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<sup>(1)</sup> Text with EEA relevance

## II

*(Non-legislative acts)*

## REGULATIONS

## COMMISSION IMPLEMENTING REGULATION (EU) No 359/2012

of 25 April 2012

**approving the active substance metam, in accordance with Regulation (EC) No 1107/2009 of the European Parliament and of the Council concerning the placing of plant protection products on the market, and amending the Annex to Commission Implementing Regulation (EU) No 540/2011**

*(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 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC <sup>(1)</sup>, and in particular Article 13(2) and Article 78(2) thereof,

Whereas:

- (1) In accordance with Article 80(1)(c) of Regulation (EC) No 1107/2009, Council Directive 91/414/EEC <sup>(2)</sup> is to apply with respect to the procedure and the conditions for approval to active substances for which completeness has been established in accordance with Article 16 of Commission Regulation (EC) No 33/2008 of 17 January 2008 laying down detailed rules for the application of Council Directive 91/414/EEC as regards a regular and an accelerated procedure for the assessment of active substances which were part of the programme of work referred to in Article 8(2) of that Directive but have not been included into its Annex I <sup>(3)</sup>. Metam is an active substance for which completeness has been established in accordance with that Regulation.
- (2) Commission Regulations (EC) No 451/2000 <sup>(4)</sup> and (EC) No 1490/2002 <sup>(5)</sup> lay down the detailed rules for the implementation of the second and third stages of the programme of work referred to in Article 8(2) of Directive 91/414/EEC and establish lists of active substances to be assessed, with a view to their possible inclusion in Annex I to Directive 91/414/EEC. These lists

included metam. By Council Decision 2009/562/EC of 13 July 2009 concerning the non-inclusion of metam in Annex I to Directive 91/414/EEC and the withdrawal of authorisations for plant protection products containing that substance <sup>(6)</sup> it was decided not to include metam in Annex I to Directive 91/414/EEC.

- (3) Pursuant to Article 6(2) of Directive 91/414/EEC the original notifier (hereinafter 'the applicant') submitted a new application requesting the accelerated procedure to be applied, as provided for in Articles 14 to 19 of Regulation (EC) No 33/2008.
- (4) The application was submitted to Belgium, which had been designated rapporteur Member State by Regulation (EC) No 1490/2002. The time period for the accelerated procedure was respected. The specification of the active substance and the supported uses are the same as those that were the subject of Decision 2009/562/EC. That application also complies with the remaining substantive and procedural requirements of Article 15 of Regulation (EC) No 33/2008.
- (5) Belgium evaluated the additional data submitted by the applicant and prepared an additional report. It communicated that report to the European Food Safety Authority (hereinafter 'the Authority') and to the Commission on 31 August 2010.
- (6) The Authority communicated the additional report to the other Member States and the applicant for comments and forwarded the comments it had received to the Commission. In accordance with Article 20(1) of Regulation (EC) No 33/2008 and at the request of the Commission, the Authority presented its conclusion on metam to the Commission on 8 August 2011 <sup>(7)</sup>. The draft assessment report, the additional report and the

<sup>(1)</sup> OJ L 309, 24.11.2009, p. 1.

<sup>(2)</sup> OJ L 230, 19.8.1991, p. 1.

<sup>(3)</sup> OJ L 15, 18.1.2008, p. 5.

<sup>(4)</sup> OJ L 55, 29.2.2000, p. 25.

<sup>(5)</sup> OJ L 224, 21.8.2002, p. 23.

<sup>(6)</sup> OJ L 196, 28.7.2009, p. 22.

<sup>(7)</sup> European Food Safety Authority; Conclusion on the peer review of the pesticide risk assessment of the active substance metam. EFSA Journal 2011;9(9):2334.[97 pp.] doi:10.2903/j.efsa.2011.2334. Available online: [www.efsa.europa.eu/efsajournal.htm](http://www.efsa.europa.eu/efsajournal.htm)

conclusion of the Authority were reviewed by the Member States and the Commission within the Standing Committee on the Food Chain and Animal Health and finalised on 9 March 2012 in the format of the Commission review report for metam.

- (7) The additional report by the rapporteur Member State and the new conclusions by the Authority concentrate on the concerns that led to the non-inclusion. Those concerns were in particular that it was not possible to demonstrate the acceptability of consumer exposure and lack of data with respect to the behaviour in the environment of the impurity N,N-dimethylthiourea (DMTU).
- (8) The new information submitted by the applicant shows that the exposure of consumers may be considered acceptable and the behaviour of DMTU in the environment will not result in unacceptable effects.
- (9) Consequently, the additional information provided by the applicant permits to eliminate the specific concerns that led to the non-inclusion.
- (10) It has appeared from the various examinations made that plant protection products containing metam may be expected to satisfy, in general, the requirements laid down in Article 5(1)(a) and (b) of Directive 91/414/EEC, in particular as regards the uses which were examined and detailed in the Commission review report. It is therefore appropriate to approve metam in accordance with Regulation (EC) No 1107/2009.
- (11) In accordance with Article 13(2) of Regulation (EC) No 1107/2009 in conjunction with Article 6 thereof and in the light of current scientific and technical knowledge, it is, however, necessary to include certain conditions and restrictions.
- (12) Without prejudice to the conclusion that metam should be approved, it is, in particular, appropriate to require further confirmatory information.
- (13) A reasonable period should be allowed to elapse before approval in order to permit Member States and the interested parties to prepare themselves to meet the new requirements resulting from the approval.
- (14) Without prejudice to the obligations defined by Regulation (EC) No 1107/2009 as a consequence of the approval, taking into account the specific situation created by the transition from Directive 91/414/EEC to Regulation (EC) No 1107/2009 the following should, however, apply. Member States should be allowed a period after approval to review authorisations of plant protection products containing metam which have been maintained for certain uses in accordance with Article 3 of Decision 2009/562/EC. For the calculation of that period that provision is to be taken into account. Member States should, as appropriate, vary, replace or withdraw existing authorisations.
- (15) For plant protection products containing metam, where Member States grant any period of grace in accordance with Article 46 of Regulation (EC) No 1107/2009, Article 4 of Decision 2009/562/EC should be taken

into account for the calculation of that period. Hence, such a period of grace should expire at the latest by 31 December 2014.

- (16) The experience gained from inclusions in Annex I to Directive 91/414/EEC of active substances assessed in the framework of Commission Regulation (EEC) No 3600/92 of 11 December 1992 laying down the detailed rules for the implementation of the first stage of the programme of work referred to in Article 8(2) of Council Directive 91/414/EEC concerning the placing of plant protection products on the market<sup>(1)</sup> has shown that difficulties can arise in interpreting the duties of holders of existing authorisations in relation to access to data. In order to avoid further difficulties it therefore appears necessary to clarify the duties of the Member States, especially the duty to verify that the holder of an authorisation demonstrates access to a dossier satisfying the requirements of Annex II to that Directive. However, this clarification does not impose any new obligations on Member States or holders of authorisations compared to the directives which have been adopted until now amending Annex I to that Directive or to the Regulations approving active substances.
- (17) In accordance with Article 13(4) of Regulation (EC) No 1107/2009 the Annex to Commission Implementing Regulation (EU) No 540/2011 of 25 May 2011 implementing Regulation (EC) No 1107/2009 of the European Parliament and of the Council as regards the list of approved active substances<sup>(2)</sup> should be amended accordingly.
- (18) In the interest of clarity, Decision 2009/562/EC should be repealed.
- (19) 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*

#### **Approval of active substance**

The active substance metam, as specified in Annex I, is approved subject to the conditions laid down in that Annex.

#### *Article 2*

#### **Re-evaluation of plant protection products**

1. Member States shall in accordance with Regulation (EC) No 1107/2009, where necessary, amend or withdraw existing authorisations for plant protection products containing metam as an active substance by 31 December 2014.

By that date they shall in particular verify that the conditions in Annex I to this Regulation are met, with the exception of those identified in Part B of the column on specific provisions of that Annex, and that the holder of the authorisation has, or has access to, a dossier satisfying the requirements of Annex II to

<sup>(1)</sup> OJ L 366, 15.12.1992, p. 10.

<sup>(2)</sup> OJ L 153, 11.6.2011, p. 1.

Directive 91/414/EEC in accordance with the conditions of Article 13(1) to (4) of that Directive and Article 62 of Regulation (EC) No 1107/2009.

2. By way of derogation from paragraph 1, for each authorised plant protection product containing metam as either the only active substance or as one of several active substances, all of which were listed in the Annex to Implementing Regulation (EU) No 540/2011, by 30 June 2012 Member States shall re-evaluate the product in accordance with the uniform principles, as referred to in Article 29(6) of Regulation (EC) No 1107/2009, on the basis of a dossier satisfying the requirements of Annex III to Directive 91/414/EEC and taking into account Part B of the column on specific provisions of Annex I to this Regulation. On the basis of that evaluation, they shall determine whether the product satisfies the conditions set out in Article 29(1) of Regulation (EC) No 1107/2009.

Following that determination Member States shall:

- (a) in the case of a product containing metam as the only active substance, where necessary, amend or withdraw the authorisation by 30 June 2016;
- (b) in the case of a product containing metam as one of several active substances, where necessary, amend or withdraw the authorisation by 30 June 2016 or by the date fixed for such an amendment or withdrawal in the respective act or acts which added the relevant substance or substances to Annex I to Directive 91/414/EEC or approved that substance or substances, whichever is the latest.

#### Article 3

##### **Grace period**

Where Member States withdraw or amend an existing authorisation in accordance with Article 2(1), any grace period granted by Member States in accordance with Article 46 of Regulation (EC) No 1107/2009 shall be as short as possible and shall expire by 31 December 2014 at the latest.

#### Article 4

##### **Amendments to Implementing Regulation (EU) No 540/2011**

The Annex to Implementing Regulation (EU) No 540/2011 is amended in accordance with Annex II to this Regulation.

#### Article 5

##### **Repeal**

Decision 2009/562/EC is repealed.

#### Article 6

##### **Entry into force and date of application**

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

It shall apply from 1 July 2012.

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

Done at Brussels, 25 April 2012.

*For the Commission*

*The President*

José Manuel BARROSO

## ANNEX I

Common Name, Identification Numbers	IUPAC Name	Purity ( <sup>1</sup> )	Date of approval	Expiration of approval	Specific provisions
Metam  CAS No 144-54-7  CIPAC No 20	Methyldithiocarbamic acid	<p>≥ 965 g/kg</p> <p>Expressed as metam-sodium on a dry weight basis</p> <p>≥ 990 g/kg</p> <p>Expressed as metam-potassium on a dry weight basis</p> <p>Relevant impurities:</p> <p>methylisothiocyanate (MITC)</p> <p>— max. 12 g/kg on dry weight basis (metam-sodium),</p> <p>— max. 0,42 g/kg on dry weight basis (metam-potassium).</p> <p>N,N'-dimethylthiourea (DMTU)</p> <p>— max. 23 g/kg on a dry weight basis (metam-sodium),</p> <p>— max. 6 g/kg on a dry weight basis (metam-potassium).</p>	1 July 2012	30 June 2022	<p>PART A</p> <p>Only uses as nematocide, fungicide, herbicide and insecticide may be authorised for application as soil fumigant prior to planting, limited to one application every third year on the same field.</p> <p>The application may be authorised in open field by soil injection or drip irrigation, and in greenhouse by drip irrigation only. The use of gas-tight plastic film for drip irrigation shall be prescribed.</p> <p>The maximum application rate shall be 153 kg/ha (corresponding to 86,3 kg/ha of MITC) in case of open field applications.</p> <p>Authorisations shall be limited to professional users.</p> <p>PART B</p> <p>For the implementation of the uniform principles as referred to in Article 29(6) of Regulation (EC) No 1107/2009, the conclusions of the review report on metam, and in particular Appendices I and II thereof, as finalised in the Standing Committee on the Food Chain and Animal Health on 9 March 2012, shall be taken into account.</p> <p>In this overall assessment Member States:</p> <p>(a) shall pay particular attention to the protection of operators and shall ensure that the conditions of use include risk mitigation measures such as application of adequate personal protective equipment and a limitation in the daily work rate;</p> <p>(b) shall pay particular attention to the protection of workers and shall ensure that the conditions of use include risk mitigation measures, such as use of adequate personal protective equipment, re-entry period and limitation in the daily work rate;</p> <p>(c) shall pay particular attention to the protection of bystanders and residents and shall ensure that the conditions of use include risk mitigation measures, such as an appropriate buffer zone during and until 24 hours after the application from the perimeter of the application area to any occupied residences and areas used by the general public with obligation to use warning signs and ground markers;</p> <p>(d) shall pay particular attention to the protection of groundwater, when the active substance is applied in regions with vulnerable soil and/or climatic conditions and shall ensure that the conditions of use include risk mitigation measures, such as appropriate buffer zone;</p> <p>(e) shall pay particular attention to the risk to non-target organisms and shall ensure that conditions of use shall include risk mitigation measures, where appropriate.</p>

Common Name, Identification Numbers	IUPAC Name	Purity <sup>(1)</sup>	Date of approval	Expiration of approval	Specific provisions
					<p>The applicant shall submit confirmatory information on methyl isothiocyanate as regards:</p> <p>(1) the assessment of the long-range atmospheric transport potential and related environmental risks;</p> <p>(2) the potential groundwater contamination.</p> <p>The applicant shall submit to the Commission, the Member States and the Authority such information by 31 May 2014.</p>

<sup>(1)</sup> Further details on identity and specification of active substance are provided in the review report.



## ANNEX II

In Part B of the Annex to Implementing Regulation No (EU) 540/2011, the following entry is added:

No	Common Name, Identification Numbers	IUPAC Name	Purity <sup>(1)</sup>	Date of approval	Expiration of approval	Specific provisions
'22	Metam CAS No 144-54-7 CIPAC No 20	Methyldithiocarbamic acid	<p>≥ 965 g/kg</p> <p>Expressed as metam-sodium on a dry weight basis</p> <p>≥ 990 g/kg</p> <p>Expressed as metam-potassium on a dry weight basis</p> <p>Relevant impurities:</p> <p>methylisothiocyanate (MITC)</p> <p>— max. 12 g/kg on dry weight basis (metam-sodium),</p> <p>— max. 0,42 g/kg on dry weight basis (metam-potassium).</p> <p>N,N'-dimethylthiourea (DMTU)</p> <p>— max. 23 g/kg on a dry weight basis (metam-sodium),</p> <p>— max. 6 g/kg on a dry weight basis (metam-potassium).</p>	1 July 2012	30 June 2022	<p>PART A</p> <p>Only uses as nematocide, fungicide, herbicide and insecticide may be authorised for application as soil fumigant prior to planting, limited to one application every third year on the same field.</p> <p>The application may be authorised in open field by soil injection or drip irrigation, and in greenhouse by drip irrigation only. The use of gas-tight plastic film for drip irrigation shall be prescribed.</p> <p>The maximum application rate shall be 153 kg/ha (corresponding to 86,3 kg/ha of MITC) in case of open field applications.</p> <p>Authorisations shall be limited to professional users.</p> <p>PART B</p> <p>For the implementation of the uniform principles as referred to in Article 29(6) of Regulation (EC) No 1107/2009, the conclusions of the review report on metam, and in particular Appendices I and II thereof, as finalised in the Standing Committee on the Food Chain and Animal Health on 9 March 2012, shall be taken into account.</p> <p>In this overall assessment Member States:</p> <p>(a) shall pay particular attention to the protection of operators and shall ensure that the conditions of use include risk mitigation measures such as application of adequate personal protective equipment and a limitation in the daily work rate;</p> <p>(b) shall pay particular attention to the protection of workers and shall ensure that the conditions of use include risk mitigation measures, such as use of adequate personal protective equipment, re-entry period and limitation in the daily work rate;</p> <p>(c) shall pay particular attention to the protection of bystanders and residents and shall ensure that the conditions of use include risk mitigation measures, such as an appropriate buffer zone during and until 24 hours after the application from the perimeter of the application area to any occupied residences and areas used by the general public with obligation to use warning signs and ground markers;</p> <p>(d) shall pay particular attention to the protection of groundwater, when the active substance is applied in regions with vulnerable soil and/or climatic conditions and shall ensure that the conditions of use include risk mitigation measures, such as appropriate buffer zone;</p>



No	Common Name, Identification Numbers	IUPAC Name	Purity <sup>(1)</sup>	Date of approval	Expiration of approval	Specific provisions
						<p>(e) shall pay particular attention to the risk to non-target organisms and shall ensure that conditions of use shall include risk mitigation measures, where appropriate.</p> <p>The applicant shall submit confirmatory information on methyl isothiocyanate as regards:</p> <p>(1) the assessment of the long-range atmospheric transport potential and related environmental risks;</p> <p>(2) the potential groundwater contamination.</p> <p>The applicant shall submit to the Commission, the Member States and the Authority such information by 31 May 2014.'</p>

<sup>(1)</sup> Further details on identity and specification of active substance are provided in the review report.

## COMMISSION REGULATION (EU) No 360/2012

of 25 April 2012

on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest

(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 994/98 of 7 May 1998 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid <sup>(1)</sup>, and in particular Article 2(1) thereof,

Having published a draft of this Regulation <sup>(2)</sup>,

After consulting the Advisory Committee on State Aid,

Whereas:

- (1) Regulation (EC) No 994/98 empowers the Commission to set out in a Regulation a threshold below which aid measures are considered not to meet all the criteria laid down in Article 107(1) of the Treaty and therefore do not fall under the notification procedure provided for in Article 108(3) of the Treaty.
- (2) On the basis of that Regulation, the Commission has adopted, in particular, Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid <sup>(3)</sup>, which sets a general *de minimis* ceiling of EUR 200 000 per beneficiary over a period of three fiscal years.
- (3) The Commission's experience in applying the State aid rules to undertakings providing services of general economic interest within the meaning of Article 106(2) of the Treaty has shown that the ceiling below which advantages granted to such undertakings may be deemed not to affect trade between Member States and/or not to distort or threaten to distort competition can, in some cases, differ from the general *de minimis* ceiling established in Regulation (EC) No 1998/2006. Indeed, at least some of those advantages are likely to constitute

compensation for additional costs linked to the provision of services of general economic interest. Moreover, many activities qualifying as the provision of services of general economic interest have a limited territorial scope. It is therefore appropriate to introduce, alongside Regulation (EC) No 1998/2006, a Regulation containing specific *de minimis* rules for undertakings providing services of general economic interest. A ceiling should be established for the amount of *de minimis* aid each undertaking may receive over a specific period of time.

- (4) In the light of the Commission's experience, aid granted to undertakings providing a service of general economic interest should be deemed not to affect trade between Member States and/or not to distort or threaten to distort competition provided that the total amount of aid granted for the provision of services of general economic interest received by the beneficiary undertaking does not exceed EUR 500 000 over any period of three fiscal years. In view of the development of the road passenger transport sector and of the mostly local nature of services of general economic interest in this field, it is not appropriate to apply a lower ceiling to this sector and the ceiling of EUR 500 000 should apply.
- (5) The years to be taken into account for the purpose of determining whether that ceiling is met should be the fiscal years as used for fiscal purposes by the undertaking in the Member State concerned. The relevant period of three years should be assessed on a rolling basis so that, for each new grant of *de minimis* aid, the total amount of *de minimis* aid granted in the fiscal year concerned, as well as during the previous two fiscal years, needs to be determined. Aid granted by a Member State should be taken into account for this purpose even when financed entirely or partly by resources of Union origin. It should not be possible for aid measures exceeding the *de minimis* ceiling to be broken down into a number of smaller parts in order to bring such parts within the scope of this Regulation.
- (6) This Regulation should apply only to aid granted for the provision of a service of general economic interest. The beneficiary undertaking should therefore be entrusted in writing with the service of general economic interest in respect of which the aid is granted. While the entrustment act should inform the undertaking of the service of general economic interest in respect of which it is granted, it must not necessarily contain all the detailed information as set out in Commission Decision 2012/21/EU of 20 December 2011 on the application

<sup>(1)</sup> OJ L 142, 14.5.1998, p. 1.

<sup>(2)</sup> OJ C 8, 11.1.2012, p. 23.

<sup>(3)</sup> OJ L 379, 28.12.2006, p. 5.

of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest <sup>(1)</sup>.

- (7) In view of the special rules which apply in the sectors of primary production of agricultural products, fisheries, aquaculture and road freight transport, of the fact that undertakings in those sectors are rarely entrusted with services of general economic interest, and of the risk that amounts of aid below the ceiling set out in this Regulation could fulfil the criteria of Article 107(1) of the Treaty in those sectors, this Regulation should not apply to those sectors. However, if undertakings are active in the sectors of primary production of agricultural products, fisheries, aquaculture or road freight transport as well as in other sectors or activities, this Regulation should apply to those other sectors or activities (such as for example collection of litter at sea) provided that Member States ensure that the activities in the excluded sectors do not benefit from the *de minimis* aid under this Regulation, by appropriate means such as separation of activities or distinction of costs. Member States can fulfill this obligation, in particular, by limiting the amount of *de minimis* aid to the compensation of the costs of the provision of the service, including a reasonable profit. This Regulation should not apply to the coal sector, in view of its special characteristics and of fact that undertakings in those sectors are rarely entrusted with services of general economic interest.
- (8) Considering the similarities between the processing and marketing of agricultural products, on the one hand, and of non-agricultural products, on the other, this Regulation should apply to the processing and marketing of agricultural products, provided that certain conditions are met. Neither on-farm activities necessary for preparing a product for the first sale, such as harvesting, cutting and threshing of cereals, or packing of eggs, nor the first sale to resellers or processors should be considered as processing or marketing in this respect.
- (9) The Court of Justice has established <sup>(2)</sup> that, once the Union has legislated for the establishment of a common organisation of the market in a given sector of agriculture, Member States are under an obligation to refrain from taking any measure which might undermine or create exceptions to it. For this reason, this Regulation should not apply to aid the amount of which is set on the basis of the price or quantity of products purchased or put on the market. Nor should it apply to *de minimis* support which is linked to an obligation to share the aid with primary producers.

- (10) This Regulation should not apply to *de minimis* export aid or *de minimis* aid favouring domestic over imported products.
- (11) This Regulation should not apply to undertakings in difficulty within the meaning of the Community guidelines on State aid for rescuing and restructuring firms in difficulty <sup>(3)</sup> since it is not appropriate to grant operating aid to firms in difficulty outside of a restructuring concept and there are difficulties linked to determining the gross grant equivalent of aid granted to undertakings of this type.
- (12) In accordance with the principles governing aid falling within Article 107(1) of the Treaty, *de minimis* aid should be considered to be granted at the moment the legal right to receive the aid is conferred on the undertaking under the applicable national legal regime.
- (13) In order to avoid circumvention of maximum aid intensities laid down in different Union instruments, *de minimis* aid should not be cumulated with State aid in respect of the same eligible costs if such cumulation would result in an aid intensity exceeding that specified in the particular circumstances of each case by a block exemption regulation or decision adopted by the Commission.
- (14) This Regulation should not restrict the application of Regulation (EC) No 1998/2006 to undertakings providing services of general economic interest. Member States should remain free to rely either on this Regulation or on Regulation (EC) No 1998/2006 as regards aid granted for the provision of services of general economic interest.
- (15) The Court of Justice, in its *Altmark* judgment <sup>(4)</sup>, has identified a number of conditions which must be fulfilled in order for compensation for the provision of a service of general economic interest not to constitute State aid. Those conditions ensure that compensation limited to the net costs incurred by efficient undertakings for the provision of a service of general economic interest does not constitute State aid within the meaning of Article 107(1) of the Treaty. Compensation

<sup>(1)</sup> OJ L 7, 11.1.2012, p. 3.

<sup>(2)</sup> Case C-456/00 *French Republic v Commission of the European Communities* [2002] I-11949.

<sup>(3)</sup> OJ C 244, 1.10.2004, p. 2.

<sup>(4)</sup> Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht* [2003] ECR I-7747.

in excess of those net costs constitutes State aid which may be declared compatible on the basis of the applicable Union rules. In order to avoid this Regulation being applied to circumvent the conditions identified in the *Altmark* judgment, and in order to avoid *de minimis* aid granted under this Regulation affecting trade due to its cumulation with other compensation for the same service of general economic interest, *de minimis* aid under this Regulation should not be cumulated with any other compensation in respect of the same service, regardless of whether or not it constitutes State aid under the *Altmark* judgment or compatible State aid under Decision 2012/21/EU or under the Communication from the Commission — European Union framework for State aid in the form of public service compensation (2011) <sup>(1)</sup>. Therefore, this Regulation should not apply to compensation received for the provision of a service of general economic interest in respect of which other types of compensation are also being granted, except where that other compensation constitutes *de minimis* aid according to other *de minimis* regulations and the cumulation rules set out in this Regulation are complied with.

- (16) For the purposes of transparency, equal treatment and correct application of the *de minimis* ceiling, all Member States should apply the same method of calculation. In order to facilitate such calculation and in accordance with present practice in applying the *de minimis* rule, aid amounts not taking the form of a cash grant should be converted into their gross grant equivalent. Calculation of the grant equivalent of transparent types of aid other than grants and of aid payable in several instalments requires the use of market rates prevailing at the time of granting such aid. With a view to uniform, transparent and simple application of the State aid rules, the market rates for the purposes of this Regulation should be deemed to be the reference rates, as currently set out in the Communication from the Commission on the revision of the method for setting the reference and discount rates <sup>(2)</sup>.

- (17) For the purposes of transparency, equal treatment and effective monitoring, this Regulation should apply only to *de minimis* aid which is transparent. Transparent aid is aid for which it is possible to calculate precisely the gross grant equivalent *ex ante* without a need to undertake a risk assessment. Such a precise calculation can, for instance, be made for grants, interest rate subsidies and capped tax exemptions. Aid comprised in capital injections should not be considered as transparent *de minimis* aid, unless the total amount of the public injection is lower than the *de minimis* ceiling. Aid

comprised in risk capital measures as referred to in the Community guidelines on State aid to promote risk capital investments in small and medium-sized enterprises <sup>(3)</sup> should not be considered as transparent *de minimis* aid, unless the risk capital scheme concerned provides capital only up to the *de minimis* ceiling to each target undertaking. Aid comprised in loans should be treated as transparent *de minimis* aid when the gross grant equivalent has been calculated on the basis of market interest rates prevailing at the time of grant.

- (18) Legal certainty needs to be provided for guarantee schemes which do not have the potential to affect trade and distort competition and in respect of which sufficient data are available to assess any potential effects reliably. This Regulation should therefore transpose the *de minimis* ceiling of EUR 500 000 into a guarantee-specific ceiling based on the guaranteed amount of the individual loan underlying such guarantee. This specific ceiling should be calculated using a methodology assessing the State aid amount included in guarantee schemes covering loans in favour of viable undertakings. The methodology and the data used to calculate the guarantee-specific ceiling should exclude undertakings in difficulty as referred to in the Community guidelines on State aid for rescuing and restructuring firms in difficulty. This specific ceiling should therefore not apply to individual aid granted outside the scope of a guarantee scheme, to aid granted to undertakings in difficulty, or to guarantees on underlying transactions not constituting a loan, such as guarantees on equity transactions. The specific ceiling should be determined on the basis of the fact that taking account of a cap rate (net default rate) of 13 %, representing a worst case scenario for guarantee schemes in the Union, a guarantee amounting to EUR 3 750 000 can be considered as having a gross grant equivalent identical to the EUR 500 000 *de minimis* ceiling. Only guarantees covering up to 80 % of the underlying loan should be covered by these specific ceilings. A methodology accepted by the Commission following notification of such methodology on the basis of a Commission regulation in the State aid area may also be used by Member States for the purpose of assessing the gross grant equivalent contained in a guarantee, if the approved methodology explicitly addresses the type of guarantees and the type of underlying transactions at stake in the context of the application of this Regulation.
- (19) Upon notification by a Member State, the Commission may examine whether an aid measure which does not consist in a grant, loan, guarantee, capital injection, risk capital measure or capped tax exemption leads to a

<sup>(1)</sup> OJ C 8, 11.1.2012, p. 15.

<sup>(2)</sup> OJ C 14, 19.1.2008, p. 6.

<sup>(3)</sup> OJ C 194, 18.8.2006, p. 2.

gross grant equivalent that does not exceed the *de minimis* ceiling and could therefore be covered by the provisions of this Regulation.

- (20) The Commission has a duty to ensure that State aid rules are complied with and in particular that aid granted under the *de minimis* rules adheres to the conditions thereof. In accordance with the cooperation principle laid down in Article 4(3) of the Treaty on European Union, Member States should facilitate the fulfilment of this task by establishing the necessary tools in order to ensure that the total amount of *de minimis* aid granted to the same undertaking for the provision of services of general economic interest does not exceed the overall permissible ceiling. To that end and to ensure compliance with the provisions on cumulation with *de minimis* aid under other *de minimis* regulations, when granting *de minimis* aid under this Regulation, Member States should inform the undertaking concerned of the amount of the aid and of its *de minimis* character by referring to this Regulation. Moreover, prior to granting such aid the Member State concerned should obtain from the undertaking a declaration about other *de minimis* aid covered by this Regulation or by other *de minimis* regulations received during the fiscal year concerned and the two previous fiscal years. Alternatively, the Member State should have the possibility to ensure that the ceiling is observed by means of a central register.
- (21) This Regulation should apply without prejudice to the requirements of Union law in the area of public procurement or of additional requirements flowing from the Treaty or from sectoral Union legislation.
- (22) This Regulation should apply to aid granted before its entry into force to undertakings providing services of general economic interest.
- (23) The Commission intends to carry out a review of this Regulation five years after its entry into force,

HAS ADOPTED THIS REGULATION:

#### Article 1

##### Scope and definitions

1. This Regulation applies to aid granted to undertakings providing a service of general economic interest within the meaning of Article 106(2) of the Treaty.
2. This Regulation does not apply to:
  - (a) aid granted to undertakings active in the fishery and aquaculture sectors, as covered by Council Regulation (EC) No 104/2000 <sup>(1)</sup>;
  - (b) aid granted to undertakings active in the primary production of agricultural products;

(c) aid granted to undertakings active in the processing and marketing of agricultural products, in the following cases:

- (i) when the amount of the aid is fixed on the basis of the price or quantity of such products purchased from primary producers or put on the market by the undertakings concerned,
  - (ii) when the aid is conditional on being partly or entirely passed on to primary producers;
- (d) aid to export-related activities towards third countries or Member States, namely aid directly linked to the quantities exported, to the establishment and operation of a distribution network or to other current expenditure linked to the export activity;
- (e) aid contingent upon the use of domestic over imported goods;
- (f) aid granted to undertakings active in the coal sector, as defined in Council Decision 2010/787/EU <sup>(2)</sup>;
- (g) aid granted to undertakings performing road freight transport for hire or reward;
- (h) aid granted to undertakings in difficulty.

If undertakings are active in the sectors referred to in points (a), (b), (c) or (g) of the first subparagraph as well as in sectors not excluded from the scope of application of this Regulation, this Regulation applies only to aid granted in respect of those other sectors or activities, provided that Member States ensure that the activities in the excluded sectors do not benefit from the *de minimis* aid under this Regulation, by appropriate means such as separation of activities or distinction of costs.

3. For the purposes of this Regulation:

- (a) 'agricultural products' means products listed in Annex I to the Treaty, with the exception of fishery products;
- (b) 'processing of agricultural products' means any operation on an agricultural product resulting in a product which is also an agricultural product, except on-farm activities necessary for preparing an animal or plant product for the first sale;
- (c) 'marketing of agricultural products' means holding or display with a view to sale, offering for sale, delivery or any other manner of placing on the market, except the first sale by a primary producer to resellers or processors and any activity preparing a product for such first sale; a sale by a primary producer to final consumers shall be considered as marketing if it takes place in separate premises reserved for that purpose.

<sup>(1)</sup> OJ L 17, 21.1.2000, p. 22.

<sup>(2)</sup> OJ L 336, 21.12.2010, p. 24.



## Article 2

**De minimis aid**

1. Aid granted to undertakings for the provision of a service of general economic interest shall be deemed not to meet all the criteria of Article 107(1) of the Treaty and shall therefore be exempt from the notification requirement of Article 108(3) of the Treaty if it fulfils the conditions laid down in paragraphs 2 to 8 of this Article.

2. The total amount of *de minimis* aid granted to any one undertaking providing services of general economic interest shall not exceed EUR 500 000 over any period of three fiscal years.

This ceiling shall apply irrespective of the form of the *de minimis* aid and regardless of whether the aid granted by the Member State is financed entirely or partly by resources of Union origin. The period shall be determined by reference to the fiscal years used by the undertaking in the Member State concerned.

3. The ceiling laid down in paragraph 2 shall be expressed as a cash grant. All figures used shall be gross, that is, before any deduction of tax or other charges. Where aid is awarded in a form other than a grant, the aid amount shall be the gross grant equivalent of the aid.

Aid payable in several instalments shall be discounted to its value at the moment of it being granted. The interest rate to be used for discounting purposes shall be the discount rate applicable at the time of grant.

4. This Regulation shall apply only to aid in respect of which it is possible to calculate precisely the gross grant equivalent of the aid *ex ante* without need to undertake a risk assessment ('transparent aid'). In particular:

- (a) aid comprised in loans shall be considered as transparent *de minimis* aid when the gross grant equivalent has been calculated on the basis of the reference rate applicable at the time of the grant;
- (b) aid comprised in capital injections shall not be considered as transparent *de minimis* aid, unless the total amount of the public injection does not exceed the *de minimis* ceiling;
- (c) aid comprised in risk capital measures shall not be considered as transparent *de minimis* aid, unless the risk capital scheme concerned provides capital only up to the *de minimis* ceiling to each target undertaking;
- (d) individual aid provided under a guarantee scheme to undertakings which are not undertakings in difficulty shall be treated as transparent *de minimis* aid when the guaranteed part of the underlying loan provided under such scheme does not exceed EUR 3 750 000 per undertaking. If the guaranteed part of the underlying loan only accounts for

a given proportion of this ceiling, the gross grant equivalent of that guarantee shall be deemed to correspond to the same proportion of the ceiling laid down in paragraph 2. The guarantee shall not exceed 80 % of the underlying loan. Guarantee schemes shall also be considered as transparent if:

- (i) before the implementation of the scheme, the methodology to calculate the gross grant equivalent of the guarantees has been accepted following notification of this methodology to the Commission under a regulation adopted by the Commission in the State aid area, and
- (ii) the approved methodology explicitly addresses the type of guarantees and the type of underlying transactions at stake in the context of the application of this Regulation.

5. Where the overall amount of *de minimis* aid under this Regulation granted to an undertaking for the provision of services of general economic interest exceeds the ceiling laid down in paragraph 2, that amount may not benefit from this Regulation, even for a fraction not exceeding that ceiling. In such a case, the benefit of this Regulation may not be claimed for this aid measure.

6. *De minimis* aid under this Regulation shall not be cumulated with State aid in respect of the same eligible costs if such cumulation would result in an aid intensity exceeding that stipulated in the specific circumstances of each case by a block exemption regulation or decision adopted by the Commission.

7. *De minimis* aid under this Regulation may be cumulated with *de minimis* aid under other *de minimis* regulations up to the ceiling laid down in paragraph 2.

8. *De minimis* aid under this Regulation shall not be cumulated with any compensation in respect of the same service of general economic interest, regardless of whether or not it constitutes State aid.

## Article 3

**Monitoring**

1. Where a Member State intends to grant *de minimis* aid under this Regulation to an undertaking, it shall inform that undertaking in writing of the prospective amount of the aid expressed as gross grant equivalent, of the service of general economic interest in respect of which it is granted and of the *de minimis* character of the aid, making express reference to this Regulation and citing its title and publication reference in the *Official Journal of the European Union*. Where *de minimis* aid under this Regulation is granted to different undertakings on the basis of a scheme and different amounts of individual aid are granted to those undertakings under that scheme, the Member State concerned may choose to fulfil that obligation by informing

the undertakings of a fixed sum corresponding to the maximum aid amount to be granted under that scheme. In such case, the fixed sum shall be used for determining whether the ceiling laid down in Article 2(2) is met. Prior to granting the aid, the Member State shall also obtain a declaration from the undertaking providing the service of general economic interest, in written or electronic form, about any other *de minimis* aid received under this Regulation or under other *de minimis* regulations during the previous two fiscal years and the current fiscal year.

The Member State shall grant the new *de minimis* aid under this Regulation only after having checked that this will not raise the total amount of *de minimis* aid granted to the undertaking concerned to a level above the ceiling laid down in Article 2(2) and that the cumulation rules in Article 2(6), (7) and (8) are complied with.

2. Where a Member State has set up a central register of *de minimis* aid containing complete information on all *de minimis* aid granted to undertakings providing services of general economic interest by any authority within that Member State, the first subparagraph of paragraph 1 shall cease to apply from the moment the register covers a period of three years.

3. Member States shall record and compile all the information regarding the application of this Regulation. Such records shall contain all information necessary to demonstrate that the conditions of this Regulation have been complied with. Records regarding individual *de minimis* aid shall be maintained for 10 fiscal years from the date on which the aid was granted. Records regarding a *de minimis* aid scheme shall be maintained for 10 years from the date on which the last individual aid was

granted under such a scheme. On written request, the Member State concerned shall provide the Commission, within a period of 20 working days or such longer period as may be fixed in the request, with all the information that the Commission considers necessary for assessing whether the conditions of this Regulation have been complied with, and in particular the total amount of *de minimis* aid under this Regulation and under other *de minimis* regulations received by any undertaking.

#### Article 4

##### Transitional provisions

This Regulation shall apply to *de minimis* aid granted for the provision of services of general economic interest before its entry into force, provided that such aid fulfils the conditions laid down in Articles 1 and 2. Any aid for the provision of services of general economic interest which does not fulfil those conditions shall be assessed in accordance with the relevant decisions, frameworks, guidelines, communications and notices.

At the end of the period of validity of this Regulation, any *de minimis* aid which fulfils the conditions of this Regulation may be validly implemented for a further period of six months.

#### Article 5

##### Entry into force and period of validity

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

It shall apply until 31 December 2018.

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

Done at Brussels, 25 April 2012.

For the Commission

The President

José Manuel BARROSO

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**COMMISSION IMPLEMENTING REGULATION (EU) No 361/2012****of 25 April 2012****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) <sup>(1)</sup>,

Having regard to Commission Implementing Regulation (EU) No 543/2011 of 7 June 2011 laying down detailed rules for the application of Council Regulation (EC) No 1234/2007 in respect of the fruit and vegetables and processed fruit and vegetables sectors <sup>(2)</sup>, and in particular Article 136(1) thereof,

Whereas:

- (1) Implementing Regulation (EU) No 543/2011 lays down, pursuant to the outcome of the Uruguay Round multi-lateral 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 XVI, Part A thereto.

- (2) The standard import value is calculated each working day, in accordance with Article 136(1) of Implementing Regulation (EU) No 543/2011, taking into account variable daily data. Therefore this Regulation should enter into force on the day of its publication in the *Official Journal of the European Union*,

HAS ADOPTED THIS REGULATION:

*Article 1*

The standard import values referred to in Article 136 of Implementing Regulation (EU) No 543/2011 are fixed in the Annex to this Regulation.

*Article 2*

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

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

Done at Brussels, 25 April 2012.

*For the Commission,  
On behalf of the President,  
José Manuel SILVA RODRÍGUEZ  
Director-General for Agriculture and  
Rural Development*

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<sup>(1)</sup> OJ L 299, 16.11.2007, p. 1.

<sup>(2)</sup> OJ L 157, 15.6.2011, p. 1.

## ANNEX

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

(EUR/100 kg)		
CN code	Third country code <sup>(1)</sup>	Standard import value
0702 00 00	JO	98,8
	MA	58,7
	TN	124,7
	TR	110,1
	ZZ	98,1
0707 00 05	JO	216,8
	TR	148,3
	ZZ	182,6
0709 93 10	TR	140,2
	ZZ	140,2
0805 10 20	EG	58,5
	IL	77,3
	MA	52,8
	TR	50,5
	ZZ	59,8
0805 50 10	TR	58,4
	ZZ	58,4
0808 10 80	AR	94,2
	BR	81,0
	CA	117,0
	CL	95,1
	CN	119,8
	MK	31,8
	NZ	125,7
	US	153,6
	ZA	85,5
0808 30 90	ZZ	100,4
	AR	96,4
	CL	114,1
	CN	81,7
	US	107,0
	ZA	109,2
	ZZ	101,7

<sup>(1)</sup> 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 IMPLEMENTING REGULATION (EU) No 362/2012

of 25 April 2012

**fixing the allocation coefficient to be applied to applications for export licences for certain milk products to be exported to the Dominican Republic under the quota referred to in Regulation (EC) No 1187/2009**

THE EUROPEAN COMMISSION,

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

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

Having regard to Commission Regulation (EC) No 1187/2009 of 27 November 2009 laying down detailed rules for the application of Council Regulation (EC) No 1234/2007 as regards export licences and export refunds for milk and milk products <sup>(2)</sup>, and in particular Article 31(2) thereof,

Whereas:

- (1) Section 3 of Chapter III of Regulation (EC) No 1187/2009 determines the procedure for allocating export licences for certain milk products to be exported to the Dominican Republic under a quota opened for that country.
- (2) Applications submitted for the 2012/2013 quota year cover quantities less than those available. As a result, it is appropriate, pursuant to Article 31(2), fourth subparagraph of Regulation (EC) No 1187/2009 to provide for the allocation of the remaining quantities. The issue of export licences for such remaining quantities should be conditional upon the competent authority being notified of the quantities accepted by the operator concerned and upon the interested operators lodging a security,

HAS ADOPTED THIS REGULATION:

*Article 1*

The applications for export licences lodged from 1 to 10 April 2012 for the quota period 1 July 2012 to 30 June 2013 shall be accepted.

The quantities covered by export licence applications referred to in the first paragraph of this Article for the products referred to in Article 27(2) of Regulation (EC) No 1187/2009 shall be multiplied by the following allocation coefficients:

- 1,294210 for applications submitted for the part of the quota referred to in Article 28(1)(a) of Regulation (EC) No 1187/2009,
- 2,928104 for applications submitted for the part of the quota referred to in Article 28(1)(b) of Regulation (EC) No 1187/2009.

Export licences for the quantities exceeding the quantities applied for and which are allocated in accordance with the coefficients set out in the second paragraph, shall be issued after acceptance by the operator within one week from the date of publication of this Regulation and subject to the lodging of the security applicable.

*Article 2*

This Regulation shall enter into force on the third 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, 25 April 2012.

*For the Commission,  
On behalf of the President,  
José Manuel SILVA RODRÍGUEZ  
Director-General for Agriculture and  
Rural Development*

<sup>(1)</sup> OJ L 299, 16.11.2007, p. 1.

<sup>(2)</sup> OJ L 318, 4.12.2009, p. 1.

# DECISIONS

## COUNCIL DECISION

of 24 April 2012

**appointing a German alternate member of the Committee of the Regions**

(2012/214/EU)

THE COUNCIL OF THE EUROPEAN UNION,

HAS ADOPTED THIS DECISION:

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 305 thereof,

Having regard to the proposal of the German Government,

Whereas:

(1) On 22 December 2009 and on 18 January 2010, the Council adopted Decisions 2009/1014/EU <sup>(1)</sup> and 2010/29/EU <sup>(2)</sup> appointing the members and alternate members of the Committee of the Regions for the period from 26 January 2010 to 25 January 2015.

(2) An alternate member's seat on the Committee of the Regions has become vacant following the end of the term of office of Mr Heino VAHL DIECK,

### Article 1

The following is hereby appointed as alternate member to the Committee of the Regions for the remainder of the current term of office, which runs until 25 January 2015:

— Mr Heiko HECHT, *Mitglied des Europa-ausschusses der Hamburgischen Bürgerschaft.*

### Article 2

This Decision shall enter into force on the day of its adoption.

Done at Luxembourg, 24 April 2012.

*For the Council*

*The President*

N. WAMMEN

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<sup>(1)</sup> OJ L 348, 29.12.2009, p. 22.

<sup>(2)</sup> OJ L 12, 19.1.2010, p. 11.

**COUNCIL DECISION**  
**of 24 April 2012**  
**appointing a Luxembourg member of the Committee of the Regions**  
(2012/215/EU)

THE COUNCIL OF THE EUROPEAN UNION,

HAS ADOPTED THIS DECISION:

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 305 thereof,

Having regard to the proposal of the Luxembourg Government,

Whereas:

- (1) On 22 December 2009 and on 18 January 2010, the Council adopted Decisions 2009/1014/EU <sup>(1)</sup> and 2010/29/EU <sup>(2)</sup> appointing the members and alternate members of the Committee of the Regions for the period from 26 January 2010 to 25 January 2015.
- (2) A member's seat on the Committee of the Regions has become vacant following the end of the term of office of Mr Albert LENTZ,

*Article 1*

The following is hereby appointed as member of the Committee of the Regions for the remainder of the current term of office, which runs until 25 January 2015:

— Mr Ali KAES, *Bourgmestre de la commune de Tandel*.

*Article 2*

This Decision shall enter into force on the day of its adoption.

Done at Luxembourg, 24 April 2012.

*For the Council*  
*The President*  
N. WAMMEN

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<sup>(1)</sup> OJ L 348, 29.12.2009, p. 22.

<sup>(2)</sup> OJ L 12, 19.1.2010, p. 11.

**COUNCIL DECISION**  
**of 24 April 2012**  
**appointing a Finnish member and a Finnish alternate member of the Committee of the Regions**  
(2012/216/EU)

THE COUNCIL OF THE EUROPEAN UNION,

HAS ADOPTED THIS DECISION:

*Article 1*

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 305 thereof,

The following are hereby appointed to the Committee of the Regions for the remainder of the current term of office, which runs until 25 January 2015:

Having regard to the proposal of the Finnish Government,

(a) as member:

— Ms Gun-Mari LINDHOLM, *Kansliminister, Åland*;

Whereas:

and

(b) as alternate member:

— Mr Wille VALVE, *Ledamot av Ålands lagting*.

*Article 2*

(1) On 22 December 2009 and on 18 January 2010, the Council adopted Decisions 2009/1014/EU <sup>(1)</sup> and 2010/29/EU <sup>(2)</sup> appointing the members and alternate members of the Committee of the Regions for the period from 26 January 2010 to 25 January 2015.

This Decision shall enter into force on the day of its adoption.

(2) A member's seat on the Committee of the Regions has become vacant following the end of the term of office of Mr Folke SJÖLUND.

Done at Luxembourg, 24 April 2012.

(3) An alternate member's seat has become vacant following the end of the term of office of Ms Britt LUNDBERG,

*For the Council*

*The President*

N. WAMMEN

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<sup>(1)</sup> OJ L 348, 29.12.2009, p. 22.

<sup>(2)</sup> OJ L 12, 19.1.2010, p. 11.

## COUNCIL DECISION

of 24 April 2012

appointing seven French members and 11 French alternate members of the Committee of the Regions

(2012/217/EU)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 305 thereof,

Having regard to the proposal from the French Government,

Whereas:

- (1) On 22 December 2009 and on 18 January 2010, the Council adopted Decisions 2009/1014/EU <sup>(1)</sup> and 2010/29/EU <sup>(2)</sup> appointing the members and alternate members of the Committee of the Regions for the period from 26 January 2010 to 25 January 2015.
- (2) Seven members' seats on the Committee of the Regions have become vacant following the end of the mandates of Ms Claude du GRANRUT, Mr Alain LE VERN, Mr Daniel PERCHERON, Mr Jean PRORIOL, Mr Camille de ROCCA SERRA, Mr Alain ROUSSET and Mr Ange SANTINI.
- (3) Eleven alternate members' seats on the Committee of the Regions have become vacant following the end of the mandates of Mr Jacques AUXIETTE, Mr Jean-Paul BACHY, Ms Martine CALDEROLI-LOTZ, Ms Anne-Marie COMPARINI, Mr Jean-Jacques FRITZ, Mr Claude GEWERC, Ms Arlette GROSSKOST, Mr Antoine KARAM, Mr Martin MALVY, Mr Michel NEUGNOT and Ms Élisabeth THÉVENON-DURANTIN,

HAS ADOPTED THIS DECISION:

## Article 1

The following are hereby appointed to the Committee of the Regions for the remainder of the current term of office, which runs until 25 January 2015:

(a) as members:

- Mr François DECOSTER, *Conseiller régional du Nord Pas de Calais*,
- Mr Jean-Paul DENANOT, *Conseiller régional du Limousin*,
- Mr Claude GEWERC, *Conseiller régional de Picardie*,
- Ms Annabelle JAEGER, *Conseillère régionale de Provence-Alpes Côte d'Azur*,
- Mr Pascal MANGIN, *Conseiller régional d'Alsace*,

— Mr Didier ROBERT, *Conseiller régional de la Réunion*,— Mr Stéphan ROSSIGNOL, *Conseiller régional du Languedoc Roussillon*;

and

(b) as alternate members:

- Mr Laurent BEAUVAIS, *Conseiller régional de Basse-Normandie*,
- Ms Caroline CAYEUX, *Conseillère régionale de Picardie*,
- Ms Nathalie COLIN-OESTERLE, *Conseillère régionale de Lorraine*,
- Mr Mathieu DARNAUD, *Conseiller régional de Rhône-Alpes*,
- Ms Marie-Marguerite DUFAY, *Conseillère régionale de Franche-Comté*,
- Mr Nicolas FLORIAN, *Conseiller régional d'Aquitaine*,
- Ms Peggy KANÇAL, *Conseillère régionale d'Aquitaine*,
- Mr Alain LE VERN, *Conseiller régional de Haute-Normandie*,
- Mr Victorin LUREL, *Conseiller régional de Guadeloupe*,
- Mr Daniel PERCHERON, *Conseiller régional du Nord Pas-de-Calais*,
- Mr Christophe ROSSIGNOL, *Conseiller régional du Centre*.

## Article 2

This Decision shall enter into force on the day of its adoption.

Done at Luxembourg, 24 April 2012.

For the Council  
The President  
N. WAMMEN

<sup>(1)</sup> OJ L 348, 29.12.2009, p. 22.

<sup>(2)</sup> OJ L 12, 19.1.2010, p. 11.



## COMMISSION IMPLEMENTING DECISION

of 24 April 2012

**exempting the production and wholesale of electricity produced from conventional sources in Germany from the application of Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors**

*(notified under document C(2012) 2426)***(Only the German text is authentic)****(Text with EEA relevance)**

(2012/218/EU)

THE EUROPEAN COMMISSION,

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

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

Having regard to the request submitted by *Bundesverband der Energie- und Wasserwirtschaft e.V.* (Federal Association of the Energy and Water Industry) (hereinafter referred to as BDEW) by e-mail of 26 October 2011,

Whereas:

## I. FACTS

- (1) On 26 October 2011, BDEW transmitted a request pursuant to Article 30(5) of Directive 2004/17/EC to the Commission by e-mail. The Commission informed the German authorities about the request on 11 November 2011 and also requested additional information of the German authorities by e-mail of 10 January 2012, and of BDEW by e-mail of 21 December 2011. Additional information was transmitted by the German authorities by e-mail of 14 December 2011 and by BDEW on 17 January 2012 on 26 January 2012 and on 28 February 2012.
- (2) The request submitted by BDEW on behalf of contracting entities in the sector concerns, as described in the request, 'the construction, the purchase and the operation (including maintenance) of all types of electricity generation plants, as well as the relevant support activities' <sup>(2)</sup>.
- (3) The request is accompanied by an opinion of the Federal Cartel Office (*Bundeskartellamt*) dated 25 July 2011. This opinion (hereinafter referred to as the 'Opinion') was issued on the basis of relevant German legislation, and addresses the question as to whether the activity subject

to the procedure is directly exposed to competition. The Opinion is based on a large sectorial survey of the relevant markets.

## II. LEGAL FRAMEWORK

- (4) Article 30 of Directive 2004/17/EC provides that contracts intended to enable the performance of one of the activities to which the Directive applies shall not be subject to the Directive if, in the Member State in which it is carried out, the activity is directly exposed to competition on markets to which access is not restricted. Direct exposure to competition is assessed on the basis of objective criteria, taking account of the specific characteristics of the sector concerned. Access is deemed to be unrestricted if the Member State has implemented and applied the relevant Community legislation opening a given sector or a part of it. This legislation is listed in Annex XI to Directive 2004/17/EC, which, for the electricity sector, refers to Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity <sup>(3)</sup>. Directive 96/92/EC has been superseded by Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC <sup>(4)</sup> which was also replaced by Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC <sup>(5)</sup>.
- (5) Germany has implemented and applied not only Directive 96/92/EC but also Directives 2003/54/EC and 2009/72/EC. Consequently, and in accordance with the first subparagraph of Article 30(3), access to the market should be deemed not to be restricted on the entire territory of Germany.
- (6) Direct exposure to competition should be evaluated on the basis of various indicators, none of which are, necessarily, per se, decisive. In respect of the markets concerned by this Decision, the market share of the main players on a given market constitutes one criterion which should be taken into account. Another criterion is the degree of

<sup>(1)</sup> OJ L 134, 30.4.2004, p. 1.

<sup>(2)</sup> The exemption request is intended to cover also activities linked to electricity generation, such as combined heat and power stations.

<sup>(3)</sup> OJ L 27, 30.1.1997, p. 20.

<sup>(4)</sup> OJ L 176, 15.7.2003, p. 37.

<sup>(5)</sup> OJ L 211, 14.8.2009, p. 55.

concentration on those markets. Given the characteristics of the markets concerned, further criteria should also be taken into account such as the functioning of the balancing market, price competition and the degree of customer switching.

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

### III. ASSESSMENT

- (8) The German market of electricity is characterised by a large number of power plants which are operated by a big number of market players<sup>(1)</sup>. The majority of production capacity belongs to four large energy companies: RWE AG, E.ON AG, EnBW AG and Vattenfall Europe AG. However, as two of these companies, namely RWE and E.ON are private companies (i.e. companies not subject to the direct or indirect dominant influence of contracting authorities as provided for under Article 2(1)(b) of Directive 2004/17/EC), which do not operate in the electricity generation sector on the basis of special or exclusive rights within the meaning of Article 2(3) of Directive 2004/17/EC, they are not contracting entities in the sense of the Directive 2004/17/EC. Their procurement for the purpose of producing or selling electricity is therefore not subject to the provisions of this Directive; consequently, in respect of these activities, they should be considered as competitors of the contracting entities whose procurement is subject to this Directive. The analysis will therefore in the following focus on the contracting entities when examining whether the activity is exposed to competition in markets to which access is not restricted.
- (9) Electricity is marketed at wholesale level via the exchanges, i.e. the spot and forward markets of the European Energy Exchange AG (EEX) and the European Power Exchange S.E. (EPEX), or in over-the-counter transactions outside the exchanges. The price on the power exchanges usually serves as a reference price for transactions over the counter. The production companies optimise operation of their power stations in line with the results of the spot market trade on the exchanges. In principle, only those power stations are operated whose marginal costs are below the market price.
- (10) The *Gesetz für den Vorrang Erneuerbarer Energien* <sup>(2)</sup> (hereinafter referred to as EEG) sets out the rules for the

electricity generated from renewable energy sources <sup>(3)</sup>, which, in addition to the electricity generated through conventional sources <sup>(4)</sup>, is playing an increasing role in the German market. According to the amended EEG which entered into force at the beginning of 2012, the share of renewable energy sources in the electricity supply shall increase to 35 % by 2020, to 50 % by 2030 and to 80 % by 2050.

- (11) At the end of 2010, 160,5 GW generating capacity was connected to the networks of the Transmission System Operators (TSOs) (77,6 GW) and Distribution System Operators (DSOs) (82,9 GW). Compared to 2009 (152,7 GW), this represents an increase of approximately 7,8 GW. Renewables account for 54,2 GW of the total capacity. Some 50,7 GW of the renewables are paid for in accordance with EEG tariffs. This means that renewables represent approximately 34 % of overall capacity <sup>(5)</sup>.
- (12) In terms of feed-in, in 2010, a total of 531,2 TWh was fed into the TSO (367,5 TWh) and DSO (163,7 TWh) systems. The volume fed in from renewable sources was 93,7 TWh, of which 80,7 TWh were remunerated in accordance with the EEG. This means that feed-in from renewables represents approximately 18 % of the total feed-in volume, a proportion that therefore lies below the 34 % of total generation capacity accounted for by these sources <sup>(6)</sup>. The difference is due to the fact that the period of utilisation of renewable sources per year is lower than that of conventional sources.
- (13) Another feature of the German electricity market relates to the recent decision of the national authorities to close eight nuclear power plants, with a total capacity of 8 400 MW <sup>(7)</sup>, following the nuclear catastrophe in Japan, at the beginning of 2011. Moreover, it was decided to close the rest of the nuclear power plants in Germany by 2022. On the short term this changed the balance between imports and exports, so that, from a net exporter of electricity until 2010, Germany became a net importer in 2011.

<sup>(1)</sup> According to Eurostat data on Environment and Energy of 11/2010, in 2008 there were reported more than 450 electricity generator companies in Germany representing at least 95 % of the net electricity generation.

<sup>(2)</sup> EEG regulates: priority connection to the grid systems for general electricity supply of installations generating electricity from renewable energy sources and from mine gas; priority purchase, transmission, distribution of and payment for such electricity by the grid system operators, also in relation to electricity from combined heat and power (CHP) generation, and including premiums for integrating this electricity in the electricity supply system; and the nationwide equalisation scheme for the quantity of electricity purchased for which a tariff or premium has been paid.

<sup>(3)</sup> Within the meaning of EEG, and under the conditions set out therein, 'renewable energy sources' means hydropower, including wave power, tidal power, salt gradient and flow energy, wind energy, solar radiation, geothermal energy, energy from biomass, including biogas, biomethane, landfill gas and sewage treatment gas, as well as the biodegradable fraction of municipal waste and industrial waste.

<sup>(4)</sup> Within the meaning of this Decision electricity generated from conventional sources, and conventional electricity, means electricity which does not fall within the scope of the EEG.

<sup>(5)</sup> According to the 'Monitoring Benchmark Report 2011' by Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen (EN translation), p. 9.

<sup>(6)</sup> According to the 'Monitoring Benchmark Report 2011' by Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen (EN translation), p. 10.

<sup>(7)</sup> According to the 'Monitoring Benchmark Report 2011' by Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen (EN translation).

## Market definition

### Product market definition

- (14) According to Commission precedents<sup>(1)</sup>, the following relevant product markets could be distinguished in the electricity sector: (i) generation and wholesale supply; (ii) transmission; (iii) distribution; and (iv) retail supply. While some of these markets may be further subdivided, to date previous Commission practice<sup>(2)</sup> rejected a distinction between an electricity generation market and a wholesale supply market since generation as such is only a first step in the value chain, but electricity volumes generated are marketed via the wholesale market.
- (15) The request by BDEW pertains to electricity generation and wholesale. The Federal Cartel Office in its Opinion defines the product market as 'a primary sales market for electricity'<sup>(3)</sup>, which covers initial sales of all electricity suppliers of their own production and the net imports of electricity, but do not include subsequent trading between market participants. Moreover, the Federal Cartel Office considers that the production and marketing of electricity regulated under EEG (hereinafter referred to as 'EEG electricity') is not part of this market.
- (16) The Federal Cartel Office considers that the market for EEG electricity represents a separate market as far as its first sale is concerned. The EEG electricity is normally not directly sold on the wholesale market but first bought by the transmission grid operators for a statutory rate of remuneration. They then sell it in a second step on the wholesale market.
- (17) The Federal Cartel Office concludes that the production and marketing of EEG electricity is not organised on a competitive basis and that the EEG electricity is independent of demand and price indicators<sup>(4)</sup>. This conclusion is notably based on the following facts:
- (18) The EEG electricity has feed-in priority; therefore the production of EEG electricity is totally independent of demand. The production and feed-in is also independent of the prices as the operators are entitled to a statutory payment. The EEG electricity is marketed by the TSOs on the spot market in conformity with statutory provisions, without any scope for manoeuvre.
- (19) The Federal Cartel Office also noted that, according to the law, EEG electricity may be marketed directly, and a certain percentage of operators are using this opportunity. EEG provides that EEG installation operators may switch between direct selling and receipt of the

tariff payment under the EEG on the first day of the month. Depending on the market price forecast and depending on demand, EEG installation operators can thus decide each month, which form of selling is best for them. However, this direct marketing will in the future only be of marginal importance.

- (20) According to the amended EEG which entered into force at the beginning of 2012, EEG installation operators have — as indicated above — the option of marketing the electricity they produce themselves and receive a marketing premium as well. The marketing premium is to replace the difference between the fixed EEG remuneration and the monthly average price on the exchange determined *ex post*. The taking-up of the marketing premium is however optional, i.e. EEG installation operators can remain in the fixed remuneration system or return to it any month. The largest share of EEG electricity is, however, expected to be marketed via the transmission grid operators. Moreover, the market premium model will not alter the fact that the total remuneration level for EEG producers is not primarily determined by market prices<sup>(5)</sup>.
- (21) The Federal Cartel Office acknowledges therefore that, while EEG electricity exerts a competitive pressure on the electricity produced from conventional sources, the reverse is not true; therefore, EEG electricity cannot be included in the same market as the conventional electricity as the market conditions which prevail for the first sale significantly differ between these two generation forms. The first sale of EEG electricity, moreover, mostly takes place via the transmission grid operators. The market therefore evidently differs also from a demand-side perspective from the wholesale market for conventional electricity.
- (22) Taking into account the specificity of the German electricity market, for the purposes of evaluating the conditions laid down in Article 30(1) of Directive 2004/17/EC, and without prejudice to competition law, the relevant product market is hereby defined as the market for generation and first sale of electricity produced from conventional sources. Generation and first sale of EEG electricity is not part of this market, for the reasons set out above, and it will be hereinafter assessed separately.

### Geographic market definition

- (23) According to the application, the request pertains to activities on the territory of the Federal Republic of Germany. The applicant explores the possibility of a wider market including Germany and Austria based on several trends in respect of development of the regulatory

<sup>(1)</sup> Case COMP/M.4110 — E.ON/ENDESA, of 25.4.2006, paragraph 10, p. 3.

<sup>(2)</sup> Case COMP/M.3696 — E.ON/MOL, of 21.1.2005, paragraph 223, Case COMP/M.5467 — RWE/ESSENT, of 23.6.2009, paragraph 23.

<sup>(3)</sup> According to Federal Cartel Office Opinion (EN translation), p. 5.

<sup>(4)</sup> According to Federal Cartel Office Opinion (EN translation), p. 5.

<sup>(5)</sup> The remuneration of an individual operator may nevertheless vary depending on whether he will manage to market his electricity at a price above the monthly average price.

framework, level of electricity imports and exports and market coupling and congestion management procedures, but eventually concludes that 'the applicant cannot draw a final conclusion as to whether the German wholesale electricity market and relevant markets in neighbouring countries are sufficiently integrated at the moment so as to be considered a regional market'.

- (24) The Federal Cartel Office, following the sectorial survey carried out, assumes that there is a common primary market for electricity in Germany and Austria. This conclusion is based on the absence of bottlenecks at the border interconnectors between Germany and Austria and the standard marketing and pricing area on the European Power Exchange S.E. (EPEX).
- (25) Previous Commission practice mostly defined the electricity markets as being national in scope<sup>(1)</sup> or even smaller<sup>(2)</sup>. Occasionally, it has left open the possibility of wider than national markets<sup>(3)</sup>.
- (26) The Commission considers that for the purposes of evaluating the conditions laid down in Article 30(1) of Directive 2004/17/EC, and without prejudice to the competition law, it is not necessary to conclude on the precise scope of the relevant geographic market for the generation and first sale of conventional electricity as, under any alternative market definition, the results of the assessment would be the same.
- (27) As regards production and first sale of EEG electricity, its geographic scope could not extend beyond the territory of Germany since it is based on the specific legal conditions laid down in the German EEG.

### Market analysis

*Production and first sale of electricity produced from conventional sources*

(a) Market shares and market concentration

- (28) As it results from a constant practice<sup>(4)</sup> in respect of Commission Decisions pursuant to Article 30, the Commission considered that, in respect of electricity

generation, 'one indicator for the degree of competition on national markets is the total market share of the biggest three producers'.

- (29) According to the Opinion of the Federal Cartel Office<sup>(5)</sup>, the cumulative market shares of the first three producers, in terms of feed-in electricity, was 74 % in 2007 and 73 % in 2008 and 70 % in 2010. The German electricity market is therefore in the middle of the range, by comparison with previous exemptions decisions under Article 30 of Directive 2004/17/EC<sup>(6)</sup>.
- (30) However, it is recalled that the first two producers RWE and E.ON, which together have a cumulative market share of 58 % of the market<sup>(7)</sup>, are not subject to the provisions of the procurement law.
- (31) The aim of the present Decision is to establish whether the activities of generation and wholesale of electricity are exposed to such a level of competition (on markets to which access is free) that this will ensure that, also in the absence of the discipline brought about by the detailed procurement rules set out in Directive 2004/17/EC, the procurement for the pursuit of the activities concerned will be carried out in a transparent, non-discriminatory manner based on criteria allowing it to identify the solution which overall is the economically most advantageous one. In this context it is important to keep in mind that the companies which are not subject to the public procurement procedures (notably RWE and E.ON) when acting on these markets have the possibility to bring competitive pressure on the other market players. This will not change even if Austria is included into the relevant geographic market since the market shares of the first producers are expected to be only slightly smaller in a market covering both Austria and Germany<sup>(8)</sup>.

- (32) In respect of production and wholesale supply of electricity from conventional sources the facts above can be considered to be an indication of direct exposure to competition of the market players which are covered by the procurement law provisions.

- (33) It is also worth noting that the Commission Staff Working Paper '2009-2010 Report on Progress in Creating the Internal Gas and Electricity Market' of

<sup>(1)</sup> Commission Decisions 2008/585/EC (OJ L 188, 16.7.2008, p. 28, recital 9) and 2008/741/EC (OJ L 251, 19.9.2008, p. 35, recital 9) and Case COMP/M.3440 — ENI/EDP/GDP, of 9.12.2004, paragraph 23.

<sup>(2)</sup> Commission Decision 2010/403/EC (OJ L 186, 20.7.2010, p. 44, recital 9).

<sup>(3)</sup> Case COMP/M.3268 — SYDKRAFT/GRANINGE, of 30.10.2003, paragraph 27 and Case COMP/M.3665 — ENEL/SLOVENSKE ELEKTRARNE, of 26.4.2005, paragraph 14.

<sup>(4)</sup> Commission Decisions 2009/47/EC (OJ L 19, 23.1.2009, p. 57); 2008/585/EC, 2008/741/EC, 2007/141/EC (OJ L 62, 1.3.2007, p. 23), 2007/706/EC (OJ L 287, 1.11.2007, p. 18), 2006/211/EC (OJ L 76, 15.3.2006, p. 6) and 2006/422/EC (OJ L 168, 21.6.2006, p. 33).

<sup>(5)</sup> According to Federal Cartel Office Opinion (EN translation) paragraph 2 of page 7.

<sup>(6)</sup> Cumulated market shares of the first three producers in United Kingdom (39 %), Austria (52 %) and Poland (55 %) have lower values, but the corresponding values in Finland (73,6 %) and Sweden (87 %) are higher.

<sup>(7)</sup> The production is calculated taking into account the own power stations, the shares in jointly owned power stations and the long-term output secured on a contractual basis (drawing rights).

<sup>(8)</sup> According to Federal Cartel Office Opinion (EN translation) paragraph 3 of page 7.



June 2011 <sup>(1)</sup> indicated a decrease in the market concentration in Germany <sup>(2)</sup> compared to the previous years and placed the German electricity market in the category of 'moderately concentrated markets' <sup>(3)</sup>, namely those markets with a Herfindahl-Hirschman Index (HHI) <sup>(4)</sup> by capacity between 750 and 1 800.

- (34) Having regards to the above figures, for the purposes of this Decision and without prejudice to the competition law, it can be assumed with respect to the contracting entities that the degree of concentration of the market can be considered as an indication of a certain degree of exposure to competition of electricity production and wholesale from conventional sources in Germany.

(b) Other factors

- (35) In the last years, actually until March 2011, Germany was a net exporter of electricity. However, due to the decision to phase out production of electricity by several nuclear plants, Germany became a net importer. There is therefore currently a competitive pressure on the market deriving from the potential to import electricity from outside Germany. This ensures that investment in the electricity sector in Germany cannot be made without taking into account other producers in the surrounding countries. These factors should therefore be seen as not opposing the conclusion that contracting entities operating on the German production market from conventional sources are exposed to competition. Furthermore, an analysis of the situation in respect of customer switching <sup>(5)</sup> and the degree of liquidity on the wholesale market <sup>(6)</sup> show that these factors do not oppose the conclusion that contracting entities operating on the German production market from conventional sources are exposed to competition. Finally, it should

also be noted that the German balancing market <sup>(7)</sup> and its main characteristics (market-based pricing and price difference between positive and negative balancing power) do not either oppose the conclusion that contracting entities operating on the German production market from conventional sources are exposed to competition.

*Production and first sale of EEG electricity*

- (36) EEG electricity benefits from priority connection to the grid, and it has priority over conventional electricity for grid feed-in, which means that EEG electricity production is independent from demand. Since EEG electricity is generally produced at costs which are higher than the market price, a system was established by which EEG electricity receives particular support. EEG installation operators <sup>(8)</sup> have the right to receive a statutory rate of remuneration from the transmission grid operators for a period of 20 years plus the commissioning year. This remuneration provides for a coverage of their costs and is therefore higher than the market price. They can therefore feed the electricity they produce into the grid irrespective of the price on the exchanges <sup>(9)</sup>.
- (37) EEG electricity is generally not directly sold on the wholesale market but first bought by the transmission grid operators for a statutory rate of remuneration. The transmission system operators are responsible for marketing the EEG electricity on the power exchange spot market which consequently causes a loss for them. These costs are ultimately paid by the final electricity consumers who pay to their energy suppliers an extra EEG fee which is subsequently passed to the transmission grid operators. Energy suppliers buying more than 50 % of EEG electricity including at least 20 % of electricity from solar or wind pay a reduced EEG fee.

<sup>(1)</sup> [http://ec.europa.eu/energy/gas\\_electricity/legislation/doc/20100609\\_internal\\_market\\_report\\_2009\\_2010.pdf](http://ec.europa.eu/energy/gas_electricity/legislation/doc/20100609_internal_market_report_2009_2010.pdf)

<sup>(2)</sup> See page 7, paragraph 4 of the Commission Staff Working Paper.

<sup>(3)</sup> Table 3.1 of the Technical Annex, p. 12 of the Technical Annex to Commission Staff Working Paper '2009-2010 Report on Progress in Creating the Internal Gas and Electricity Market' of June 2011.

<sup>(4)</sup> Herfindahl-Hirschmann Index: it is defined as the sum of the squares of the market shares of each individual firm. As such, it can range from almost 0 to 10 000, moving from a very large amount of very small firms to a single monopolistic producer. Decreases in the HHI generally indicate an increase in competition, whereas increases imply the opposite.

<sup>(5)</sup> According to Table 2.1, page 6 and Table 2.2, page 7 of the Technical Annex to Commission Staff Working Paper '2009-2010 Report on Progress in Creating the Internal Gas and Electricity Market' of June 2011, 2009 Germany had a customer switching for large industry of 10,7 % in volume and of 15,6 % by eligible meter point.

<sup>(6)</sup> According to the 'Monitoring Benchmark Report 2011' by Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen, page 28, the German wholesale market is extremely liquid. In 2010, the volume of wholesale trade amounts to an estimated 10 600 TWh, which is more than 17 times the actual electricity demand in Germany.

<sup>(7)</sup> Even though they represent a small part of the total amount of electricity produced and/or consumed in a Member State, the functioning of the balancing mechanisms should also be considered as an additional indicator. This is because if there is a large difference between the price at which transmission system operators provide balancing power and the price at which they buy back surplus production, this can be a problem for smaller market participants and undermine the development of competition.

<sup>(8)</sup> Within the meaning of this Decision and in accordance with the EEG, 'EEG installation' means any facility generating electricity from renewable energy sources or from mine gas. Installations generating electricity from renewable energy sources or from mine gas shall also mean all those facilities which receive energy which has been temporarily stored and originates exclusively from renewable energy sources or from mine gas and convert it into electricity; and 'EEG installation operator' means anyone, irrespective of the issue of ownership, who uses the installation to generate electricity from renewable energy sources or from mine gas.

<sup>(9)</sup> Remuneration rates for EEG electricity are regularly above the exchange price, EEG electricity is therefore more expensive than conventionally produced electricity. These additional costs must be borne by energy consumers via the EEG levy (3,5 cents/kWh in 2011).

- (38) The EEG installation operators have also the possibility to do 'direct marketing' of the electricity produced. This means that an EEG plant operator can renounce to the statutory remuneration and opt to sell the electricity directly on the spot market. Due to the high generation costs of EEG electricity, direct marketing outside of the statutory conditions is normally not a viable option. In the past, this method has mainly been used to a limited extent in instances where the buyers were able to achieve an exemption from the extra EEG fee by combining a certain amount of EEG electricity sourced directly from a producer with conventional electricity <sup>(1)</sup>. With the new EEG law which entered into force beginning of 2012, the possibility for this specific exemption was limited which is expected to reduce this form of direct marketing <sup>(2)</sup>.
- (39) The new law contains a new possibility of 'direct marketing' which, however, includes the payment of a so-called 'market premium' to the EEG electricity producers that covers the difference between their higher costs and the average market price (in the following: 'market premium model'). Transmission System Operators estimate selling in the market premium model to take a share of 15 % for all types of renewable energies together in 2012 <sup>(3)</sup>. It can be concluded that at present and in the near future, the by far largest part of EEG electricity is marketed in the regime of statutory payments and via the transmission grid operators. Unsubsidised direct marketing will only play a marginal role.
- (40) For the reasons indicated above the generation and first sale of EEG electricity form part of a regulated system in which producers are remunerated on the basis of a statutory payment. They are not exposed to competition since they can feed in their EEG electricity regardless of the prevailing market price. Due to the feed-in priority they can also sell all the quantities they produce. It cannot be therefore concluded that the activity of producers of EEG electricity is exposed to competition. In view of the above, no other indicators, such as those listed in recital 6, need to be assessed.
- (41) In view of the factors examined above, the condition of direct exposure to competition laid down in Article 30(1) of Directive 2004/17/EC should be considered to be met in view of the contracting entities with respect of production and wholesale supply of electricity from conventional sources in Germany.
- (42) Furthermore, since the condition of unrestricted access to the market is deemed to be met, Directive 2004/17/EC should not apply when contracting entities award contracts intended to enable production and wholesale supply of electricity from conventional sources to be carried out in Germany nor when they organise design contests for the pursuit of such an activity in that geographical area.
- (43) Nevertheless, the condition of direct exposure to competition laid down in Article 30(1) of Directive 2004/17/EC should be considered not to be met in view of the contracting entities with respect to production and first sale of EEG electricity in Germany.
- (44) Since the production and first sale of EEG electricity continues to be subject to the provisions of Directive 2004/17/EC, it is recalled that procurement contracts covering several activities shall be treated in accordance with Article 9 of Directive 2004/17/EC. This means that, when a contracting entity is engaged in 'mixed' procurement, that is procurement used to support the performance of both, activities exempted from the application of Directive 2004/17/EC and activities not exempted, regard shall be had to the activities for which the contract is principally intended. In the event of such mixed procurement, where the purpose is principally to support the production and wholesale of EEG electricity, the provision of Directive 2004/17/EC shall apply. If it is objectively impossible to determine for which activity the contract is principally intended, the contract shall be awarded in accordance with the rules referred to in paragraphs 2 and 3 of Article 9 of Directive 2004/17/EC. This Decision is based on the legal and factual situation as of October 2011 to February 2012 as it appears from the information submitted by BDEW and the German authorities. It may be revised, should significant changes in the legal or factual situation mean that the conditions for the applicability of Article 30(1) of Directive 2004/17/EC in respect of production and wholesale supply of electricity from conventional sources are no longer met.
- (45) The measures provided for in this Decision are in accordance with the opinion of the Advisory Committee for Public Contracts,

#### IV. CONCLUSIONS

- (41) In view of the factors examined above, the condition of direct exposure to competition laid down in Article 30(1) of Directive 2004/17/EC should be considered to be met in view of the contracting entities with respect of production and wholesale supply of electricity from conventional sources in Germany.

<sup>(1)</sup> This phenomenon has been sometimes referred to as 'Grünstrom-privileg'.

<sup>(2)</sup> The Transmission System Operators estimate the share of such direct marketing (§33b EEG (2012)) at 3,7 % in 2012. See [http://www.eeg-kwk.net/de/file/111115\\_Eckwerte\\_Einspeisung\\_final.pdf](http://www.eeg-kwk.net/de/file/111115_Eckwerte_Einspeisung_final.pdf)

<sup>(3)</sup> See [http://www.eeg-kwk.net/de/file/111115\\_Eckwerte\\_Einspeisung\\_final.pdf](http://www.eeg-kwk.net/de/file/111115_Eckwerte_Einspeisung_final.pdf)

#### Article 1

Directive 2004/17/EC shall not apply to contracts awarded by contracting entities and intended to enable production and first sale of electricity produced from conventional sources to be carried out in Germany.

For the purposes of this Decision, electricity produced from conventional sources means electricity which does not fall within the scope of the EEG. Moreover, within the meaning of the EEG, and under the conditions set out therein, 'renewable energy sources' means hydropower, including wave power, tidal power, salt gradient and flow energy, wind energy, solar radiation, geothermal energy, energy from biomass, including biogas, biomethane, landfill gas and sewage treatment gas, as well as the biodegradable fraction of municipal waste and industrial waste.

*Article 2*

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 24 April 2012.

*For the Commission*

Michel BARNIER

*Member of the Commission*

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## COMMISSION IMPLEMENTING DECISION

of 24 April 2012

**recognising Serbia as being free from *Clavibacter michiganensis* ssp. *sepedonicus* (Spieckerman and Kotthoff) Davis et al.**

(notified under document C(2012) 2524)

(2012/219/EU)

THE EUROPEAN COMMISSION,

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

Having regard to Council Directive 2000/29/EC of 8 May 2000 on protective measures against the introduction into the Community of organisms harmful to plants or plant products and against their spread within the Community<sup>(1)</sup>, and in particular point (12) of Part A of Annex III thereto,

Whereas:

- (1) Point (12) of Part A of Annex III to Directive 2000/29/EC provides for a general prohibition concerning the introduction into the Union of tubers of species of *Solanum* L. and their hybrids, other than those specified in points (10) and (11) of that Part A, including tubers of *Solanum tuberosum* L., originating in third countries. That prohibition is not to apply to European third countries recognised as being free from *Clavibacter michiganensis* ssp. *sepedonicus* (Spieckerman and Kotthoff) Davis et al. ('the organism').
- (2) It appears from official reports related to survey campaigns in 2009, 2010 and 2011 supplied by Serbia and from information collected during a mission carried out in that country by the Food and Veterinary Office in November and December 2009, that the organism does not occur in Serbia and that that country has applied control, inspection and testing procedures for the organism to imports and domestic production of tubers of *Solanum tuberosum* L.
- (3) It is therefore appropriate to recognise Serbia as being free from the organism.

(4) This Decision is without prejudice to any subsequent findings that may show that the organism is present in Serbia.

(5) The Commission will request Serbia to supply, on a yearly basis, the information necessary to verify that Serbia continues to be free from the organism.

(6) The measures provided for in this Decision are in accordance with the opinion of the Standing Committee on Plant Health,

HAS ADOPTED THIS DECISION:

## Article 1

**Recognition**Serbia is recognised as being free from *Clavibacter michiganensis* ssp. *sepedonicus* (Spieckerman and Kotthoff) Davis et al.

## Article 2

**Addressees**

This Decision is addressed to the Member States.

Done at Brussels, 24 April 2012.

For the Commission

John DALLI

Member of the Commission

<sup>(1)</sup> OJ L 169, 10.7.2000, p. 1.

## ACTS ADOPTED BY BODIES CREATED BY INTERNATIONAL AGREEMENTS

### **DECISION No 1/2012 OF THE EU-EFTA JOINT COMMITTEE ON A COMMON TRANSIT PROCEDURE**

**of 19 January 2012**

**concerning an invitation to Croatia to accede to the Convention of 20 May 1987 on a common  
transit procedure**

(2012/220/EU)

THE JOINT COMMITTEE,

Having regard to the Convention of 20 May 1987 on a common transit procedure <sup>(1)</sup> ('the Convention'),  
and in particular Article 15(3)(e) thereof,

Whereas:

- (1) The promotion of trade with Croatia would be facilitated by a common transit procedure for goods transported between Croatia and the European Union, the Republic of Iceland, the Kingdom of Norway and the Swiss Confederation.
- (2) With a view to achieving such a procedure, it is appropriate to invite Croatia to accede to the Convention,

HAS ADOPTED THIS DECISION:

#### *Article 1*

In accordance with Article 15a of the Convention, Croatia is invited, in the form of an Exchange of Letters between the Council of the European Union and Croatia annexed to this Decision, to accede to the Convention as from 1 July 2012.

#### *Article 2*

This Decision shall enter into force on the date of its adoption.

Done at Brussels, 19 January 2012.

*For the Joint Committee*

*The President*

Mirosław ZIELIŃSKI

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<sup>(1)</sup> OJ L 226, 13.8.1987, p. 2.

## ANNEX

## LETTER No 1

**Communication of the Decision of the EU-EFTA Joint Committee to invite Croatia to accede to the Convention of 20 May 1987 on a common transit procedure**

Sir,

I have the honour to inform you of the Decision of the EU-EFTA Joint Committee on a common transit procedure of 19 January 2012 (Decision No 1/2012) inviting Croatia to become a Contracting Party to the Convention of 20 May 1987 on a common transit procedure. The European Union invites Croatia to give assurance that it would apply the above Convention in a non-discriminatory manner to all Member States.

The accession of Croatia to the Convention may be effected by lodging its Instrument of Accession with the General Secretariat of the Council of the European Union together with a translation of the Convention in the official language of Croatia, in accordance with Article 15a of the Convention.

Please accept, Sir, the assurance of my highest consideration.

*The General Secretary  
General Secretariat of the  
Council of the European Union*

## LETTER No 2

**Instrument of Accession of Croatia to the Convention on a common transit procedure**

Croatia,

Taking note of the Decision of the EU-EFTA Joint Committee on a common transit procedure of 19 January 2012 (Decision No 1/2012) inviting Croatia to accede to the Convention of 20 May 1987 on a common transit procedure (the Convention'),

Taking into account the invitation to accede to the Convention, and

Desiring to become a Contracting Party to the Convention,

HEREBY

Accedes to the Convention;

Attaches to this Instrument a translation of the Convention in the official language of Croatia;

Declares that it accepts all the Recommendations and Decisions of the EU-EFTA Joint Committee on a common transit procedure adopted between 19 January 2012 and the date that the Accession of Croatia becomes effective in accordance with Article 15a of the Convention.

Done at ...

**DECISION No 1/2012 OF THE EU-EFTA JOINT COMMITTEE ON THE SIMPLIFICATION OF  
FORMALITIES IN TRADE IN GOODS**

**of 19 January 2012**

**concerning an invitation to Croatia to accede to the Convention of 20 May 1987 on the  
simplification of formalities in trade in goods**

(2012/221/EU)

THE JOINT COMMITTEE,

Having regard to the Convention of 20 May 1987 on the simplification of formalities in trade in goods <sup>(1)</sup>  
(‘the Convention’), and in particular Article 11(3) thereof,

Whereas:

- (1) The exchange of goods with Croatia would be facilitated by a simplification of formalities which affect the trade in goods between Croatia and the European Union, the Republic of Iceland, the Kingdom of Norway and the Swiss Confederation.
- (2) With a view to achieving such facilitation, it is appropriate to invite Croatia to accede to the Convention,

HAS ADOPTED THIS DECISION:

*Article 1*

In accordance with Article 11a of the Convention, Croatia is invited, in the form of an Exchange of Letters between the Council of the European Union and Croatia annexed to this Decision, to accede to the Convention as from 1 July 2012.

*Article 2*

This Decision shall enter into force on the date of its adoption.

Done at Brussels, 19 January 2012.

*For the Joint Committee*

*The President*

Mirosław ZIELIŃSKI

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<sup>(1)</sup> OJ L 134, 22.5.1987, p. 2.

## ANNEX

## LETTER No 1

**Communication of the Decision of the EU-EFTA Joint Committee to invite Croatia to accede to the Convention of 20 May 1987 on the simplification of formalities in trade in goods**

Sir,

I have the honour to inform you of the Decision of the EU-EFTA Joint Committee on the simplification of formalities in trade in goods of 19 January 2012 (Decision No 1/2012) inviting Croatia to become a Contracting Party to the Convention of 20 May 1987 on the simplification of formalities in trade in goods.

The accession of Croatia to the Convention may be effected by lodging its Instrument of Accession with the General Secretariat of the Council of the European Union together with a translation of the Convention in the official language of Croatia, in accordance with Article 11a of the Convention.

Please accept, Sir, the assurance of my highest consideration.

*The General Secretary  
General Secretariat of the  
Council of the European Union*

## LETTER No 2

**Instrument of Accession of Croatia to the Convention on the simplification of formalities in trade in goods**

Croatia,

Taking note of the Decision of the EU-EFTA Joint Committee on the simplification of formalities in trade in goods of 19 January 2012 (Decision No 1/2012) inviting Croatia to accede to the Convention of 20 May 1987 on the simplification of formalities in trade in goods ('the Convention'),

Desiring to become a Contracting Party to the Convention,

HEREBY

Accedes to the Convention;

Attaches to this Instrument a translation of the Convention in the official language of Croatia;

Declares that it accepts all the Recommendations and Decisions of the EU-EFTA Joint Committee on the simplification of formalities in trade in goods adopted between 19 January 2012 and the date that the Accession of Croatia becomes effective in accordance with Article 11a of the Convention.

Done at ...

**DECISION No 2/2012 OF THE EU-EFTA JOINT COMMITTEE ON A COMMON TRANSIT  
PROCEDURE****of 19 January 2012****concerning an invitation to Turkey to accede to the Convention of 20 May 1987 on a common  
transit procedure**

(2012/222/EU)

THE JOINT COMMITTEE,

Having regard to the Convention of 20 May 1987 on a common transit procedure <sup>(1)</sup> ('the Convention'),  
and in particular Article 15(3)(e) thereof,

Whereas:

- (1) The promotion of trade with Turkey would be facilitated by a common transit procedure for goods transported between Turkey and the European Union, the Republic of Iceland, the Kingdom of Norway and the Swiss Confederation.
- (2) With a view to achieving such a procedure, it is appropriate to invite Turkey to accede to the Convention,

HAS ADOPTED THIS DECISION:

*Article 1*

In accordance with Article 15a of the Convention, Turkey is invited, in the form of an Exchange of Letters between the Council of the European Union and Turkey annexed to this Decision, to accede to the Convention as from 1 July 2012.

*Article 2*

This Decision shall enter into force on the date of its adoption.

Done at Brussels, 19 January 2012.

*For the Joint Committee**The President*

Mirosław ZIELIŃSKI

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<sup>(1)</sup> OJ L 226, 13.8.1987, p. 2.

## ANNEX

## LETTER No 1

**Communication of the Decision of the EU-EFTA Joint Committee to invite Turkey to accede to the Convention of 20 May 1987 on a common transit procedure**

Sir,

I have the honour to inform you of the Decision of the EU-EFTA Joint Committee on a common transit procedure of 19 January 2012 (Decision No 2/2012) inviting Turkey to become a Contracting Party to the Convention of 20 May 1987 on a common transit procedure. The European Union invites Turkey to give assurance that it would apply the above Convention in a non-discriminatory manner to all Member States.

The accession of Turkey to the Convention may be effected by lodging its Instrument of Accession with the General Secretariat of the Council of the European Union together with a translation of the Convention in the official language of Turkey, in accordance with Article 15a of the Convention.

Please accept, Sir, the assurance of my highest consideration.

*The General Secretary  
General Secretariat of the  
Council of the European Union*

## LETTER No 2

**Instrument of Accession of Turkey to the Convention on a common transit procedure**

Turkey,

Taking note of the Decision of the EU-EFTA Joint Committee on a common transit procedure of 19 January 2012 (Decision No 2/2012) inviting Turkey to accede to the Convention of 20 May 1987 on a common transit procedure (the Convention'),

Taking into account the invitation to accede to the Convention, and

Desiring to become a Contracting Party to the Convention,

HEREBY

Accedes to the Convention;

Attaches to this Instrument a translation of the Convention in the official language of Turkey;

Declares that it accepts all the Recommendations and Decisions of the EU-EFTA Joint Committee on a common transit procedure adopted between 19 January 2012 and the date that the Accession of Turkey becomes effective in accordance with Article 15a of the Convention.

Done at ...



**DECISION No 2/2012 OF THE EU-EFTA JOINT COMMITTEE ON THE SIMPLIFICATION OF  
FORMALITIES IN TRADE IN GOODS**

**of 19 January 2012**

**concerning an invitation to Turkey to accede to the Convention of 20 May 1987 on the  
simplification of formalities in trade in goods**

(2012/223/EU)

THE JOINT COMMITTEE,

Having regard to the Convention of 20 May 1987 on the simplification of formalities in trade in goods <sup>(1)</sup>  
(‘the Convention’), and in particular Article 11(3) thereof,

Whereas:

- (1) In preparing the enlargement of the European Union to Turkey, the exchange of goods with Turkey would be facilitated by a simplification of formalities which affect the trade in goods between Turkey and the European Union, the Republic of Iceland, the Kingdom of Norway and the Swiss Confederation.
- (2) With a view to achieving such facilitation, it is appropriate to invite Turkey to accede to the Convention,

HAS ADOPTED THIS DECISION:

*Article 1*

In accordance with Article 11a of the Convention, Turkey is invited, in the form of an Exchange of Letters between the Council of the European Union and Turkey annexed to this Decision, to accede to the Convention as from 1 July 2012.

*Article 2*

This Decision shall enter into force on the date of its adoption.

Done at Brussels, 19 January 2012.

*For the Joint Committee*

*The President*

Mirosław ZIELIŃSKI

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<sup>(1)</sup> OJ L 134, 22.5.1987, p. 2.

## ANNEX

## LETTER No 1

**Communication of the Decision of the EU-EFTA Joint Committee to invite Turkey to accede to the Convention of 20 May 1987 on the simplification of formalities in trade in goods**

Sir,

I have the honour to inform you of the Decision of the EU-EFTA Joint Committee on the simplification of formalities in trade in goods of 19 January 2012 (Decision No 2/2012) inviting Turkey to become a Contracting Party to the Convention of 20 May 1987 on the simplification of formalities in trade in goods.

The accession of Turkey to the Convention may be effected by lodging its Instrument of Accession with the General Secretariat of the Council of the European Union together with a translation of the Convention in the official language of Turkey, in accordance with Article 11a of the Convention.

Please accept, Sir, the assurance of my highest consideration.

*The General Secretary  
General Secretariat of the  
Council of the European Union*

---

## LETTER No 2

**Instrument of Accession of Turkey to the Convention on the simplification of formalities in trade in goods**

Turkey,

Taking note of the Decision of the EU-EFTA Joint Committee on the simplification of formalities in trade in goods of 19 January 2012 (Decision No 2/2012) inviting Turkey to accede to the Convention of 20 May 1987 on the simplification of formalities in trade in goods ('the Convention'),

Desiring to become a Contracting Party to the Convention,

HEREBY

Accedes to the Convention;

Attaches to this Instrument a translation of the Convention in the official language of Turkey;

Declares that it accepts all the Recommendations and Decisions of the EU-EFTA Joint Committee on the simplification of formalities in trade in goods adopted between 19 January 2012 and the date that the Accession of Turkey becomes effective in accordance with Article 11a of the Convention.

Done at ...

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