loan ('the 2008 loan') was awarded on 2 April 2008, the day on which the IDA received details of the second increase in the offer. The IDA granted this loan as a bridging loan until such time as a deal was closed with [...]. PZL Wrocław needed the money in order to process the upturn in orders from the Ministry of Defence.
- (83) The loan was granted for a period of five years at a variable interest rate based on the Commission reference rate for Poland (6,42 % when it was awarded) and was secured by the following collateral:
- registered pledge on fixed assets of PZL Wrocław (four machines and items of equipment) of PLN 2,8 million which was entered in the register of pledges,
 - assignment of receivables under a commercial contract in an amount of PLN 5,2 million.
- (84) The Polish authorities therefore consider that the value of the pledges exceeded the value of the loan.
- (85) The loan was granted in order to enable PZL Wrocław to acquire machinery necessary for the production process. The IDA granted the 2008 loan at an advanced stage of negotiations with [...] on the assumption that it would be repaid either by PZL Wrocław using its own funds or by the investor.
- (86) On that basis, the Polish authorities claimed that the IDA did not just act in a manner comparable to a private investor but as the entity selling PZL Wrocław.
- (87) The Commission likewise was informed by the Polish authorities that the activity of PZL Wrocław in 2008 was partially financed by operating leasing. In June 2008 two operating leasing agreements, [...] and [...] were signed with a private company [...]. The net value of the lease under these agreements amounted to EUR 271 002 and EUR 401 263,20 (PLN 0,82 million including value added tax)⁽¹⁾. The cost of the lease for PZL Wrocław under these agreements was: EUR 88 762,30, which is the difference between the net value of the machinery and the net value of the lease. These agreements function similarly to loans with the leased object serving as collateral. Following the expiry of the lease, PZL Wrocław will acquire the right to purchase the machinery for an amount of EUR 5 835. Before entering into these leasing contracts with PZL Wrocław, [...] made a thorough analysis of the financial and economic situation of the company, including its capacity to generate sufficient cash flow for repayment of the instalments.
- (88) The Polish authorities also referred in their initial notification to the debt-for-equity swap provided for in the Plan of PLN 13,5 million (plus interest).
- (89) In March and April 2008 negotiations on the terms and provisions of the share transfer agreement were concluded. However, on 14 April 2008, [...] withdrew its offer. According to the Polish authorities, the probable reason for the withdrawal was the considerable changes which had occurred on the world market as a result of the economic crisis.

⁽¹⁾ The euro was the nominal currency for these agreements.

The 2008 buyer selection procedure

- (90) As a result of [...]’s withdrawal from the negotiations, the sale process was relaunched. The sale was advertised in the domestic and international press in the form of an invitation to take part in negotiations for the purchase of 100 % of PZL Wrocław’s shares. On 19 May 2008 the invitation was published in Puls Biznesu (Business Pulse), the largest specialist publication in Poland and in Rzeczpospolita, the country’s largest daily newspaper. On 20–26 May 2008 it was also published in Flight International, the global specialist aviation magazine. In November 2008, details of the planned sale were published in Raport Wojsko Technika Obronność, an aviation magazine in Polish with an international readership. No offers to purchase the shares were received.
- (91) Accordingly, further efforts were made and the information referred to above was forwarded and presented directly by PZL Hydral to companies potentially interested in purchasing PZL Wrocław. The Polish authorities have pointed out that the sale was advertised during fairs and industry events, including air shows⁽¹⁾, as well as by letters sent to more than 80 companies. The Polish authorities have also indicated that information on the sale was permanently available on PZL Hydral’s website, which records 500 000 visits each year. Taking into account the specific nature PZL Wrocław’s production (as a supplier of goods and services for the Polish armed forces, PZL Wrocław is of particular importance to national security) and the fairly high level of concentration of the aviation industry throughout the world, resulting in a relatively low number of potential investors, the Polish authorities have argued that all the potential investors had the opportunity to obtain information on the sale of PZL Wrocław and to take part in this privatisation process. Therefore, according to the Polish authorities, the whole sector knew about the sale.
- (92) The sale notice was only an invitation to negotiations, and did not contain any specific conditions.
- (93) Following the renewed efforts of the Polish authorities, in the second half of 2008, the IDA received a first indication of interest, and later an offer, from [...]. In the second half of 2008, the IDA received a second indication of interest, this time from [...].

Negotiations with [...] for the sale of PZL Wrocław’s shares

- (94) On 30 September 2008 [...] submitted a preliminary non-binding offer for the purchase of 100 % of shares in PZL Wrocław (‘the offer of 30 September 2008’) for

an amount of [...]. [...] is an investment fund which invests in the private equity market and whose owner (a private person) also has a 100 % stake in [...] (?). The offer of 30 September 2008 was made for a debt-free company and was conditional upon the financial results for 2009 (in particular, net profit and EBITDA) being similar to 2008. In particular, EBITDA of at least [...] was to be achieved and the net profit in 2009 had to be at least [...]; in addition, sales growth of 5 % was required. However, as a result of the financial crisis PZL Wrocław’s income declined by some 35 %, and the benchmarks laid down in the offer were not achieved. By the first quarter of 2009 PZL Hydral was already fully aware that the financial result would not meet the minimum threshold laid down in [...]’s offer. In addition, the reduction of orders from the Ministry of Defence was confirmed at the beginning of 2009, with significant implications for the company’s profitability in that year. There have been no subsequent contacts with [...].

Negotiations with [...] for the privatisation of PZL Wrocław

- (95) [...], a [...] company that is among the world’s largest suppliers of technologically advanced aviation products (for commercial, regional, corporate and military aircraft) and industrial products, and which had turnover in 2009 of [...] commenced talks with a view to purchasing shares in PZL Wrocław in the first quarter of 2009.
- (96) This company carried out a due diligence study between 20 April 2009 and 12 May 2009. On the basis of this study, it signed a memorandum of understanding (indicating the general outline of the planned transaction) with the IDA on 20 August 2009 for the purchase of PZL Wrocław’s shares for an amount of [...]. The IDA undertook to ensure that all PZL Wrocław’s assets were free of any claims on the part of PZL Hydral’s public creditors. The memorandum of understanding assumed that the IDA would itself buy 100 % of shares in PZL Wrocław and sell them subsequently to the investor. The investor undertook to carry out its own detailed investment plan worth an additional [...] after the sale. On 18 December 2009, the IDA, PZL Hydral and [...] signed a framework agreement. Annex 2 to the Agreement, which sets out the rules governing the partial debt-for-equity swap, partial cancellation and partial repayment of the 2007 and 2008 loans, was concluded on 12 March 2010.

- (97) The Polish authorities confirmed that the sale was not conditional, in particular on jobs being maintained. The

⁽¹⁾ In particular, ILA Berlin, the international Paris air show, Farnborough Air Show in the UK and the defence industry fair (MSPO) in Poland.

⁽²⁾ [...] is one of the largest outsourcing companies in Europe, employing nearly [...] workers with an estimated value of approximately [...] (according to the wording of the proposal of 30 September 2008).

Polish authorities also informed the Commission that the investor was free to determine its business dealings with the Ministry of Defence.

- (98) A detailed description of the negotiations with [...] can be found in point VI.

II.6. Legal assessment of the Plan by the Polish authorities

- (99) The Polish authorities indicated that the overall costs of restructuring would amount to PLN 262,2 million, broken down as follows: restructuring of public debt in an amount of PLN 234 million, other financial restructuring in an amount of PLN 11,5 million, investments of PLN 11 million, asset restructuring of PLN 5,6 million and employment restructuring of PLN 0,3 million.
- (100) According to the Polish authorities, the overall costs of restructuring PZL Hydral would be funded by state aid of PLN 130,5 million and by an own contribution of PLN 132 million. Under the Plan, the own contribution represents 50,3 % of the restructuring costs. The own contribution comprises revenue from the sale of fixed assets and shares as well as funds to be provided by the future investor in PZL Wrocław.
- (101) As regards compensatory measures, the Plan proposed the sale of some production assets, which was partially implemented between 2004 and 2006, resulting in capacity reduction. According to the Plan, the sale of machinery and equipment would reduce the company's capacity by 380 000 machine hours in total, i.e. by 42 %. The bulk of the planned reduction (315 000 machine hours) has already been implemented. The Polish authorities claimed that one third of this reduction was not necessary to restore viability but was designed to cut production in the field of industrial hydraulics, a low-profit segment in which the company had decided to limit its involvement.
- (102) In addition, the Plan indicated that the planned withdrawal from certain (allegedly profitable) activities and the sale of assets not related to production should be regarded as compensatory measures within the meaning of the Guidelines on state aid for rescuing and restructuring firms in difficulty⁽¹⁾ ('the rescue and restructuring guidelines'). Lastly, the Polish authorities claimed that the privatisation of PZL Wrocław, which will allow the company's competitors to acquire PZL Hydral's capacity, know-how and market share, should also be regarded as a compensatory measure.

III. DOUBTS EXPRESSED BY THE COMMISSION WHEN OPENING AND EXTENDING THE FORMAL INVESTIGATION PROCEDURE

- (103) The Plan was notified as a restructuring scenario under the rescue and restructuring guidelines. The Commission therefore based its preliminary assessment on the information at its disposal at that stage. On the basis of that information, the Commission voiced the following concerns:
- (104) As regards the eligibility of the company for restructuring aid under the rescue and restructuring guidelines, the Commission doubted that PZL Hydral had not benefited from any rescue or restructuring aid in the previous ten years.
- (105) In particular, the Commission wondered whether the non-enforcement or late enforcement of public liabilities should not be treated as state aid. The Commission pointed out that, where a public body collecting social security contributions tolerates the non-payment or late payment of such contributions over a long period of time, it undoubtedly gives the recipient an advantage by reducing the burden which the normal application of the social security system represents for the recipient⁽²⁾. The Commission, while recognising that the public creditors had taken certain enforcement measures, doubted whether these were sufficient or, if they had been taken at a late stage, effective, especially in respect of the collateral held by the public creditors and which could have been relied on. At this stage of the proceedings, therefore, the Commission doubted that the conduct of the public creditors was in line with the way that private creditors would have behaved in those circumstances.
- (106) The Commission also expressed doubts with regard to other measures reported by the Polish authorities as free of state aid.
- (107) The Commission doubted whether the partial repayment and partial write-off of public liabilities reported by the Polish authorities as free of state aid, was in line with the private creditor rule.
- (108) The Commission also expressed doubts regarding the Plan's compatibility with the internal market in the light of point 31 et seq. of the rescue and restructuring guidelines.
- (109) The Commission doubted that the proposed contribution was real and actual and thus that the Plan complied with points 43-45 of the rescue and restructuring guidelines.

⁽¹⁾ OJ C 244, 1.10.2004, p. 2.

⁽²⁾ Case C-256/97 DMT [1999] ECR I-3919, paragraph 21.

The Commission doubted whether the planned revenue from the sale of PZL Wrocław, even if achieved, could be regarded as an own contribution to the restructuring. As mentioned above, PZL Wrocław was set up at end-2004. Under the Plan, the production assets were to have been transferred and the privatisation process was to have been launched as early as 2007. Initial offers by potential investors were to be submitted by the fourth quarter of 2007 and, following negotiations, a preliminary sales agreement was to be concluded in the first half of 2008. However, at the time when the opening decision was adopted, the Commission had not been informed of any interest on the part of potential investors in acquiring PZL Wrocław.

(110) The Commission also expressed doubts that the Plan would ensure long-term viability as required under points 34-37 of the rescue and restructuring guidelines. The Commission observed that the planned restructuring concentrated on financial restructuring, i.e. circa 90 % of all restructuring costs had been earmarked for the repayment of public debt arrears. Consequently, the remaining restructuring measures were rather limited. The Commission also noted that, as already explained, at the time when the opening decision was adopted, it had not been informed of any interest on the part of potential investors. Poland also indicated that further restructuring measures might be necessary after the company was privatised, which raised additional doubts as to the Plan's viability.

(111) The Commission also stated that it needed further clarifications as regards the compatibility of the proposed compensatory measures with points 38-42 of the rescue and restructuring guidelines. The Polish authorities argued in the notification that at least one third of the capacity reduction was designed to cut capacity in the low-profit industrial hydraulics segment. On the basis of the information at its disposal, the Commission doubted that the reduction in production capacity implemented or planned by the company was sufficient. The Commission also noted that at least some of the proposed measures appeared to be necessary in order to achieve long-term viability. In particular, the Commission pointed out that the sale of some production assets in the past seemed to have been specifically designed to restore viability. Similarly, the planned sale of real estate would serve as a source of financing rather than as compensation for a distortion of competition.

IV. COMMENTS OF POLAND ON THE OPENING OF THE FORMAL INVESTIGATION PROCEDURE

(112) The Polish authorities submitted their comments on the opening decision with regard to the possibility of applying the private creditor test in the reported scenario, i.e. in conjunction with capital injections.

(113) The Polish authorities stated that the proposed write-offs were in line with the private creditor rule in view of the fact that the public creditors would obtain more in the event of PZL Hydral's assets being sold than in the event of the company going bankrupt. The Polish authorities also stated that this viewpoint was based on economic and financial analysis and was shared by the public creditors concerned.

(114) The Polish authorities claimed that the two capital injections to be granted by the IDA to PZL Hydral and which, according to the notification, were to be earmarked for the repayment of public creditors, did not preclude applying the private creditor rule.

(115) In addition, the Polish authorities claimed that the market value of PZL Wrocław was closely linked to its ownership of aviation certificates and arms-trading permits and its uniquely experienced and qualified workforce. In the event of bankruptcy, it would be impossible to restore this organisation to an extent acceptable to the aviation supervision services.

(116) The Polish authorities valued the own contribution at PLN 130 million, which would amount to 50 % of the restructuring costs even if non-enforcement of public debts were to be treated as state aid. Moreover, the Polish authorities noted that the sale of assets was under way, and so all the assets provided for in the Plan would be disposed of within the framework of restructuring.

(117) As regards the long-term viability of the Plan, the Polish authorities affirmed that the objectives of the restructuring were being implemented properly. In particular, the process of concentrating production in the eastern part of PZL Hydral's site had yielded a reduction in fixed costs, operational improvements in production and additional revenue from renting out the space freed up. Moreover, production and sales (including 570 employees) had been relocated to PZL Wrocław, which was economically viable at that time (data for the first ten months of 2008). PZL Wrocław's net profit at end-2008 was estimated at PLN 6 million approx., with sales of PLN 50 million. The Polish authorities added that since agreement was reached on the private creditor scenario in the fourth quarter of 2007, both PZL Hydral and PZL Wrocław had paid their current liabilities to public creditors on time.

V. THIRD PARTY COMMENTS

(118) The Commission did not receive any third party comments.

VI. EVENTS FOLLOWING THE OPENING OF THE FORMAL INVESTIGATION PROCEDURE - THE REVISED PLAN

- (119) The Polish authorities consider that the sale price for PZL Wrocław's shares offered by [...] corresponds to the market value of this company. According to the Polish authorities, the price offered reflected the company's financial situation, which worsened in 2009 as a result of the financial crisis and a downturn in orders from the Polish armed forces.
- (120) The Polish authorities also indicated that this price reflected macroeconomic conditions. On the Warsaw stock exchange alone the Warsaw Stock Exchange Index (WIG) fell by 36 %. Between April 2008 (withdrawal of [...] from negotiations) and June 2009, the market ranking of listed aviation sector companies with a similar production profile to PZL Wrocław dropped dramatically. Shares in [...], to which [...] belongs, fell by [...] %, shares in [...] by [...] % and shares in [...] by [...] %.
- (121) [...] carried out a due diligence study (see point 96). The study compared the figures concerning [...] of 32 aviation sector companies. The study then calculated average coefficients which determined how these [...]. These coefficients were then applied to [...]. The result was [...].
- (122) However, talks with the IDA on the investor's evaluation suggest that at this stage [...] is highly dependent on one customer, the Polish armed forces, from which it is expected to derive [...] % of its planned revenue in 2010-13 under the modernisation programme, the outcome of which is uncertain, and bankruptcy proceedings could be launched if PZL Wrocław's financial situation does not improve in 2010.
- (123) On that basis the investor maintains that in offering [...] for PZL Wrocław's shares, he will *de facto* pay a premium for them.

Settlement of outstanding claims of public creditors

- (124) Once the price offered by the investor was known, the IDA started negotiations with the public creditors on partial repayments and partial write-offs of their claims as specified in the Plan, on the basis of the proceeds of the sale of PZL Hydral's assets without any additional capital injections.

- (125) For that purpose, a study was commissioned by the IDA from Ernst&Young on 15 January 2010. Ernst&Young was instructed, as an independent expert, to produce a comparison between the following two scenarios:
- bankruptcy proceedings for PZL Hydral, including its subsidiary PZL Wrocław,
 - settlement of liabilities on the basis of the proceeds of the sale of PZL Wrocław to [...] for [...] and the proceeds of the sale of PZL Hydral's other assets.
- (126) Ernst&Young assessed the situation for each individual public creditor: the Social Security Office, the Lower Silesia Region Tax Office, Wrocław Psie Pole Tax Office, Wrocław City Council, the State Fund for the Rehabilitation of the Disabled, the Lower Silesia Regional Office and the Ministry of Finance. The analysis does not include the IDA as it was not a creditor of PZL Hydral but only a shareholder.
- (127) The Ernst&Young study was completed on 24 February 2010. The study was based on a conservative approach: only the amounts expected to be directly recovered under each scenario were quantified. Therefore the analysis did not take account of alternative costs ⁽¹⁾, long-term profit forecasts and inflation.
- (128) The bankruptcy scenario leading to liquidation was analysed on the assumption that liquidation would be reasonably effective. It refers, as the basis for its methodology, to the requirements of a proper private creditor test based on case-law (*Spain v Commission* and *Hamsa v Commission*) which analyses the behaviour of a public body from the point of view of a private creditor seeking to obtain payment by a debtor in financial difficulties ⁽²⁾. The report is based on an analysis of each individual creditor, taking into account, in particular, the creditor's collateral on the debtor's assets and the extent to which claims can be satisfied in the event of the debtor going bankrupt ⁽³⁾.
- (129) In order to establish the bankruptcy value of the assets, the Ernst&Young study assumed that the fire sale value of the immovable fixed assets was 50 % of their fair value. To establish the fair value, Ernst&Young relied on the methods defined in International Accounting Standard 16 on property, plant and equipment, and used any available assessments by independent experts. The 50 % reduction is justified by the low effectiveness of bankruptcy proceedings in Poland, where revenue from sales of assets constitutes on average 26,86 % of their fair value.

⁽¹⁾ The costs that would be generated if an alternative set of conditions or assumptions were to prevail (as compared with the costs incurred or generated in the current circumstances).

⁽²⁾ Case C-342/96 *Spain v Commission* [1999] ECR I-2459.

⁽³⁾ Case T-152/99 *HAMSA v Commission* [2002] ECR II-3049, paragraph 170.

- (130) The Ernst&Young study also notes that the proceeds which public creditors can expect in a bankruptcy scenario depend on the respective ranking of their collateral on the assets to which the mortgages are attached. The Ernst&Young study provides for this purpose an overview of the mortgages attached to each asset component of PZL Hydral, the value of the respective mortgages and the ranking of the creditors.
- (131) On the basis of the assumptions set out in the previous two paragraphs, Ernst&Young estimates that the total amount recoverable in the event of bankruptcy from the assets secured by mortgages is PLN 52,4 million; three public creditors (the State Fund for the Rehabilitation of the Disabled, the Lower Silesian Regional Office and the Ministry of Finance) will not be able to recover anything and the remaining creditors will be able to recover the following amounts: the Social Security Office – PLN 44,8 million, the Lower Silesia Region Tax Office – PLN 2,3 million, Wrocław Psie Pole Tax Office – PLN 0,457 million and Wrocław City Council – PLN 4,9 million.
- (132) The actual amount of the proceeds under the bankruptcy scenario should then be corrected by adding the amount recovered from the other assets of PZL Hydral, i.e. PLN 13,5 million ⁽¹⁾. Accordingly, the bankruptcy proceeds amount to PLN 66 million, as shown in Table 26.
- (133) The sale of assets scenario provides for the sale of all PZL Hydral's assets referred to in the Plan for PLN 122 323 202,31: Zakład Produkcji Hydrauliki 'Hydral' Sp. z o.o. for [...], BBCenter's real estate for [...], car park for [...], Zakład Ciepłowniczy 'Term-Hydral' Sp. z o.o. for [...], power station (GSZ) for [...], PZL Wrocław for [...], the casting plant for PLN [...], minority shareholdings for [...] and repayment of PZL Hydral's receivables in an amount of [...].

Table 26

Comparison of the sale scenario and bankruptcy scenario from the perspective of PZL Hydral in 2010 (in PLN) in the Ernst&Young study

Public creditor	Total amount of liabilities (*)	Proceeds in bankruptcy scenario	Proceeds in sale of assets scenario
Social Insurance Fund	192 427 569,63	58 326 475,00	91 857 554,58
Lower Silesia Region Tax Office	59 579 407,58	2 294 047,11	18 250 999,45
Wrocław – Psie Pole Tax Office	532 432,60	456 768,68	456 800,00
Wrocław City Council	27 087 078,25	4 928 184,34	4 930 000,00
State Fund for the Rehabilitation of the Disabled	12 884 457,46	—	5 007 169,46
Lower Silesian Regional Office	1 320 678,82	—	1 320 678,82
Ministry of Finance	24 050 232,71	—	500 000,00
Total	317 881 857,5	66 005 475,13	122 323 202,31

(*) The Polish authorities also specified that the companies total debt vis-à-vis Wrocław City Council amounted to PLN 32 094 812,25 and, vis-à-vis the State Fund for the Rehabilitation of the Disabled, to PLN 14 578 542,46. For these two creditors the study did not include backdated interest, as stated in point 135.

- (134) Table 26 indicates that under the Ernst&Young study the Social Security Office would recover 47,7 % of its claims, Lower Silesia Region Tax Office would recover 30,6 %, Wrocław Psie Pole Tax Office 85,8 %, Wrocław City Council 18,2 %, the Lower Silesian Regional Office would recover the entirety of its claims, the State Fund for the Rehabilitation of the Disabled would recover 38,9 % and the Ministry of Finance 2,1 %.

⁽¹⁾ This amount is used to repay amounts owed to the Social Security Office.

- (135) Under Polish law, once the public creditors agree to the settlement of their claims by partial write-offs, interest ceases to accrue on these claims and is charged only if settlement is not implemented, which would be the case in a bankruptcy scenario. Therefore the liabilities shown in Table 26 include appropriate interest backdated to the date of the 2007 agreement for all public creditors apart from the Lower Silesia Region Tax Office (to which interest is still being charged on some tax liabilities) and the Lower Silesian Regional Office (to which interest is still being charged) due to the special legal nature of their claim.
- (136) It should be noted that as regards Wrocław City Council, the State Fund for the Rehabilitation of the Disabled and the Lower Silesia Region Tax Office, the revised Plan provided for the partial deferral of repayment to public creditors and on the repayment in instalments of part of these liabilities until the sale of PZL Hydral's assets took place, i.e. the liabilities would be repaid in part. In particular, the agreement makes detailed provision for:
- repayment of the amount of PLN 4,9 million owed to Wrocław City Council is deferred;
 - repayment of the amount of PLN 5 million owed to the State Fund for the Rehabilitation of the Disabled is deferred;
 - PLN 18,25 million will be used to partially repay the amount owed to the Lower Silesia Region Tax Office; part of this repayment is deferred, part will be repaid into instalments⁽¹⁾ and part will be repaid with interest calculated on the payment date.
- (137) On this basis, according to the Ernst&Young study (see Table 26) the creditors would receive PLN 122 million in total in the event of the sale of PZL Wrocław and the other assets of PZL Hydral, while in the event of bankruptcy resulting in the liquidation of PZL Hydral the creditors would receive only PLN 66 million, and three of them (the Ministry of Finance, Lower Silesian Regional Office and the State Fund for the Rehabilitation of the Disabled) would not receive anything.
- (138) In the sale scenario, the public creditors will write off PLN 195 million of public liabilities in total. Despite this, each public creditor is better off in the sale scenario than in the bankruptcy scenario. In total, the public creditors would recover 38,5 % of the amount owed to them.
- (139) The Polish authorities informed the Commission that on the basis of the findings of the Ernst&Young study, the public creditors agreed to the partial repayment of their claims in 2010.
- Debt-for-equity swap for the outstanding loans awarded by the IDA*
- (140) In the framework of the talks with [...], the IDA agreed that its credits would be partially swapped, partially repaid and partially waived. Under Annex 2 to the Framework Agreement, the IDA was to convert part of the 2007 loan principal and part of the 2008 loan principal totalling [...] into PZL Wrocław's share capital and liquid assets and to waive interest in an amount of [...] on the 2007 loan. Following this swap, PZL Wrocław's share capital was to be reduced by lodging an application to that effect with the court with jurisdiction.
- (141) The Polish authorities pointed out that the deterioration in PZL Wrocław's financial situation only occurred in 2009 and was caused by the economic downturn, which could not have been predicted and which resulted in a decline in orders from the Polish armed forces of almost [...]. Consequently, the IDA's situation as a creditor worsened considerably, as did the prospects for recovering its claims in full.
- (142) The provisions of Annex 2 to the Framework Agreement were negotiated in close correlation with the results of the supplement to the Ernst&Young study. This supplement was prepared on 24 February 2010. It analyses two scenarios, bankruptcy leading to the liquidation of PZL Wrocław and its sale to the investor. In particular, it focuses on what the IDA would obtain from its collateral in the bankruptcy scenario and compares this with the amounts it could expect if PZL Wrocław were sold to the investor.
- (143) The supplement to the Ernst&Young study points out that the assets of PZL Wrocław were encumbered by pledges and mortgages. The book value of all PZL Wrocław's assets on 31 December 2009 was PLN 52,5 million, of which secured assets accounted for PLN 21,3 million and unsecured/non-encumbered assets PLN 31,2 million.

⁽¹⁾ An extension fee will be charged.

- (144) Even if the unsecured/non-encumbered assets represented [...] % of the value of PZL Wrocław's assets, if the sale of PZL Wrocław did not take place, the tax authorities would issue a tax decision pursuant to Articles 112 and 118 of the Tax Code⁽¹⁾ declaring that PZL Wrocław was liable for PZL Hydral's 2006-07 liabilities in order to enforce their claims. This is confirmed by a letter from the Lower Silesia Region Tax Office of 23 November 2007, which states that should the restructuring fail, enforcement steps will be taken under Article 112 of the Tax Code.
- (145) As PZL Wrocław owns PZL Hydral's production assets (which it purchased between 2004 and 2007), this decision would impact on some of PZL Hydral's public liabilities. The value of the claims that would be affected by such proceedings would correspond to PZL Hydral's public liabilities generated in 2006-07 and would amount to a minimum of PLN 64,4 million⁽²⁾. According to the supplement to the Ernst&Young study, the value of these claims would exceed the book value of the unsecured/non-encumbered assets. At the same time, the book value of these assets should be considered in the light of their market value as they are receivables, cash and other monetary assets.
- (146) In the event of PZL Wrocław going bankrupt, only assets secured by mortgages and registered pledges would therefore take priority over the claims of the tax authorities. The claims of PZL Wrocław's unsecured private creditors could not have been satisfied from PZL Wrocław's assets. In the light of the fact that not all creditors' claims would be satisfied from the bankruptcy estate, PZL Wrocław shares would have zero value in the event of bankruptcy. Equally, as only the holders of registered pledges and mortgages would be satisfied, ordinary pledges are worthless.
- (147) On that basis, the supplement to the Ernst&Young study analyses the value of the IDA's registered pledge on PZL Wrocław's assets. The value of the collateral in the form of registered pledges on machinery is determined on the basis of the assumption that the value of the assets pledged in the event of bankruptcy would be 50 % of their net book value, as their fair value was not available and the value of movable fixed assets was subject to change in line with the applicable depreciation rate. Ernst&Young took the view that the value in the event of a fire sale was representative in the light of the possibility of using the evaluated assets for certain purposes and as part of certain production processes, the possibility of using them for alternative purposes and the nature of the contracts with which they were associated. The Ernst&Young study points out that when the assets to be sold are highly specific and are used to produce for a specific buyer, their liquidation value can be very low and can amount to 30 % of their net book value. By way of an example, Autoglass Group SA, which had a balance-sheet value of PLN 19,8 million, was sold in bankruptcy proceedings for PLN 6 million. In addition, the PZL Wrocław assets in question which served as a registered pledge include many low-value items. In particular, the 2007 loan was secured by a list of 1 709 items which depreciated over the years and around 1 400 items with a value of less than PLN 3 500; consequently, a one-off depreciation was carried out.
- (148) As did the main report, the supplement to the Ernst&Young study disregarded the effect of inflation, i.e. in view of potentially lengthy bankruptcy proceedings, on the assessment of the bankruptcy scenario from the perspective of PZL Wrocław's creditors.
- (149) According to this study, the net book value of the assets serving as a registered pledge on machinery was PLN 2 106 392,71 on 31 January 2010. If this formula is applied to the net book value of the assets, their value (in bankruptcy) in the event of a fire sale is estimated at PLN 1 053 196,36.
- (150) The supplement to the Ernst&Young study concludes that the IDA obtains PLN 1 053 196,36 under the bankruptcy scenario and [> PLN 1 053 196,36] under the sale scenario (as specified in Annex 2 to the Framework Agreement).
- (151) The Polish authorities informed the Commission that the net book value of assets serving as a registered pledge for the 2007 loan amounted in the audited 2007 financial reports to PLN 5 480 861,37 and in the audited financial reports as at 31 January 2010 to PLN 818 967,55.
- ⁽¹⁾ Tax Code of 29 August 1997 (Journal of Laws 2005/8, item 60, as amended). Article 112 states that a purchaser of a company or stand-alone part of a company is liable with all of its assets jointly and severally with the taxpayer for tax arrears generated prior to the date of purchase and which are related to business activities, unless the purchaser could not have known about these arrears having performed due diligence. Article 118 states that a decision on tax liability cannot be issued to a third party where five years have elapsed from the end of the calendar year in which the tax arrears were generated.
- ⁽²⁾ This includes an amount of PLN 7,5 million owed to the Social Security Office, PLN 19,1 million owed to the Lower Silesia Region Tax Office, PLN 24,9 million owed to Wrocław City Council and PLN 12,9 million owed to the State Fund for the Rehabilitation of the Disabled.

- (152) The Polish authorities informed the Commission that the net book value of assets serving as a registered pledge for the 2008 loan amounted to PLN 2 763 000 according to the independent expert report dated 1 February 2008. The book value of these assets according to the audited financial reports amounted to PLN 1 883 098,97 on 1 February 2008 and the net book value of these assets according to the audited financial reports amounted to PLN 1 287 425,16 on 31 January 2010.
- (153) Accordingly, the Polish authorities withdrew from the two capital injections to PZL Hydral, arguing that the partial write-offs and partial repayments of public liabilities were free of state aid in the light of the private creditor rule. They also stated that the public creditors' conduct in the past (1998-2007) was in line with the private creditor rule. They also indicated that the sale of PZL Wrocław had been open, transparent and unconditional and that the price offered by the investor could be regarded as a market price. The Polish authorities argued that both the 2007 and 2008 loans had been awarded on market terms. They also withdrew from the debt-for-equity swap for the 2007 loan described above but proposed a partial swap for both the 2007 and 2008 loans prior to the sale, arguing that this complied with the private creditor rule.

VII. COMPETENCE OF THE COMMISSION

- (154) The initial part of certain measures, namely the non-enforcement of public liabilities against PZL Hydral, started in 1998, i.e. prior to Poland's accession to the EU on 1 May 2004.
- (155) Under the Accession Treaty, aid measures put into effect in the new Member States before accession and still applicable after accession which constitute state aid within the meaning of Article 107(1) of the TFEU and are not existing aid are to be treated as new aid for the purpose of applying Article 108(3) of the TFEU.
- (156) Point 3 of Annex IV to the Accession Treaty sets out the interim mechanism procedure. It constitutes a legal framework for the assessment of aid schemes and individual aid measures which are put into effect in a new Member State before the date of its accession to the EU and are applicable after accession.
- (157) Aid measures that were put into effect before accession and are not applicable after accession cannot be examined by the Commission, either under the interim mechanism procedure or under the procedure laid down in Article 108(2) of the TFEU. On the other hand, measures that were not put into effect until after accession will be assessed by the Commission as notified aid or as unlawful aid pursuant to the procedure laid down in Article 108(2) of the TFEU.
- (158) A measure is applicable after accession if it was put into effect before accession but can still give rise, after accession, to the granting of additional aid or to an increase in the amount of aid already granted, i.e. if the precise economic exposure of the state is not known on the date on which the measure was put into effect and is still not known on the date of accession.
- (159) In the present case, the Commission notes that the non-enforcement of public creditors' liabilities started in 1998, and continued at the date of accession. The Commission considers that the non-enforcement of all liabilities outstanding on 1 May 2004 fell under its jurisdiction as of that date.
- (160) In the light of the foregoing, the non-enforcement of the public liabilities outstanding on 1 May 2004 constitutes a measure applicable after accession and falls under the Commission's jurisdiction pursuant to Article 108 of the TFEU.

VIII. ASSESSMENT

- (161) According to Article 107(1) of the TFEU, state aid is 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 in so far as it affects trade between Member States.
- (162) The conditions laid down in Article 107(1) of the TFEU are cumulative and therefore for a measure to be qualified as state aid all the conditions must be fulfilled simultaneously.
- (163) In the following sections, the Commission assesses possible state aid to PZL Hydral and PZL Wrocław separately.
- (164) It identifies the following measures concerning PZL Hydral:
- the planned and withdrawn capital injections for PZL Hydral,
 - the enforcement of public liabilities against PZL Hydral (1998-2007),
 - the settlement with the public creditors of PZL Hydral (2007-10).
- (165) It identifies the following measures concerning PZL Wrocław:
- the 2007 loan,
 - the 2008 loan,
 - the debt-for-equity swap concerning the 2007 and 2008 loans.

(166) The Commission notes that the Polish authorities contested the classification of the above-mentioned measures as state aid, claiming that the measures passed the private creditor test (in the case of the measures for PZL Hydral and the 2010 debt-for-equity swap for PZL Wrocław) and the market investor test (in the case of the 2007 and the 2008 loans to PZL Wrocław).

VIII.1. The withdrawn capital injections to PZL Hydral

(167) Pursuant to Article 8 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ⁽¹⁾ ('the Procedural Regulation'), a Member State may, after the opening of the formal investigation procedure, withdraw the notification in due time before the Commission has taken a decision on whether the notified measure constitutes aid. In such cases, the Commission terminates the procedure on the basis that it no longer serves any purpose.

(168) The Polish authorities withdrew the two notified capital injections (PLN 113 million). Accordingly, the Commission's investigation into these measures no longer serves any purpose.

VIII.2. Non-enforcement of public liabilities against PZL Hydral (1998-2007)

(169) State aid may have been granted to PZL Hydral in the form of continued non-enforcement of public liabilities against the company by various public creditors.

(170) The Commission points out that Article 107(1) of the TFEU covers interventions in various forms which reduce a company's normal costs and which, without therefore being subsidies in the strict sense of the word, are similar in character and have the same effect. It is universally accepted in case-law that the conduct of a public body with responsibility for collecting social security contributions which tolerates late payment of such contributions gives a company in financial difficulties which benefits from that conduct a significant commercial advantage by mitigating the burden associated with the normal application of the social security system which cannot be wholly removed by the interest and default surcharges applied to it ⁽²⁾. This reasoning applies *mutatis mutandis* to other fees, charges and taxes collected by public authorities.

(171) In the present case, the public collecting bodies had not recovered their claims against PZL Hydral 1998–2007 in full when the public creditors adopted the Plan (see point 60 et seq.).

(172) It follows from case-law that, in order to determine whether any state aid was granted by the public authorities by way of non-enforcement of public claims, it has to be ascertained whether the company concerned would manifestly have been unable to obtain comparable facilities from a private creditor in the same situation vis-à-vis that company as the public collecting body ⁽³⁾.

(173) The Commission notes that in order to ensure the long-term economic viability of PZL Hydral, its owner at that time, the Polish Treasury, and subsequently the IDA, developed a privatisation strategy on the basis of a 1998 study carried out by private consultants, and started a search for investors (see point 54). The private and public creditors supported this approach and were closely involved in it.

(174) In 2002 the Polish authorities, still with the support of private and public creditors, entered into negotiations with [...]. These creditors were given regular updates on the progress made (see points 30 and 56).

(175) The Commission notes that both private and public creditors took the view that the value of PZL Hydral, and in particular of its aviation and defence activities, as a going concern by far exceeded the value of its assets, in particular by virtue of its military certificates and arms-trading permits, as well as its human capital, and that for that reason they agreed to refrain from instituting bankruptcy proceedings against PZL Hydral.

(176) The Commission notes in particular that the main private creditors, i.e. Bank [...] and Bank [...], refrained from forced enforcement of their liabilities in spite of holding first-rank collateral (see points 32 and 34) which was enforceable directly on the basis of bank enforcement orders and could be relatively easily disposed of (see point 28).

(177) The public creditors, on the other hand, took enforcement actions via the court enforcement officer, and by end-2007 had recovered a total amount of PLN 28,76 million (see point 41).

(178) The Commission therefore concludes that between 1998 and 2007, PZL Hydral was able to obtain comparable facilities from two private creditors, i.e. Bank [...] and Bank [...], which were not merely in the same but actually in a better situation vis-à-vis that company than the public collecting bodies.

⁽¹⁾ OJ L 83, 27.3.1999, p. 1.

⁽²⁾ Case C-256/97 *DM Transports* [1999] ECR I-3913, paragraph 30; Case T-36/99 *Lenzing v Commission* [2004] ECR II-3597, paragraphs 137 and 139.

⁽³⁾ Case C-256/97 *DM Transports* [1999] ECR I-3913, paragraph 30.

(179) The Commission also concludes that the decision of both private and public creditors to refrain from instituting bankruptcy proceedings against PZL Hydral was justified by the good prospects for restoring viability to the aviation and defence activities once their debt arrears had been repaid, as indicated in the strategy developed in 1998 (see point 54).

(180) Therefore, the non-enforcement of the public collecting bodies of the amounts owed to them in 1998-2007 does not confer an advantage on PZL Hydral because the public authorities acted in the same way as a private creditor would have acted, and this therefore does not constitute state aid within the meaning of Article 107(1) of the TFEU.

VIII.3. Repayment of PZL Hydral's public liabilities (2007-10)

(181) After the failure of the privatisation negotiations with [...], the main private creditors of PZL Hydral, i.e. Bank [...] and Bank [...], settled their claims vis-à-vis PZL Hydral.

(182) The private creditors' claims were settled in April 2003 (Bank [...]) and November 2006 (Bank [...]) respectively. Despite the good quality of their collateral, Bank [...] accepted the settlement of PZL Hydral's debts of PLN 51,6 million against a payment of PLN 4 million and Bank [...] accepted the settlement of PZL Hydral's debts of PLN 86,4 million against a payment of PLN 11,5 million respectively (see points 31 and 33).

(183) The public collecting bodies reached a debt settlement agreement with the IDA and PZL Hydral in 2007, which was incorporated into the Plan in November 2007. This agreement contained four essential elements:

- PLZ Hydral would pay all new taxes, charges and contributions on time,
- PZL Hydral would pay off part of its outstanding liabilities in instalments; payment for the remainder would be deferred until PZL Hydral had sold off its subsidiaries and assets,
- PLZ Hydral would sell all its subsidiaries and assets, and use the proceeds to pay its debt arrears,
- the aviation and defence business of PZL Hydral would be hived off into the subsidiary PZL Wrocław, which would subsequently be privatised and public creditors would be repaid from the proceeds. This would leave PZL Hydral as an empty shell, which would be liquidated.

(184) In accordance with the estimated proceeds from sales in 2007-2010, the Plan provided for the public collecting bodies to recover PLN 120,8 million (see point 61). *Ex post*, this turned out to be a good estimate, as the amount established in 2010 is PLN 122,3 million (see point 133).

(185) The Commission notes that the Plan also provided for two capital injections to PZL Hydral, which were designed to increase the amount of money available for settling past liabilities. The inclusion of these capital injections in the Plan was to be subject to the Commission's prior authorisation; therefore, it was clear to the public creditors when agreement was reached on the Plan that they could not view the inclusion of these additional amounts in the Plan as acquired and certain.

(186) The Commission also notes that the Plan does not include a final decision on how the proceeds will be divided between the different public creditors. This division was to be done after the process of selling the subsidiaries and assets had been carried out on the basis of the actual proceeds of the sale, taking account of the collateral of the different public creditors on these assets.

(187) With regard to the assessment of the conduct of public creditors from 2007 to 2010, the Commission considers that two different decisions on the part of the public creditors need to be assessed: first, the decision in 2007 to agree to the Plan, and second, the decision in 2010 to accept the final settlement as detailed in Table 26 of this Decision.

(188) According to Court case-law, in such situations the Commission must apply the private creditor rule, i.e. in order to determine whether the reduction of some of the debts owed by a firm in difficulty to a public-law body constitutes state aid, it must compare that body to a private creditor seeking to recover amounts owed to it by a debtor in financial difficulty⁽¹⁾.

(189) However, according to case-law, when a company facing a significant deterioration in its financial situation proposes an agreement or series of agreements for debt restructuring to its creditors with a view to remedying the situation and avoiding bankruptcy, each creditor must take its decision in the light of the amount offered to it under the proposed agreement on the one hand, and the amount it expects to be able

⁽¹⁾ Case C-342/96 *Spain v Commission* [1999] ECR I-2459, paragraph 46; Case C-256/97 *DMT* [1999] ECR I-3913, paragraph 24. Case T-152/99 *HAMSA v Commission* [2002] ECR II-3049, paragraph 167. Case T-198/01 *Technische Glaswerke Ilmenau v Commission* [2004] ECR II-2717, paragraph 99; Case T-68/03 *Olympic Airways v Commission* [2007] ECR II-2911, paragraph 283.

to recover in the event of the company's liquidation on the other. Its decision is influenced by number of factors, including the creditor's status as the holder of a secured, preferential or ordinary claim, the nature and extent of any collateral it may hold, its assessment of the likelihood of the company being restored to viability and the risks of its losses increasing in the event of this not taking place and the amount it would receive in the event of liquidation. If it turned out, for example, that in the event of the company being liquidated, the realisation value of its assets sufficed only to cover mortgage and preferential claims, ordinary claims would have no value. In these circumstances, acceptance by an ordinary creditor of the cancellation of a major part of its claim would not really be a sacrifice ⁽¹⁾.

Agreement to the Plan in 2007

- (190) The Commission notes that the terms of the settlement with the public collecting bodies are different from the terms of the settlement with the two private banks.
- (191) First of all, the private banks opted for an immediate payout, whereas the public collecting authorities agreed to await the results of the sale of PLZ Hydral's assets and subsidiaries.
- (192) Second, the expected recovery rate of the public collecting authorities by far exceeds the recovery rate of the private banks: Bank [...] recovered 7 %, Bank [...] recovered 13 %, whereas the public collecting authorities could expect to recover 38,5 % on the basis of sale proceedings of PLN 122,3 million.
- (193) The Commission must assess whether the decision of the public creditors to agree in 2007 to the Plan, which is different in nature to the settlement obtained by the private creditors, would have been taken by a private creditor in their place, applying the principles set out in points 188 and 189 above.
- (194) First, the Commission notes that the public creditors had only limited collateral, and that their collateral was of an inferior quality to that of the private banks (see Tables 16 to 20 above). They were therefore in a weaker negotiating position. At the same time, following the settlement with the private creditors, the quality of their collateral increased significantly, giving them additional security that, even in the event of the Plan not working out as predicted, they would still obtain an acceptable recovery rate from the assets.

- (195) Second, the Commission notes that the public creditors could expect, on the basis of the assumptions underpinning the Plan, a substantially higher recovery rate than the private creditors, which had opted for a quick settlement.
- (196) Third, the Commission notes that the private creditors obtained assurances from PZL Hydral and PZL Wrocław that all new liabilities would be paid on time.
- (197) Fourth, the Commission observes that as regards outstanding liabilities, PZL Hydral agreed to a payment schedule which provided for part of the debt to be repaid in instalments and for the remainder to be repaid once the proceeds of the sale of assets and subsidiaries were known. These payments constituted a substantial improvement in comparison with recovery in the years before the Plan was agreed: in 2008, the first year of the Plan, PZL Hydral repaid PLN 54,6 million, against only PLN 9,5 million in 2007 (see Table 21).
- (198) The Commission concludes that on the basis of these guarantees and the assurances received from PZL Hydral, the public creditors acted as a private creditor placed in a comparable situation would have acted.
- (199) The Commission also observes that due to the failure of negotiations with [...] and [...] (see point 94), the actual realisation of the Plan took longer than initially envisaged. The Commission considers that this was a risk inherent to the agreement given to the Plan by the public collecting bodies.

Agreement to the final settlement in 2010

- (200) The final settlement between PZL Hydral and its public creditors is described in Table 26. Once the sale price for PZL Wrocław had been established following an offer made by [...], the public creditors agreed to settlement from the sale of PZL Hydral's assets, without any capital injections, in accordance with the private creditor rule, taking into account the value of their claims and the quality of their collateral (see point 96).
- (201) The Commission must therefore determine whether, in the event of a sale without capital injections, each of the public creditors is better off than in the event of bankruptcy, and whether a sale to [...] is the best sale scenario the public creditors could expect.

⁽¹⁾ Case C-256/97 DMT [1999] ECR I-3913, paragraph 30. Case T-152/99 HAMSA v Commission [2002] ECR II-3049, paragraph 168. Case T-46/97 SIC v Commission [2000] ECR II-2125, paragraph 95. Case T-68/03 Olympic Airways v Commission [2007] ECR II-2911, paragraph 283.

- (202) All the public creditors will recover more than the private creditors (see point 134), except the Ministry of Finance, which, however, did not hold any collateral and thus cannot be compared with private creditors holding first-rank collateral (see points 32 and 34).
- (203) It should also be noted that the Ernst&Young study commissioned by the IDA compared the amounts each public creditor could expect to receive in the event of bankruptcy and in the event of a sale (which took place in 2010) (see point 137). The study concludes that each public creditor is better off in the event of a sale.
- (204) The Commission has critically assessed the Ernst&Young study in order to determine whether its findings withstand scrutiny and demonstrate that by agreeing to the settlement, each public creditor behaved like a private creditor in a comparable situation, relying on the case-law cited in points 188 and 189 above.
- (205) First, the Commission notes that the Ernst&Young study used as methodology the relevant case-law of the European courts to assess the private creditor rule and took into consideration the status of each public creditor, the collateral it held, its ranking and the amount it would recover in the event of liquidation.
- (206) Table 26 of the present decision shows that on the basis of this assessment, each public creditor (the Social Security Office, the Lower Silesia Region Tax Office, Wrocław Psie Pole Tax Office, Wrocław City Council, the State Fund for the Rehabilitation of the Disabled, the Lower Silesia Regional Office and the Ministry of Finance) is better off in the event of the sale of all PZL Hydral's assets, i.e. each recuperates a higher proportion of its outstanding liabilities, than in a bankruptcy scenario leading to liquidation, taking into consideration the ranking and the respective collateral of the public creditors (see point 134).
- (207) The Commission then verified the plausibility of the bankruptcy scenario developed by Ernst&Young. The starting point of the assessment is that the value of PZL Hydral is nil, as its liabilities by far exceed the value of its assets and subsidiaries. Therefore any creditor in a bankruptcy scenario would only be able to recoup the portion of its outstanding liabilities that was secured by collateral, in so far as its rank enabled it to benefit from the liquidation value of the secured assets.
- (208) Tables 16 to 20 show the collateral for each public creditor. The extent to which each public creditor is to be satisfied from its collateral, taking its ranking into account, in the event of PZL Hydral being declared bankrupt is shown in point 131. With a view to estimating the fire sale value of the real estate, Ernst&Young took the current fair value of assets forming part of the company in accordance with point 30 and international accounting standard (IAS) 16 on property, plant and equipment⁽¹⁾. The Commission notes that the use of this IAS is mandatory in the EU and is therefore an appropriate starting point for assessing the liquidation value. The Commission regards it as reasonable that the bankruptcy value of these assets is reduced in the fire sale by 50 % due to the fact that these assets will be sold separately, that it will not be possible to apply the 'going concern' rule due to decreased demand for industrial assets in the economic crisis and that this value is above the average revenue from the sale of assets in bankruptcy in Poland, which is 26,86 % compared to their fair value.
- (209) The Commission concludes that each public creditor is better off under the scenario of a sale to [...] than under a bankruptcy scenario.
- (210) It remains to be determined whether the offer from [...] is the best offer the public creditors could expect. The Commission notes that when it became clear in the first half of 2009 that the conditions contained in the offer from [...] had not been met, [...] was the only buyer interested in purchasing the PZL Wrocław shares. Despite the publication of an invitation to express interest and an active search for possible investors as of May 2008 (see point 90 et seq.), no other investors came forward. Therefore the public creditors did not have reasonable grounds to believe that any other investor would offer a better price in the future.
- (211) On this basis, the Commission considers that by agreeing in 2010 to the settlement structure shown in Table 26, the public creditors behaved like a private creditor seeking to recover amounts owed to it by a debtor in financial difficulty. Therefore the public creditors did not confer an advantage on PZL Hydral. Accordingly, the settlement of outstanding liabilities in the form of a partial write-off of public liabilities as per the Ernst&Young study does not constitute state aid within the meaning of Article 107(1) TFEU.
- ⁽¹⁾ The use of the IAS is mandatory in the EU pursuant to Commission Regulation (EC) No 1725/2003 of 29 September 2003 adopting certain international accounting standards in accordance with Regulation (EC) No 1606/2002 of the European Parliament and of the Council (OJ L 261, 13.10.2003, p. 1).

VIII.4. Measures with regard to PZL Wrocław

The 2007 loan granted to PZL Wrocław

- (212) The Commission needs to determine whether the 2007 loan conferred an advantage on PZL Wrocław. For that purpose, the Commission must establish whether a private investor ('market economy investor principle') would have concluded the transaction in question on the same terms and, if not, on which terms it would have done so ⁽¹⁾.
- (213) The Commission notes that in order to ascertain whether a loan granted by a state body which is already a shareholder in the company complies with the market economy investor principle, its investment should be compared with investments by a private holding company or private group of companies pursuing structural policy and being guided by the longer-term prospects ⁽²⁾.
- (214) The Commission takes the view that the IDA is not an external creditor which invests in order to obtain profits based on the return on its investment in the form of an interest rate, but that it is a shareholder with more than 90 % of shares in PZL Hydral, which in turn holds 100 % of shares in PZL Wrocław. It must therefore be determined whether a private investor would have granted the 2007 loan in the same circumstances.
- (215) As regards the 2007 loan to PZL Wrocław, the Commission notes first that it was granted to PZL Wrocław, a company which at that time was financially viable and not in financial difficulty within the meaning of the rescue and restructuring guidelines (see points 47 and 48). Instead it was a new company without debt which already had a significant number of orders on its books, mainly in the form of contracts with the Polish Ministry of Defence, with which it had a longstanding business relationship.
- (216) The Commission notes that the IDA anticipated securing a return on its investment by way of a debt-for-equity swap of [...] % and the subsequent sale of this stake in PZL Wrocław to a private investor (for an estimated [...]), as stated in the Plan.
- (217) The IDA took into consideration the ongoing negotiations with [...] (see point 74).
- (218) In order to establish whether the IDA had acted in accordance with the private investor principle, it is therefore necessary to determine what sales price IDA could expect for its stake, what the level of risk was, and whether the return on the investment resulting from that sale was adequate in relation to the risk taken by the IDA.

- (219) Prior to granting the loan, the IDA had commissioned a study from an independent expert in order to establish the value of PZL Wrocław once the hive-off from PZL Hydral had been completed (see point 66).
- (220) The Commission critically assessed this study and concluded that it was reasonable to expect a sales price of at least [...] (see point 71 et seq.). By selling approximately [...] % of the shares, the IDA could therefore expect a considerable return of at least PLN 48,5 million in the event of a successful sale.
- (221) The Commission acknowledges that there are always considerable risks inherent in any privatisation. In the present case a first attempt had already failed. At the same time, the Commission notes that the overall prospects for a Polish aviation and defence company were relatively stable taking into account the Polish army's ongoing duties abroad and Poland's commitments to NATO regarding its defence capabilities. Furthermore, in view of the need to hold special permits, barriers to entry to the relevant market segment are high, which in turn increases the attractiveness of the established players.
- (222) The Commission also notes that the expected return on investment was sufficiently important to justify a relatively high risk, and that in addition the IDA had obtained collateral in the form of a registered pledge on machinery for PLN 5,5 million and an ordinary pledge on [...] % of the shares (see point 65).
- (223) On this basis, the Commission is satisfied that the 2007 loan was granted in line with the private investor principle and therefore does not constitute state aid within the meaning of Article 107(1) of the TFEU.

The 2008 loan granted to PZL Wrocław

- (224) The Commission needs to determine whether the 2008 loan conferred an advantage on PZL Wrocław. To that end the Commission will apply the private investor principle as set out in points 212 to 214 and for the reasons explained therein.
- (225) As regards the 2008 loan to PZL Wrocław, the Commission notes first that it was granted to PZL Wrocław, a company which at that time was financially viable and not in financial difficulty within the meaning of the rescue and restructuring guidelines. Instead it was a new company without debt which already had a

⁽¹⁾ Case T-16/96 *Cityflyer v Commission* [1998] ECR II-575, paragraph 52.

⁽²⁾ Case T-228 and 233/99 *Westdeutsche Landesbank v Commission* [2003] ECR II-435, paragraph 314.

significant number of orders on its books, mainly in the form of contracts for an amount of [...] with the Ministry of Defence (see point 48). The Commission takes the view that this loan was granted specifically for the purpose of processing the increasing number of orders from the Ministry of Defence. Moreover, in 2008 the company obtained private funding in the form of an operating lease (see point 87).

- (226) The Commission notes that the IDA granted the 2008 loan shortly before the expected end of negotiations with [...] regarding the sale of PZL Wrocław (see point 74). It did so in order to provide a bridging loan for the period prior to closing the deal, when PZL Wrocław had to expand its capacity rapidly in order to cope with increasing orders from the Ministry of Defence. The IDA's main motivation for granting the loan was therefore to ensure that the company could take advantage of business opportunities before the deal with [...] was closed and to ensure that the deal would be concluded swiftly.
- (227) The Commission notes that the loan is limited to PLN 4 million, the amount necessary to acquire the assets needed to meet the additional demand from the Ministry of Defence.
- (228) Furthermore, the Commission observes that the loan was secured by a registered pledge on machinery to a value of PLN 2,8 million and by an ordinary pledge on receivables from commercial contracts to a value of PLN 5,2 million, and that it had a variable interest rate which was identical to the applicable reference rate published by the Commission (see point 83). Nevertheless, before granting the 2008 loan, the IDA examined PZL Wrocław's financial situation and found it to be profit-making. On that basis the IDA could expect PZL Wrocław to generate sufficient cash flow for it to repay the loan and for the IDA to receive a return on its investment.
- (229) The Commission observes that it is normal business behaviour for a majority shareholder that is in the process of selling a company to grant a small bridging loan, if that loan is necessary to take advantage of business opportunities and ensures that the sale is concluded smoothly. The Commission takes the view that the 2008 loan, which, furthermore, was adequately secured and provided for interest at the reference rate, was granted by the IDA in line with that logic.
- (230) On this basis, the Commission is satisfied that the 2008 loan was granted in line with the market economy

investor principle and therefore does not constitute state aid within the meaning of Article 107(1) of the TFEU.

The debt-for-equity swap in connection with the 2007 and 2008 loans

- (231) By agreeing to first swap its debt for equity and then passing on the entire proceeds of the sale of the equity to PZL Hydral to enable it to settle its outstanding liabilities to public bodies as provided for in the Plan, the IDA effectively waived debts of PLN 17,2 million, recovering only [> PLN 1 053 196,36].
- (232) It is necessary to establish whether the debt-for-equity swap involves an advantage granted by the IDA to PZL Wrocław. To that end, the Commission must determine whether, in performing this transaction, the IDA complied with the private creditor rule as defined in points 188 and 189.
- (233) The Commission notes first that [...]’s 2009 offer ([...]) was [...] lower than [...]’s 2008 offer. The Commission takes the view that this difference reflects the deterioration in the situation of PZL Wrocław, which in 2008 had been profitable and with good prospects, whereas by 2009 it was showing signs of difficulties, mainly as a result of the significant downturn in orders from the Ministry of Defence.
- (234) The Commission also notes that the IDA had no expectation of finding a buyer other than [...] for the shares it had obtained in PZL Wrocław as a result of the debt-for-equity swap (see point 210). In order to ensure that the deal was successful, the IDA had to ensure that it could settle the liabilities of the public creditors, in so far as they had mortgages on the assets of PZL Wrocław, as otherwise it would not have been in a position to honour the commitment to transfer all assets free from collateral.
- (235) Moreover, if the sale of PZL Wrocław - which was the event on which restructuring of public liabilities by way of partial repayments was based - did not proceed, the tax authorities would enforce their claims pursuant to the Tax Code (see point 144). In addition, in view of the financial situation of PZL Wrocław, the failure of the sale agreement would lead to PZL Wrocław’s bankruptcy (see point 52).
- (236) Therefore the Commission concludes that the only alternative to accepting the *de facto* waiver of PLN 17,2 million was to put PZL Wrocław and PZL Hydral into liquidation.

- (237) The supplement to the Ernst&Young study assessed these two scenarios. The Commission has critically assessed the Ernst&Young study to determine whether its findings withstand scrutiny and demonstrate that, by agreeing to the settlement, the IDA behaved like a private creditor in a comparable situation, relying on the case-law quoted in points 188 and 189.
- (238) In the event of bankruptcy, the study concludes that ordinary creditors will not receive anything, as many of the assets are encumbered by pledges and mortgages and, in addition, the tax authorities will be able to enforce their claims against PZL Wrocław (see points 143 et seq.). The Commission has confirmed this information by examining the financial reports of PZL Wrocław and by analysing implementation of Polish law, and has reached the conclusion that Ernst&Young's assessment is justified.
- (239) As a result, the Commission considers that the value of the ordinary pledge on receivables which secures the 2008 loan is without any value in a liquidation scenario. Furthermore, the pledge on [...] % of the shares is without any value in the liquidation scenario, as the value of the shares themselves is nil.
- (240) Therefore, in order to establish what the IDA would obtain in a liquidation scenario, it is necessary to estimate the profits it could expect from selling the items on which it has registered pledges.
- (241) The supplement to the Ernst&Young study notes that the machinery on which the IDA had pledges for the 2007 loan had a book value in 2007 of PLN 5,5 million, whereas the machinery on which it had pledges for the 2008 loan had a book value of PLN 2,8 million in 2008.
- (242) In the supplement to the Ernst&Young study the assessment of the liquidation value of the pledges registered in favour of the IDA was based on the book value of the assets entered in PZL Wrocław's audited financial reports (see points 151 and 152) as at 31 January 2010, i.e. PLN 2,1 million.
- (243) The Commission considers that the book value of the fixed movable assets (serving as a pledge for the 2007 and 2008 loans), as entered in the audited financial report, is an appropriate starting point for assessing their liquidation value. The Commission notes first that the large difference between the book value and the net asset value which the 2008 study evaluating PZL Wrocław had found was due to a significant increase in the value of real estate. No correction was made for the value of machinery. Second, the Commission notes that, in view of the short period of time between the establishment of the pledge and the assessment, there are no other indications that the book value does not reflect the conservatively estimated value of the machinery.
- (244) The supplement to the Ernst&Young study argues that in the event of liquidation, these assets would have to be sold in a fire sale at a 50 % reduction, and that therefore the expected value is PLN 1 053 196,36. The Commission acknowledges that assets such as machinery that are put up for sale in the context of liquidation are usually sold below their book value.
- (245) The Commission considers that the 50 % discount is justified for the reasons stated by Ernst&Young, and described in point 147 above. It considers in particular that the evaluation of their hypothetical value in the event of bankruptcy was done using a methodology which can be considered appropriate for the purpose of determining the realisable value of claims vis-à-vis borrowers under threat of bankruptcy, taking account of the specific type of machinery to be sold, the contingency of sales on a specific customer (the Ministry of Defence) which is cutting its spending in the light of the need to adapt to the downturn in tax revenue resulting from the crisis.
- (246) The Commission therefore concludes that, on the basis of the information available to it when the present decision was adopted, the bankruptcy value of the IDA's outstanding loans was PLN 1 053 196,36.
- (247) In the sale scenario, the value of the IDA's outstanding loans was higher, as [...] offered to pay IDA [> PLN 1 053 196,36].
- (248) The Commission concludes that a private creditor placed in the situation of the IDA would have accepted to waive PLN 17,2 million, because it could not reasonably expect to recover more of its claims under bankruptcy proceedings. Therefore, on that basis, the Commission is satisfied that the behaviour of the IDA with regard to the 2010 debt-for-equity swap is in line with the private investor principle and that the debt-for-equity swap does not contain state aid within the meaning of Article 107(1) of the TFEU.
- IX. CONCLUSION**
- (249) The Commission notes that the formal investigation into the capital injections of PLN 113 million notified but subsequently withdrawn by the Polish authorities no longer serves any purpose pursuant to Article 8 of the Procedural Regulation.

(250) With regard to the non-enforcement of public creditors' liabilities and their eventual settlement, the Commission finds that the public creditors acted in line with the private creditor rule. Consequently, the behaviour of the public creditors does not involve state aid within the meaning of Article 107(1) of the TFEU.

(251) The Commission finds that the planned partial debt-for-equity swap by the Industrial Development Agency within the framework of the Plan, as amended, does not constitute state aid in the meaning of Article 107(1) of the TFEU as it complies with the private creditor rule. The Commission also considers that the 2007 loan and the 2008 loan in favour of PZL Wrocław do not constitute state aid within the meaning of Article 107(1) of the TFEU as they comply with the private investor principle,

HAS ADOPTED THIS DECISION:

Article 1

The Commission has decided to close the formal investigation procedure under Article 108(2) of the Treaty on the Functioning of the European Union in respect of the capital injections of PLN 113 million, noting that Poland has withdrawn its notification and will not pursue this aid project further.

Article 2

1. The partial non-enforcement from 1998 to 2007 of the claims that the Polish public authorities had against PZL Hydral and the settlement of these debts from 2007 to 2010 does not constitute aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

2. The loans granted by the IDA to PZL Wrocław in 2007 (PLN 12,5 million) and 2008 (PLN 4 million) do not constitute aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

3. The subsequent partial write-off of these loans concerning PLN 17,2 million, carried out in the form of a debt-for-equity swap, does not constitute aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

Article 3

This Decision is addressed to the Republic of Poland.

Done at Brussels, 4 August 2010.

For the Commission
Joaquín ALMUNIA
Vice-President

COMMISSION DECISION

of 15 November 2010

granting the Czech Republic a derogation from the application of Decision 2006/679/EC concerning the technical specification for interoperability relating to the control-command and signalling subsystem of the trans-European conventional rail system to the line Strančice–České Budějovice

*(notified under document C(2010) 7789)***(Only the Czech text is authentic)**

(2010/691/EU)

THE EUROPEAN COMMISSION,

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

Having regard to Commission Decision 2006/679/EC of 28 March 2006 concerning the technical specification for interoperability relating to the control-command and signalling subsystem of the trans-European conventional rail system ⁽¹⁾, in particular the Annex, Section 7.1.3, thereof,

Whereas:

(1) Commission Decision 2009/561/EC ⁽²⁾ which amended Decision 2006/679/EC, established the implementing rules of the technical specification for interoperability relating to the control-command and signalling subsystem of the trans-European conventional rail system.

(2) In accordance with Section 7.1.3 of the technical specification for interoperability relating to the control-command and signalling subsystem of the trans-European conventional rail system, the fitting of ERTMS/ETCS is mandatory in the case of an upgrade or new installation of the train protection part of a CCS assembly for railway infrastructure projects receiving financial support from European Regional Development Funds and/or Cohesion Funds.

(3) When signalling is renewed on short (less than 150 km) and discontinuous sections of a line, the Commission may grant temporary derogation to this rule, provided the Member State concerned forwards a file to the Commission. This file shall contain an economical analysis showing that there is a substantial economical and/or technical advantage in putting ERTMS into service at a later date for equipment rather than during the course of the EU-funded project.

(4) The Commission shall analyse the file submitted and the measures proposed by the Member State and shall inform the committee referred to in Article 29 of Directive 2008/57/EC of the European Parliament and of the Council ⁽³⁾ of the result of its analysis. When a derogation is granted, the Member State shall ensure that ERTMS is installed at the latest 5 years after the end of the project and as soon as the section of the line is connected to another ERTMS equipped line.

(5) The line Strančice–České Budějovice will be gradually upgraded until 2016, whereby some sections are or will be receiving financial support from European Regional Development Funds and/or Cohesion Funds.

(6) The line Strančice–České Budějovice is shorter than 150 km and is not connected to an already ERTMS equipped line. On 24 January 2010, the Czech authorities sent a request for derogation to the Commission together with a file showing that there is a substantial economical and technical advantage in putting ERTMS into service by the end of 2018 rather than during the course of the EU-funded project.

(7) In accordance with Article 15 of Regulation (EC) No 881/2004 of the European Parliament and of the Council ⁽⁴⁾, the European Railway Agency provided its technical opinion on the request for derogation on 20 May 2010.

(8) This technical opinion indicated that the file submitted contains the elements required for a derogation but suggested to obtain confirmation that the tender would contain an option for the ERTMS equipment of the line.

(9) The Czech authorities confirmed on 7 June 2010 that the tender for the last subsection will contain a clear option for the ERTMS equipment of the line.

(10) The Commission informed the Committee set up by Article 29 of Directive 2008/57/EC of the result of its analysis,

⁽¹⁾ OJ L 284, 16.10.2006, p. 1.

⁽²⁾ OJ L 194, 25.7.2009, p. 60.

⁽³⁾ OJ L 191, 18.7.2008, p. 1.

⁽⁴⁾ OJ L 164, 30.4.2004, p. 1.

HAS ADOPTED THIS DECISION:

Article 1

The derogation from the obligation to implement the TSI control command and signalling of the trans-European conventional rail for the line Strančice–České Budějovice requested by the Czech Republic is hereby granted.

This derogation is granted until 31 December 2018.

Article 2

This Decision is addressed to the Czech Republic.

Done at Brussels, 15 November 2010.

For the Commission

Siim KALLAS

Vice-President

CORRIGENDA**Corrigendum to Commission Regulation (EU) No 1015/2010 of 10 November 2010 implementing Directive 2009/125/EC of the European Parliament and of the Council with regard to ecodesign requirements for household washing machines**

(Official Journal of the European Union L 293 of 11 November 2010)

On page 23, Article 8(2)(b):

for: '(b) the generic ecodesign requirements set out in point 1(2) of Annex I shall apply from 1 June 2011;'

read: '(b) the generic ecodesign requirements set out in point 1(2) of Annex I shall apply from 1 June 2012;'

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