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Contents

II *Non-legislative acts*

INTERNATIONAL AGREEMENTS

- ★ **Council Decision (EU) 2016/1841 of 5 October 2016 on the conclusion, on behalf of the European Union, of the Paris Agreement adopted under the United Nations Framework Convention on Climate Change** 1
- Paris Agreement** 4

REGULATIONS

- ★ **Commission Implementing Regulation (EU) 2016/1842 of 14 October 2016 amending Regulation (EC) No 1235/2008 as regards the electronic certificate of inspection for imported organic products and certain other elements, and Regulation (EC) No 889/2008 as regards the requirements for preserved or processed organic products and the transmission of information ⁽¹⁾** 19
- ★ **Commission Implementing Regulation (EU) 2016/1843 of 18 October 2016 on transitional measures for the application of Regulation (EC) No 882/2004 of the European Parliament and of the Council as regards the accreditation of official laboratories carrying out official testing for *Trichinella* ⁽¹⁾** 38
- Commission Implementing Regulation (EU) 2016/1844 of 18 October 2016 establishing the standard import values for determining the entry price of certain fruit and vegetables 40
- Commission Implementing Regulation (EU) 2016/1845 of 18 October 2016 fixing the allocation coefficient to be applied to applications for aid for milk production reduction pursuant to Delegated Regulation (EU) 2016/1612 42

⁽¹⁾ Text with EEA relevance

EN

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

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

DECISIONS

★ Commission Decision (EU) 2016/1846 of 4 July 2016 on the measure SA.41187 (2015/C) (ex 2015/NN) implemented by Hungary on the health contribution of tobacco industry businesses (notified under document C(2016) 4049) ⁽¹⁾	43
★ Commission Decision (EU) 2016/1847 of 4 July 2016 on the State aid SA.41612 — 2015/C (ex SA.33584 (2013/C) (ex 2011/NN)) implemented by the Netherlands in favour of the professional football club MVV in Maastricht (notified under document C(2016) 4053) ⁽¹⁾	53
★ Commission Decision (EU) 2016/1848 of 4 July 2016 on the measure SA.40018 (2015/C) (ex 2015/NN) implemented by Hungary on the 2014 Amendment to the Hungarian food chain inspection fee (notified under document C(2016) 4056) ⁽¹⁾	63
★ Commission Decision (EU) 2016/1849 of 4 July 2016 on the measure SA.41613 — 2015/C (ex SA.33584 — 2013/C (ex 2011/NN)) implemented by the Netherlands with regard to the professional football club PSV in Eindhoven (notified under document C(2016) 4093) ⁽¹⁾	75

⁽¹⁾ Text with EEA relevance

II

(Non-legislative acts)

INTERNATIONAL AGREEMENTS

COUNCIL DECISION (EU) 2016/1841

of 5 October 2016

on the conclusion, on behalf of the European Union, of the Paris Agreement adopted under the United Nations Framework Convention on Climate Change

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 192(1), in conjunction with Article 218(6)(a) thereof,

Having regard to the proposal from the European Commission,

Having regard to the consent of the European Parliament ⁽¹⁾,

Whereas:

- (1) At the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change (UNFCCC), which took place in Paris from 30 November to 12 December 2015, the text of an agreement was adopted, concerning the strengthening of the global response to climate change.
- (2) The Paris Agreement was signed on 22 April 2016 in accordance with Council Decision (EU) 2016/590 ⁽²⁾.
- (3) The Paris Agreement will enter into force on the 30th day after the date on which at least 55 Parties to the UNFCCC accounting in total for at least an estimated 55 % of total greenhouse gas emissions, have deposited their instruments of ratification, acceptance, approval or accession. Parties to the UNFCCC include the Union and its Member States. In its conclusions of 18 March 2016, the European Council underlined the need for the Union and its Member States to conclude the Paris Agreement as soon as possible and on time in order to be parties as of its entry into force.
- (4) The Paris Agreement replaces the approach taken under the 1997 Kyoto Protocol.
- (5) The Paris Agreement, inter alia, sets out a long-term goal in line with the objective to keep the global temperature increase well below 2 °C above pre-industrial levels and to pursue efforts to keep it to 1,5 °C above pre-industrial levels. In order to achieve this goal, the Parties will prepare, communicate and maintain successive nationally determined contributions.
- (6) Under the Paris Agreement, as of 2023, the Parties are to undertake a global stocktake every five years, based on the latest science and implementation to date, which will track progress and consider emission reductions, adaptation and support provided, and each Party's successive contribution is to represent a progression beyond its then current contribution and reflect its highest ambition.

⁽¹⁾ Consent of 4 October 2016 (not yet published in the Official Journal).

⁽²⁾ Council Decision (EU) 2016/590 of 11 April 2016 on the signing, on behalf of the European Union, of the Paris Agreement adopted under the United Nations Framework Convention on Climate Change (OJ L 103, 19.4.2016, p. 1).

- (7) A binding target of at least a 40 % domestic reduction in economy-wide greenhouse gas emissions by 2030 compared to 1990 was endorsed in the conclusions of the European Council of 23 and 24 October 2014 on the 2030 climate and energy policy framework. On 6 March 2015, the Council adopted this contribution of the Union and its Member States as their intended nationally determined contribution, which was submitted to the Secretariat of the UNFCCC.
- (8) In its Communication accompanying the proposal for the Union to sign the Paris Agreement the Commission emphasised that the global clean energy transition requires changes in investment behaviour and incentives across the entire policy spectrum. It is a key Union priority to establish a resilient Energy Union to provide secure, sustainable, competitive and affordable energy to its citizens. Achieving this requires continuation of ambitious climate action and progress on other aspects of the Energy Union.
- (9) The Council confirmed in its conclusions of 18 September 2015 that the Union and its Member States intend to act jointly under the Paris Agreement and welcomed the intention of Norway and Iceland to participate in this joint action.
- (10) The joint action by the Union and its Member States will be agreed in due course and will cover the respective emission level allocated to the Union and its Member States.
- (11) Article 4, paragraph 16, of the Paris Agreement requires the secretariat to be notified of the joint action, including the emission level allocated to each Party within the relevant time period.
- (12) The Paris Agreement is in conformity with the environmental objectives of the Union as referred to in Article 191 of the Treaty, namely preserving, protecting and improving the quality of the environment; protecting human health; and promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.
- (13) The Paris Agreement and the Declaration of Competence should be approved on behalf of the Union,

HAS ADOPTED THIS DECISION:

Article 1

The Paris Agreement adopted on 12 December 2015 under the United Nations Framework Convention on Climate Change is hereby approved on behalf of the Union.

The text of the Paris Agreement is attached to this Decision.

The Declaration of Competence attached to this Decision is also approved on behalf of the Union.

Article 2

The President of the Council shall designate the person(s) empowered to deposit, on behalf of the Union, the instrument of ratification with the Secretary-General of the United Nations, in accordance with Article 20, paragraph 1, of the Paris Agreement, together with the Declaration of Competence.

Article 3

1. Member States shall endeavour to take the necessary steps with a view to depositing instruments of ratification simultaneously with the Union or as soon as possible thereafter.
2. Member States shall inform the Commission of their decisions on ratification of the Paris Agreement or, according to the circumstances, of the probable date of completion of the necessary procedures.

Article 4

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

Done at Brussels, 5 October 2016.

For the Council
The President
M. LAJČÁK

PARIS AGREEMENT

THE PARTIES TO THIS AGREEMENT,

BEING Parties to the United Nations Framework Convention on Climate Change, hereinafter referred to as 'the Convention',

PURSUANT to the Durban Platform for Enhanced Action established by decision 1/CP.17 of the Conference of the Parties to the Convention at its seventeenth session,

IN PURSUIT of the objective of the Convention, and being guided by its principles, including the principle of equity and common but differentiated responsibilities and respective capabilities, in the light of different national circumstances,

RECOGNIZING the need for an effective and progressive response to the urgent threat of climate change on the basis of the best available scientific knowledge,

ALSO RECOGNIZING the specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, as provided for in the Convention,

TAKING FULL ACCOUNT of the specific needs and special situations of the least developed countries with regard to funding and transfer of technology,

RECOGNIZING that Parties may be affected not only by climate change, but also by the impacts of the measures taken in response to it,

EMPHASIZING the intrinsic relationship that climate change actions, responses and impacts have with equitable access to sustainable development and eradication of poverty,

RECOGNIZING the fundamental priority of safeguarding food security and ending hunger, and the particular vulnerabilities of food production systems to the adverse impacts of climate change,

TAKING INTO ACCOUNT the imperatives of a just transition of the workforce and the creation of decent work and quality jobs in accordance with nationally defined development priorities,

ACKNOWLEDGING that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity,

RECOGNIZING the importance of the conservation and enhancement, as appropriate, of sinks and reservoirs of the greenhouse gases referred to in the Convention,

NOTING the importance of ensuring the integrity of all ecosystems, including oceans, and the protection of biodiversity, recognized by some cultures as Mother Earth, and noting the importance for some of the concept of 'climate justice', when taking action to address climate change,

AFFIRMING the importance of education, training, public awareness, public participation, public access to information and cooperation at all levels on the matters addressed in this Agreement,

RECOGNIZING the importance of the engagements of all levels of government and various actors, in accordance with respective national legislations of Parties, in addressing climate change,

ALSO RECOGNIZING that sustainable lifestyles and sustainable patterns of consumption and production, with developed country Parties taking the lead, play an important role in addressing climate change,

HAVE AGREED AS FOLLOWS:

Article 1

For the purpose of this Agreement, the definitions contained in Article 1 of the Convention shall apply. In addition:

- (a) 'Convention' means the United Nations Framework Convention on Climate Change, adopted in New York on 9 May 1992;
- (b) 'Conference of the Parties' means the Conference of the Parties to the Convention;
- (c) 'Party' means a Party to this Agreement.

Article 2

1. This Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by:

- (a) Holding the increase in the global average temperature to well below 2 °C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1,5 °C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change;
- (b) Increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food production; and
- (c) Making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.

2. This Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.

Article 3

As nationally determined contributions to the global response to climate change, all Parties are to undertake and communicate ambitious efforts as defined in Articles 4, 7, 9, 10, 11 and 13 with the view to achieving the purpose of this Agreement as set out in Article 2. The efforts of all Parties will represent a progression over time, while recognizing the need to support developing country Parties for the effective implementation of this Agreement.

Article 4

1. In order to achieve the long-term temperature goal set out in Article 2, Parties aim to reach global peaking of greenhouse gas emissions as soon as possible, recognizing that peaking will take longer for developing country Parties, and to undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century, on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty.

2. Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.

3. Each Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.

4. Developed country Parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets. Developing country Parties should continue enhancing their mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances.
5. Support shall be provided to developing country Parties for the implementation of this Article, in accordance with Articles 9, 10 and 11, recognizing that enhanced support for developing country Parties will allow for higher ambition in their actions.
6. The least developed countries and small island developing States may prepare and communicate strategies, plans and actions for low greenhouse gas emissions development reflecting their special circumstances.
7. Mitigation co-benefits resulting from Parties' adaptation actions and/or economic diversification plans can contribute to mitigation outcomes under this Article.
8. In communicating their nationally determined contributions, all Parties shall provide the information necessary for clarity, transparency and understanding in accordance with decision 1/CP.21 and any relevant decisions of the Conference of the Parties serving as the meeting of the Parties to this Agreement.
9. Each Party shall communicate a nationally determined contribution every five years in accordance with decision 1/CP.21 and any relevant decisions of the Conference of the Parties serving as the meeting of the Parties to this Agreement and be informed by the outcomes of the global stocktake referred to in Article 14.
10. The Conference of the Parties serving as the meeting of the Parties to this Agreement shall consider common time frames for nationally determined contributions at its first session.
11. A Party may at any time adjust its existing nationally determined contribution with a view to enhancing its level of ambition, in accordance with guidance adopted by the Conference of the Parties serving as the meeting of the Parties to this Agreement.
12. Nationally determined contributions communicated by Parties shall be recorded in a public registry maintained by the secretariat.
13. Parties shall account for their nationally determined contributions. In accounting for anthropogenic emissions and removals corresponding to their nationally determined contributions, Parties shall promote environmental integrity, transparency, accuracy, completeness, comparability and consistency, and ensure the avoidance of double counting, in accordance with guidance adopted by the Conference of the Parties serving as the meeting of the Parties to this Agreement.
14. In the context of their nationally determined contributions, when recognizing and implementing mitigation actions with respect to anthropogenic emissions and removals, Parties should take into account, as appropriate, existing methods and guidance under the Convention, in the light of the provisions of paragraph 13 of this Article.
15. Parties shall take into consideration in the implementation of this Agreement the concerns of Parties with economies most affected by the impacts of response measures, particularly developing country Parties.
16. Parties, including regional economic integration organizations and their member States, that have reached an agreement to act jointly under paragraph 2 of this Article shall notify the secretariat of the terms of that agreement, including the emission level allocated to each Party within the relevant time period, when they communicate their nationally determined contributions. The secretariat shall in turn inform the Parties and signatories to the Convention of the terms of that agreement.
17. Each party to such an agreement shall be responsible for its emission level as set out in the agreement referred to in paragraph 16 of this Article in accordance with paragraphs 13 and 14 of this Article and Articles 13 and 15.

18. If Parties acting jointly do so in the framework of, and together with, a regional economic integration organization which is itself a Party to this Agreement, each member State of that regional economic integration organization individually, and together with the regional economic integration organization, shall be responsible for its emission level as set out in the agreement communicated under paragraph 16 of this Article in accordance with paragraphs 13 and 14 of this Article and Articles 13 and 15.

19. All Parties should strive to formulate and communicate long-term low greenhouse gas emission development strategies, mindful of Article 2 taking into account their common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.

Article 5

1. Parties should take action to conserve and enhance, as appropriate, sinks and reservoirs of greenhouse gases as referred to in Article 4, paragraph 1(d), of the Convention, including forests.

2. Parties are encouraged to take action to implement and support, including through results-based payments, the existing framework as set out in related guidance and decisions already agreed under the Convention for: policy approaches and positive incentives for activities relating to reducing emissions from deforestation and forest degradation, and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries; and alternative policy approaches, such as joint mitigation and adaptation approaches for the integral and sustainable management of forests, while reaffirming the importance of incentivizing, as appropriate, non-carbon benefits associated with such approaches.

Article 6

1. Parties recognize that some Parties choose to pursue voluntary cooperation in the implementation of their nationally determined contributions to allow for higher ambition in their mitigation and adaptation actions and to promote sustainable development and environmental integrity.

2. Parties shall, where engaging on a voluntary basis in cooperative approaches that involve the use of internationally transferred mitigation outcomes towards nationally determined contributions, promote sustainable development and ensure environmental integrity and transparency, including in governance, and shall apply robust accounting to ensure, inter alia, the avoidance of double counting, consistent with guidance adopted by the Conference of the Parties serving as the meeting of the Parties to this Agreement.

3. The use of internationally transferred mitigation outcomes to achieve nationally determined contributions under this Agreement shall be voluntary and authorized by participating Parties.

4. A mechanism to contribute to the mitigation of greenhouse gas emissions and support sustainable development is hereby established under the authority and guidance of the Conference of the Parties serving as the meeting of the Parties to this Agreement for use by Parties on a voluntary basis. It shall be supervised by a body designated by the Conference of the Parties serving as the meeting of the Parties to this Agreement, and shall aim:

- (a) To promote the mitigation of greenhouse gas emissions while fostering sustainable development;
- (b) To incentivize and facilitate participation in the mitigation of greenhouse gas emissions by public and private entities authorized by a Party;
- (c) To contribute to the reduction of emission levels in the host Party, which will benefit from mitigation activities resulting in emission reductions that can also be used by another Party to fulfil its nationally determined contribution; and
- (d) To deliver an overall mitigation in global emissions.

5. Emission reductions resulting from the mechanism referred to in paragraph 4 of this Article shall not be used to demonstrate achievement of the host Party's nationally determined contribution if used by another Party to demonstrate achievement of its nationally determined contribution.
6. The Conference of the Parties serving as the meeting of the Parties to this Agreement shall ensure that a share of the proceeds from activities under the mechanism referred to in paragraph 4 of this Article is used to cover administrative expenses as well as to assist developing country Parties that are particularly vulnerable to the adverse effects of climate change to meet the costs of adaptation.
7. The Conference of the Parties serving as the meeting of the Parties to this Agreement shall adopt rules, modalities and procedures for the mechanism referred to in paragraph 4 of this Article at its first session.
8. Parties recognize the importance of integrated, holistic and balanced non-market approaches being available to Parties to assist in the implementation of their nationally determined contributions, in the context of sustainable development and poverty eradication, in a coordinated and effective manner, including through, inter alia, mitigation, adaptation, finance, technology transfer and capacity-building, as appropriate. These approaches shall aim to:
 - (a) Promote mitigation and adaptation ambition;
 - (b) Enhance public and private sector participation in the implementation of nationally determined contributions; and
 - (c) Enable opportunities for coordination across instruments and relevant institutional arrangements.
9. A framework for non-market approaches to sustainable development is hereby defined to promote the non-market approaches referred to in paragraph 8 of this Article.

Article 7

1. Parties hereby establish the global goal on adaptation of enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change, with a view to contributing to sustainable development and ensuring an adequate adaptation response in the context of the temperature goal referred to in Article 2.
2. Parties recognize that adaptation is a global challenge faced by all with local, subnational, national, regional and international dimensions, and that it is a key component of and makes a contribution to the long-term global response to climate change to protect people, livelihoods and ecosystems, taking into account the urgent and immediate needs of those developing country Parties that are particularly vulnerable to the adverse effects of climate change.
3. The adaptation efforts of developing country Parties shall be recognized, in accordance with the modalities to be adopted by the Conference of the Parties serving as the meeting of the Parties to this Agreement at its first session.
4. Parties recognize that the current need for adaptation is significant and that greater levels of mitigation can reduce the need for additional adaptation efforts, and that greater adaptation needs can involve greater adaptation costs.
5. Parties acknowledge that adaptation action should follow a country-driven, gender-responsive, participatory and fully transparent approach, taking into consideration vulnerable groups, communities and ecosystems, and should be based on and guided by the best available science and, as appropriate, traditional knowledge, knowledge of indigenous peoples and local knowledge systems, with a view to integrating adaptation into relevant socioeconomic and environmental policies and actions, where appropriate.
6. Parties recognize the importance of support for and international cooperation on adaptation efforts and the importance of taking into account the needs of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change.

7. Parties should strengthen their cooperation on enhancing action on adaptation, taking into account the Cancun Adaptation Framework, including with regard to:

- (a) Sharing information, good practices, experiences and lessons learned, including, as appropriate, as these relate to science, planning, policies and implementation in relation to adaptation actions;
- (b) Strengthening institutional arrangements, including those under the Convention that serve this Agreement, to support the synthesis of relevant information and knowledge, and the provision of technical support and guidance to Parties;
- (c) Strengthening scientific knowledge on climate, including research, systematic observation of the climate system and early warning systems, in a manner that informs climate services and supports decision-making;
- (d) Assisting developing country Parties in identifying effective adaptation practices, adaptation needs, priorities, support provided and received for adaptation actions and efforts, and challenges and gaps, in a manner consistent with encouraging good practices; and
- (e) Improving the effectiveness and durability of adaptation actions.

8. United Nations specialized organizations and agencies are encouraged to support the efforts of Parties to implement the actions referred to in paragraph 7 of this Article, taking into account the provisions of paragraph 5 of this Article.

9. Each Party shall, as appropriate, engage in adaptation planning processes and the implementation of actions, including the development or enhancement of relevant plans, policies and/or contributions, which may include:

- (a) The implementation of adaptation actions, undertakings and/or efforts;
- (b) The process to formulate and implement national adaptation plans;
- (c) The assessment of climate change impacts and vulnerability, with a view to formulating nationally determined prioritized actions, taking into account vulnerable people, places and ecosystems;
- (d) Monitoring and evaluating and learning from adaptation plans, policies, programmes and actions; and
- (e) Building the resilience of socioeconomic and ecological systems, including through economic diversification and sustainable management of natural resources.

10. Each Party should, as appropriate, submit and update periodically an adaptation communication, which may include its priorities, implementation and support needs, plans and actions, without creating any additional burden for developing country Parties.

11. The adaptation communication referred to in paragraph 10 of this Article shall be, as appropriate, submitted and updated periodically, as a component of or in conjunction with other communications or documents, including a national adaptation plan, a nationally determined contribution as referred to in Article 4, paragraph 2, and/or a national communication.

12. The adaptation communications referred to in paragraph 10 of this Article shall be recorded in a public registry maintained by the secretariat.

13. Continuous and enhanced international support shall be provided to developing country Parties for the implementation of paragraphs 7, 9, 10 and 11 of this Article, in accordance with the provisions of Articles 9, 10 and 11.

14. The global stocktake referred to in Article 14 shall, inter alia:

- (a) Recognize adaptation efforts of developing country Parties;
- (b) Enhance the implementation of adaptation action taking into account the adaptation communication referred to in paragraph 10 of this Article;

- (c) Review the adequacy and effectiveness of adaptation and support provided for adaptation; and
- (d) Review the overall progress made in achieving the global goal on adaptation referred to in paragraph 1 of this Article.

Article 8

1. Parties recognize the importance of averting, minimizing and addressing loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onset events, and the role of sustainable development in reducing the risk of loss and damage.
2. The Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts shall be subject to the authority and guidance of the Conference of the Parties serving as the meeting of the Parties to this Agreement and may be enhanced and strengthened, as determined by the Conference of the Parties serving as the meeting of the Parties to this Agreement.
3. Parties should enhance understanding, action and support, including through the Warsaw International Mechanism, as appropriate, on a cooperative and facilitative basis with respect to loss and damage associated with the adverse effects of climate change.
4. Accordingly, areas of cooperation and facilitation to enhance understanding, action and support may include:
 - (a) Early warning systems;
 - (b) Emergency preparedness;
 - (c) Slow onset events;
 - (d) Events that may involve irreversible and permanent loss and damage;
 - (e) Comprehensive risk assessment and management;
 - (f) Risk insurance facilities, climate risk pooling and other insurance solutions;
 - (g) Non-economic losses; and
 - (h) Resilience of communities, livelihoods and ecosystems.
5. The Warsaw International Mechanism shall collaborate with existing bodies and expert groups under the Agreement, as well as relevant organizations and expert bodies outside the Agreement.

Article 9

1. Developed country Parties shall provide financial resources to assist developing country Parties with respect to both mitigation and adaptation in continuation of their existing obligations under the Convention.
2. Other Parties are encouraged to provide or continue to provide such support voluntarily.
3. As part of a global effort, developed country Parties should continue to take the lead in mobilizing climate finance from a wide variety of sources, instruments and channels, noting the significant role of public funds, through a variety of actions, including supporting country-driven strategies, and taking into account the needs and priorities of developing country Parties. Such mobilization of climate finance should represent a progression beyond previous efforts.
4. The provision of scaled-up financial resources should aim to achieve a balance between adaptation and mitigation, taking into account country-driven strategies, and the priorities and needs of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change and have significant capacity constraints, such as the least developed countries and small island developing States, considering the need for public and grant-based resources for adaptation.

5. Developed country Parties shall biennially communicate indicative quantitative and qualitative information related to paragraphs 1 and 3 of this Article, as applicable, including, as available, projected levels of public financial resources to be provided to developing country Parties. Other Parties providing resources are encouraged to communicate biennially such information on a voluntary basis.
6. The global stocktake referred to in Article 14 shall take into account the relevant information provided by developed country Parties and/or Agreement bodies on efforts related to climate finance.
7. Developed country Parties shall provide transparent and consistent information on support for developing country Parties provided and mobilized through public interventions biennially in accordance with the modalities, procedures and guidelines to be adopted by the Conference of the Parties serving as the meeting of the Parties to this Agreement, at its first session, as stipulated in Article 13, paragraph 13. Other Parties are encouraged to do so.
8. The Financial Mechanism of the Convention, including its operating entities, shall serve as the financial mechanism of this Agreement.
9. The institutions serving this Agreement, including the operating entities of the Financial Mechanism of the Convention, shall aim to ensure efficient access to financial resources through simplified approval procedures and enhanced readiness support for developing country Parties, in particular for the least developed countries and small island developing States, in the context of their national climate strategies and plans.

Article 10

1. Parties share a long-term vision on the importance of fully realizing technology development and transfer in order to improve resilience to climate change and to reduce greenhouse gas emissions.
2. Parties, noting the importance of technology for the implementation of mitigation and adaptation actions under this Agreement and recognizing existing technology deployment and dissemination efforts, shall strengthen cooperative action on technology development and transfer.
3. The Technology Mechanism established under the Convention shall serve this Agreement.
4. A technology framework is hereby established to provide overarching guidance to the work of the Technology Mechanism in promoting and facilitating enhanced action on technology development and transfer in order to support the implementation of this Agreement, in pursuit of the long-term vision referred to in paragraph 1 of this Article.
5. Accelerating, encouraging and enabling innovation is critical for an effective, longterm global response to climate change and promoting economic growth and sustainable development. Such effort shall be, as appropriate, supported, including by the Technology Mechanism and, through financial means, by the Financial Mechanism of the Convention, for collaborative approaches to research and development, and facilitating access to technology, in particular for early stages of the technology cycle, to developing country Parties.
6. Support, including financial support, shall be provided to developing country Parties for the implementation of this Article, including for strengthening cooperative action on technology development and transfer at different stages of the technology cycle, with a view to achieving a balance between support for mitigation and adaptation. The global stocktake referred to in Article 14 shall take into account available information on efforts related to support on technology development and transfer for developing country Parties.

Article 11

1. Capacity-building under this Agreement should enhance the capacity and ability of developing country Parties, in particular countries with the least capacity, such as the least developed countries, and those that are particularly vulnerable to the adverse effects of climate change, such as small island developing States, to take effective climate change action, including, inter alia, to implement adaptation and mitigation actions, and should facilitate technology

development, dissemination and deployment, access to climate finance, relevant aspects of education, training and public awareness, and the transparent, timely and accurate communication of information.

2. Capacity-building should be country-driven, based on and responsive to national needs, and foster country ownership of Parties, in particular, for developing country Parties, including at the national, subnational and local levels. Capacity-building should be guided by lessons learned, including those from capacity-building activities under the Convention, and should be an effective, iterative process that is participatory, cross-cutting and gender-responsive.

3. All Parties should cooperate to enhance the capacity of developing country Parties to implement this Agreement. Developed country Parties should enhance support for capacity-building actions in developing country Parties.

4. All Parties enhancing the capacity of developing country Parties to implement this Agreement, including through regional, bilateral and multilateral approaches, shall regularly communicate on these actions or measures on capacity-building. Developing country Parties should regularly communicate progress made on implementing capacity-building plans, policies, actions or measures to implement this Agreement.

5. Capacity-building activities shall be enhanced through appropriate institutional arrangements to support the implementation of this Agreement, including the appropriate institutional arrangements established under the Convention that serve this Agreement. The Conference of the Parties serving as the meeting of the Parties to this Agreement shall, at its first session, consider and adopt a decision on the initial institutional arrangements for capacity-building.

Article 12

Parties shall cooperate in taking measures, as appropriate, to enhance climate change education, training, public awareness, public participation and public access to information, recognizing the importance of these steps with respect to enhancing actions under this Agreement.

Article 13

1. In order to build mutual trust and confidence and to promote effective implementation, an enhanced transparency framework for action and support, with built-in flexibility which takes into account Parties' different capacities and builds upon collective experience is hereby established.

2. The transparency framework shall provide flexibility in the implementation of the provisions of this Article to those developing country Parties that need it in the light of their capacities. The modalities, procedures and guidelines referred to in paragraph 13 of this Article shall reflect such flexibility.

3. The transparency framework shall build on and enhance the transparency arrangements under the Convention, recognizing the special circumstances of the least developed countries and small island developing States, and be implemented in a facilitative, non-intrusive, non-punitive manner, respectful of national sovereignty, and avoid placing undue burden on Parties.

4. The transparency arrangements under the Convention, including national communications, biennial reports and biennial update reports, international assessment and review and international consultation and analysis, shall form part of the experience drawn upon for the development of the modalities, procedures and guidelines under paragraph 13 of this Article.

5. The purpose of the framework for transparency of action is to provide a clear understanding of climate change action in the light of the objective of the Convention as set out in its Article 2, including clarity and tracking of progress towards achieving Parties' individual nationally determined contributions under Article 4, and Parties' adaptation actions under Article 7, including good practices, priorities, needs and gaps, to inform the global stocktake under Article 14.

6. The purpose of the framework for transparency of support is to provide clarity on support provided and received by relevant individual Parties in the context of climate change actions under Articles 4, 7, 9, 10 and 11, and, to the extent possible, to provide a full overview of aggregate financial support provided, to inform the global stocktake under Article 14.
7. Each Party shall regularly provide the following information:
 - (a) A national inventory report of anthropogenic emissions by sources and removals by sinks of greenhouse gases, prepared using good practice methodologies accepted by the Intergovernmental Panel on Climate Change and agreed upon by the Conference of the Parties serving as the meeting of the Parties to this Agreement; and
 - (b) Information necessary to track progress made in implementing and achieving its nationally determined contribution under Article 4.
8. Each Party should also provide information related to climate change impacts and adaptation under Article 7, as appropriate.
9. Developed country Parties shall, and other Parties that provide support should, provide information on financial, technology transfer and capacity-building support provided to developing country Parties under Articles 9, 10 and 11.
10. Developing country Parties should provide information on financial, technology transfer and capacity-building support needed and received under Articles 9, 10 and 11.
11. Information submitted by each Party under paragraphs 7 and 9 of this Article shall undergo a technical expert review, in accordance with decision 1/CP.21. For those developing country Parties that need it in the light of their capacities, the review process shall include assistance in identifying capacity-building needs. In addition, each Party shall participate in a facilitative, multilateral consideration of progress with respect to efforts under Article 9, and its respective implementation and achievement of its nationally determined contribution.
12. The technical expert review under this paragraph shall consist of a consideration of the Party's support provided, as relevant, and its implementation and achievement of its nationally determined contribution. The review shall also identify areas of improvement for the Party, and include a review of the consistency of the information with the modalities, procedures and guidelines referred to in paragraph 13 of this Article, taking into account the flexibility accorded to the Party under paragraph 2 of this Article. The review shall pay particular attention to the respective national capabilities and circumstances of developing country Parties.
13. The Conference of the Parties serving as the meeting of the Parties to this Agreement shall, at its first session, building on experience from the arrangements related to transparency under the Convention, and elaborating on the provisions in this Article, adopt common modalities, procedures and guidelines, as appropriate, for the transparency of action and support.
14. Support shall be provided to developing countries for the implementation of this Article.
15. Support shall also be provided for the building of transparency-related capacity of developing country Parties on a continuous basis.

Article 14

1. The Conference of the Parties serving as the meeting of the Parties to this Agreement shall periodically take stock of the implementation of this Agreement to assess the collective progress towards achieving the purpose of this Agreement and its long-term goals (referred to as the 'global stocktake'). It shall do so in a comprehensive and facilitative manner, considering mitigation, adaptation and the means of implementation and support, and in the light of equity and the best available science.

2. The Conference of the Parties serving as the meeting of the Parties to this Agreement shall undertake its first global stocktake in 2023 and every five years thereafter unless otherwise decided by the Conference of the Parties serving as the meeting of the Parties to this Agreement.

3. The outcome of the global stocktake shall inform Parties in updating and enhancing, in a nationally determined manner, their actions and support in accordance with the relevant provisions of this Agreement, as well as in enhancing international cooperation for climate action.

Article 15

1. A mechanism to facilitate implementation of and promote compliance with the provisions of this Agreement is hereby established.

2. The mechanism referred to in paragraph 1 of this Article shall consist of a committee that shall be expert-based and facilitative in nature and function in a manner that is transparent, non-adversarial and non-punitive. The committee shall pay particular attention to the respective national capabilities and circumstances of Parties.

3. The committee shall operate under the modalities and procedures adopted by the Conference of the Parties serving as the meeting of the Parties to this Agreement at its first session and report annually to the Conference of the Parties serving as the meeting of the Parties to this Agreement.

Article 16

1. The Conference of the Parties, the supreme body of the Convention, shall serve as the meeting of the Parties to this Agreement.

2. Parties to the Convention that are not Parties to this Agreement may participate as observers in the proceedings of any session of the Conference of the Parties serving as the meeting of the Parties to this Agreement. When the Conference of the Parties serves as the meeting of the Parties to this Agreement, decisions under this Agreement shall be taken only by those that are Parties to this Agreement.

3. When the Conference of the Parties serves as the meeting of the Parties to this Agreement, any member of the Bureau of the Conference of the Parties representing a Party to the Convention but, at that time, not a Party to this Agreement, shall be replaced by an additional member to be elected by and from amongst the Parties to this Agreement.

4. The Conference of the Parties serving as the meeting of the Parties to this Agreement shall keep under regular review the implementation of this Agreement and shall make, within its mandate, the decisions necessary to promote its effective implementation. It shall perform the functions assigned to it by this Agreement and shall:

(a) Establish such subsidiary bodies as deemed necessary for the implementation of this Agreement; and

(b) Exercise such other functions as may be required for the implementation of this Agreement.

5. The rules of procedure of the Conference of the Parties and the financial procedures applied under the Convention shall be applied *mutatis mutandis* under this Agreement, except as may be otherwise decided by consensus by the Conference of the Parties serving as the meeting of the Parties to this Agreement.

6. The first session of the Conference of the Parties serving as the meeting of the Parties to this Agreement shall be convened by the secretariat in conjunction with the first session of the Conference of the Parties that is scheduled after the date of entry into force of this Agreement. Subsequent ordinary sessions of the Conference of the Parties serving as the meeting of the Parties to this Agreement shall be held in conjunction with ordinary sessions of the Conference of the Parties, unless otherwise decided by the Conference of the Parties serving as the meeting of the Parties to this Agreement.

7. Extraordinary sessions of the Conference of the Parties serving as the meeting of the Parties to this Agreement shall be held at such other times as may be deemed necessary by the Conference of the Parties serving as the meeting of the Parties to this Agreement or at the written request of any Party, provided that, within six months of the request being communicated to the Parties by the secretariat, it is supported by at least one third of the Parties.

8. The United Nations and its specialized agencies and the International Atomic Energy Agency, as well as any State member thereof or observers thereto not party to the Convention, may be represented at sessions of the Conference of the Parties serving as the meeting of the Parties to this Agreement as observers. Any body or agency, whether national or international, governmental or non-governmental, which is qualified in matters covered by this Agreement and which has informed the secretariat of its wish to be represented at a session of the Conference of the Parties serving as the meeting of the Parties to this Agreement as an observer, may be so admitted unless at least one third of the Parties present object. The admission and participation of observers shall be subject to the rules of procedure referred to in paragraph 5 of this Article.

Article 17

1. The secretariat established by Article 8 of the Convention shall serve as the secretariat of this Agreement.
2. Article 8, paragraph 2, of the Convention on the functions of the secretariat, and Article 8, paragraph 3, of the Convention, on the arrangements made for the functioning of the secretariat, shall apply *mutatis mutandis* to this Agreement. The secretariat shall, in addition, exercise the functions assigned to it under this Agreement and by the Conference of the Parties serving as the meeting of the Parties to this Agreement.

Article 18

1. The Subsidiary Body for Scientific and Technological Advice and the Subsidiary Body for Implementation established by Articles 9 and 10 of the Convention shall serve, respectively, as the Subsidiary Body for Scientific and Technological Advice and the Subsidiary Body for Implementation of this Agreement. The provisions of the Convention relating to the functioning of these two bodies shall apply *mutatis mutandis* to this Agreement. Sessions of the meetings of the Subsidiary Body for Scientific and Technological Advice and the Subsidiary Body for Implementation of this Agreement shall be held in conjunction with the meetings of, respectively, the Subsidiary Body for Scientific and Technological Advice and the Subsidiary Body for Implementation of the Convention.
2. Parties to the Convention that are not Parties to this Agreement may participate as observers in the proceedings of any session of the subsidiary bodies. When the subsidiary bodies serve as the subsidiary bodies of this Agreement, decisions under this Agreement shall be taken only by those that are Parties to this Agreement.
3. When the subsidiary bodies established by Articles 9 and 10 of the Convention exercise their functions with regard to matters concerning this Agreement, any member of the bureaux of those subsidiary bodies representing a Party to the Convention but, at that time, not a Party to this Agreement, shall be replaced by an additional member to be elected by and from amongst the Parties to this Agreement.

Article 19

1. Subsidiary bodies or other institutional arrangements established by or under the Convention, other than those referred to in this Agreement, shall serve this Agreement upon a decision of the Conference of the Parties serving as the meeting of the Parties to this Agreement. The Conference of the Parties serving as the meeting of the Parties to this Agreement shall specify the functions to be exercised by such subsidiary bodies or arrangements.
2. The Conference of the Parties serving as the meeting of the Parties to this Agreement may provide further guidance to such subsidiary bodies and institutional arrangements.

Article 20

1. This Agreement shall be open for signature and subject to ratification, acceptance or approval by States and regional economic integration organizations that are Parties to the Convention. It shall be open for signature at the United Nations Headquarters in New York from 22 April 2016 to 21 April 2017. Thereafter, this Agreement shall be open for accession from the day following the date on which it is closed for signature. Instruments of ratification, acceptance, approval or accession shall be deposited with the Depositary.

2. Any regional economic integration organization that becomes a Party to this Agreement without any of its member States being a Party shall be bound by all the obligations under this Agreement. In the case of regional economic integration organizations with one or more member States that are Parties to this Agreement, the organization and its member States shall decide on their respective responsibilities for the performance of their obligations under this Agreement. In such cases, the organization and the member States shall not be entitled to exercise rights under this Agreement concurrently.

3. In their instruments of ratification, acceptance, approval or accession, regional economic integration organizations shall declare the extent of their competence with respect to the matters governed by this Agreement. These organizations shall also inform the Depositary, who shall in turn inform the Parties, of any substantial modification in the extent of their competence.

Article 21

1. This Agreement shall enter into force on the thirtieth day after the date on which at least 55 Parties to the Convention accounting in total for at least an estimated 55 per cent of the total global greenhouse gas emissions have deposited their instruments of ratification, acceptance, approval or accession.

2. Solely for the limited purpose of paragraph 1 of this Article, 'total global greenhouse gas emissions' means the most up-to-date amount communicated on or before the date of adoption of this Agreement by the Parties to the Convention.

3. For each State or regional economic integration organization that ratifies, accepts or approves this Agreement or accedes thereto after the conditions set out in paragraph 1 of this Article for entry into force have been fulfilled, this Agreement shall enter into force on the thirtieth day after the date of deposit by such State or regional economic integration organization of its instrument of ratification, acceptance, approval or accession.

4. For the purposes of paragraph 1 of this Article, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by its member States.

Article 22

The provisions of Article 15 of the Convention on the adoption of amendments to the Convention shall apply *mutatis mutandis* to this Agreement.

Article 23

1. The provisions of Article 16 of the Convention on the adoption and amendment of annexes to the Convention shall apply *mutatis mutandis* to this Agreement.

2. Annexes to this Agreement shall form an integral part thereof and, unless otherwise expressly provided for, a reference to this Agreement constitutes at the same time a reference to any annexes thereto. Such annexes shall be restricted to lists, forms and any other material of a descriptive nature that is of a scientific, technical, procedural or administrative character.

Article 24

The provisions of Article 14 of the Convention on settlement of disputes shall apply *mutatis mutandis* to this Agreement.

Article 25

1. Each Party shall have one vote, except as provided for in paragraph 2 of this Article.

2. Regional economic integration organizations, in matters within their competence, shall exercise their right to vote with a number of votes equal to the number of their member States that are Parties to this Agreement. Such an organization shall not exercise its right to vote if any of its member States exercises its right, and vice versa.

Article 26

The Secretary-General of the United Nations shall be the Depositary of this Agreement.

Article 27

No reservations may be made to this Agreement.

Article 28

1. At any time after three years from the date on which this Agreement has entered into force for a Party, that Party may withdraw from this Agreement by giving written notification to the Depositary.
2. Any such withdrawal shall take effect upon expiry of one year from the date of receipt by the Depositary of the notification of withdrawal, or on such later date as may be specified in the notification of withdrawal.
3. Any Party that withdraws from the Convention shall be considered as also having withdrawn from this Agreement.

Article 29

The original of this Agreement, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary- General of the United Nations.

DONE at Paris this twelfth day of December two thousand and fifteen.

IN WITNESS WHEREOF, the undersigned, being duly authorized to that effect, have signed this Agreement.

Declaration by the Union made in accordance with Article 20(3) of the Paris Agreement

The following States are at present Members of the European Union: the Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Republic of Croatia, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland.

The European Union declares that, in accordance with the Treaty on the Functioning of the European Union, and in particular Article 191 and Article 192(1) thereof, it is competent to enter into international agreements, and to implement the obligations resulting therefrom, which contribute to the pursuit of the following objectives:

- preserving, protecting and improving the quality of the environment;
- protecting human health;
- prudent and rational utilisation of natural resources;
- promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

The European Union declares that the commitment contained in its intended nationally determined contribution submitted on 6 March 2015 will be fulfilled through joint action by the Union and its Member States within the respective competence of each.

The European Union will continue to provide information, on a regular basis on any substantial modifications in the extent of its competence, in accordance with Article 20(3) of the Agreement.

REGULATIONS

COMMISSION IMPLEMENTING REGULATION (EU) 2016/1842

of 14 October 2016

amending Regulation (EC) No 1235/2008 as regards the electronic certificate of inspection for imported organic products and certain other elements, and Regulation (EC) No 889/2008 as regards the requirements for preserved or processed organic products and the transmission of information

(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 834/2007 of 28 June 2007 on organic production and labelling of organic products and repealing Regulation (EEC) No 2092/91 ⁽¹⁾, and in particular Article 38 (a), (d) and (e) thereof,

Whereas:

- (1) Commission Regulation (EC) No 1235/2008 ⁽²⁾ lays down detailed rules for imports of organic products from third countries.
- (2) A period for the control bodies and control authorities to submit their request for recognition for the purpose of compliance in accordance with Article 32 of Regulation (EC) No 834/2007 is provided for in Regulation (EC) No 1235/2008. As the implementation of the provisions regarding the import of compliant products is still under assessment and the related guidelines, models, questionnaires and the necessary electronic transmission system are still under development, the deadline for the submission of requests by control bodies and control authorities should be extended.
- (3) Experience has shown diverging practices in Member States as regards the verification of the consignments of organic products prior to their release for free circulation into the Union. For the sake of consistent and effective controls, the types of checks necessary for the verification of the consignments should be clarified, in the light of the risk assessment to be carried out in accordance with Article 27(3) of Regulation (EC) No 834/2007. It is also appropriate to reword the definition of the authorities responsible for the verification of the consignments and the endorsement of the certificates of inspection in order to clarify that those authorities are a competent authority responsible for the organisation of official controls in the field of organic production and designated pursuant to Article 27(1) of Regulation (EC) No 834/2007.
- (4) Diverging practices by control bodies and control authorities have also been observed as regards the classification of products to be imported under the product categories referred to in Annexes III and IV to Regulation (EC) No 1235/2008. For a more uniform classification under those product categories certain definitions should therefore be laid down in the interest of clarity and legal certainty for operators, to ensure uniform implementation of the rules by the control bodies and control authorities, and to facilitate supervision by the competent authorities.
- (5) For product categories referring to unprocessed or processed, those terms should have the same meaning as in the definitions of processed and unprocessed products in Regulation (EC) No 852/2004 of the European Parliament and of the Council ⁽³⁾ with a view to simplification and consistency with the hygiene rules. However, it should be clarified that labelling and packaging operations are irrelevant for the qualification of the product as unprocessed or processed.
- (6) The two import schemes provided for in Article 33(2) and (3) of Regulation (EC) No 834/2007 are, in principle, mutually exclusive. If a third country is recognised as equivalent in accordance with Article 33(2) of Regulation

⁽¹⁾ OJ L 189, 20.7.2007, p. 1.

⁽²⁾ Commission Regulation (EC) No 1235/2008 of 8 December 2008 laying down detailed rules for implementation of Council Regulation (EC) No 834/2007 as regards the arrangements for imports of organic products from third countries (OJ L 334, 12.12.2008, p. 25).

⁽³⁾ Regulation (EC) No 852/2004 of the European Parliament and of the Council of 29 April 2004 on the hygiene of foodstuffs (OJ L 139, 30.4.2004, p. 1).

(EC) No 834/2007, there is no need to recognise a control authority or control body for that country in accordance with Article 33(3). As a consequence, Article 10(2)(b) of Regulation (EC) No 1235/2008 provides that a control authority or control body can only be recognised in accordance with Article 33(3) of Regulation (EC) No 834/2007 for a country that is not recognised in accordance with Article 33(2) of Regulation (EC) No 834/2007. However, in order to avoid any barrier to imports for organic products, it should be possible for control bodies or control authorities to be recognised for a recognised third country where the recognition of that third country does not cover the product to be imported. The existing derogation in Article 10(3) of Regulation (EC) No 1235/2008 should therefore be reworded to take into account the practice in place by referring to products rather than to the category of products.

- (7) On the basis of Regulation (EC) No 834/2007 products imported from a third country may be placed on the Union market as organic if they, in particular, are covered by a certificate of inspection issued by the competent authorities, control authorities or control bodies of a recognised third country or by a recognised control authority or control body.
- (8) In accordance with Action 12 of the Action Plan for the Future of Organic Production in the European Union ⁽¹⁾ the Commission has developed a system of electronic certification for imports of organic products, as a module integrated into the electronic Trade Control and Expert System (TRACES) provided for in Commission Decision 2003/24/EC ⁽²⁾.
- (9) Certain provisions of Regulation (EC) No 1235/2008 need to be amended in order to introduce the electronic certification system and to ensure the proper functioning of that system. Therefore, the rules for the release for free circulation by the relevant Member State's customs authority and the workflow for the issuing and endorsing of the certificate of inspection, including the verification of the link between the certificate of inspection and the customs declaration, should be clarified. In this context, the workflow for the issue and endorsement of the certificate of inspection under special customs procedures should also be clarified. For the proper functioning of the electronic system, it is appropriate to refer to email addresses of recognised control bodies and control authorities.
- (10) In order to ensure the integrity of the organic products imported into the Union, it is necessary to clarify that, as a general rule, the control body or control authority issuing the certificate of inspection is the control body or authority certifying the producer or the processor of the product. In case the operator carrying out the last operation for the purposes of preparation as defined in Article 2(i) of Regulation (EC) No 834/2007 is different from the original producer or processor of the product, the certificate of inspection should be issued by the control body or control authority having checked the last operation. Furthermore, it is necessary to clarify that control bodies or control authorities listed in Annex III to Regulation (EC) No 1235/2008 may only issue certificates of inspection according to the terms of their recognition, while those listed in Annex IV to that Regulation may only issue certificates of inspections for the products and origins for which they are listed for.
- (11) Experience has shown diverging practices as regards checks to be carried out by the control body or control authority issuing the certificate of inspection. Therefore, it is necessary to specify the checks to be carried out prior to issuing the certificate. Control bodies or control authorities should only issue the certificate of inspection after full documentary checks and, as appropriate according to their risk assessment, physical checks of the products concerned. For processed agricultural products, control bodies and control authorities listed in Annex III to Regulation (EC) No 1235/2008 should check that all their ingredients have been submitted to a control system in accordance with the terms of recognition of the relevant third country, while control bodies and control authorities listed in Annex IV to that Regulation should check that ingredients have been controlled and certified by control bodies or control authorities recognised in accordance with Union legislation or produced in the Union. Similarly it is necessary to specify the checks to be carried out by control bodies or control authorities listed in Annex IV to Regulation (EC) No 1235/2008 that certify operators in the final stages of the production chain, such as those only carrying out labelling or packaging operations. In such cases, it should be verified that the products concerned have been controlled and certified by control bodies or control authorities listed in that Annex and recognised for the relevant country and product category.
- (12) The authorities responsible for granting and updating the rights to access TRACES for the purpose of electronic certification of inspection should be identified. In addition, rules should be laid down to ensure that TRACES guarantees the authenticity, integrity and legibility over time of the information and the associated metadata throughout the period for which they are required to be kept.

⁽¹⁾ COM(2014) 179 final.

⁽²⁾ Commission Decision 2003/24/EC of 30 December 2002 concerning the development of an integrated computerised veterinary system (OJ L 8, 14.1.2003, p. 44).

- (13) Provision should also be made for an effective and efficient exchange of information between Member States' authorities in cases of irregularities detected, in particular where products are labelled as organic, but are not accompanied by a certificate of inspection.
- (14) As the last import authorisations issued by Member States expired on 30 June 2015, any reference to import authorisations should be deleted from Regulation (EC) No 1235/2008.
- (15) Operators and Member States should have time to adapt their procedures to the electronic certificate of inspection provided by TRACES. Therefore it is necessary to provide for a transitional period in which the issue and endorsement of the certificate of inspection in paper form is still possible.
- (16) For the sake of ensuring the proper functioning of the electronic certificate of inspection, and in particular to clarify that in-conversion products are excluded from the recognitions granted to third countries, to harmonise the wording regarding the origin of products coming from recognised third countries and to change product category C to cover algae, including micro-algae, it is appropriate to amend certain elements of Annexes III and IV to Regulation (EC) No 1235/2008 without changing the scope of the recognitions previously granted to third countries or to control bodies and control authorities.
- (17) According to the information provided by the United States, the treatment with antibiotics of apples and pears to control fire blight is not allowed in that third country since October 2014. Therefore, it is justified to remove the relevant limitation for product categories A and D from Annex III to Regulation (EC) No 1235/2008.
- (18) In the light of the experience gained with the implementation of the equivalence system, it is necessary to adapt the model of the certificate of inspection and extracts thereof as set out in Annexes V and VI to Regulation (EC) No 1235/2008, in order to provide information on the producer or processor of the product, as well as on the relevant country of origin, when different from the country of export of the product.
- (19) Commission Regulation (EC) No 889/2008 ⁽¹⁾ lays down detailed rules relating to organic production, labelling and control.
- (20) As the new definitions of 'processed' and 'unprocessed' inserted in Regulation (EC) No 1235/2008 would imply that some of the operations included in the definition of preparation in Article 2(i) of Regulation (EC) No 834/2007 are not to be considered as entailing processing, the rules set out in Article 26 of Regulation (EC) No 889/2008 for the production of processed food and feed would become unclear. Therefore, the rules on the precautionary measures to be taken to avoid the risk of contamination by unauthorised substances or products or mixtures or exchanges with non-organic products should be reworded to make clear that they apply, as appropriate, to operators carrying out preserving activities. For that purpose, it is also appropriate to include definitions of the terms 'preserving' and 'processing'.
- (21) The transmission of information on imported consignments in accordance with Regulation (EC) No 889/2008 should also be done through TRACES.
- (22) A proper functioning of the electronic certification system requires that the information to be notified by the Member States to the Commission on the competent authorities and control bodies or control authorities includes e-mails addresses and internet websites. It is appropriate to set a new ultimate date for the notification of that information.
- (23) Regulations (EC) No 1235/2008 and (EC) No 889/2008 should therefore be amended accordingly.
- (24) In order to ensure a smooth transition to the new electronic certification system, this Regulation should apply from a date which is six months after its publication. However, the amendment of product category C to cover algae, including micro-algae, should apply from the date of application of the relevant provision of Commission Implementing Regulation (EU) 2016/673 ⁽²⁾ amending Regulation (EC) No 889/2008 to allow the use of micro-algae for food.

⁽¹⁾ Commission Regulation (EC) No 889/2008 of 5 September 2008 laying down detailed rules for the implementation of Council Regulation (EC) No 834/2007 on organic production and labelling of organic products with regard to organic production, labelling and control (OJ L 250, 18.9.2008, p. 1).

⁽²⁾ Commission Implementing Regulation (EU) 2016/673 of 29 April 2016 amending Regulation (EC) No 889/2008 laying down detailed rules for the implementation of Council Regulation (EC) No 834/2007 on organic production and labelling of organic products with regard to organic production, labelling and control (OJ L 116, 30.4.2016, p. 8).

- (25) The measures provided for in this Regulation are in accordance with the opinion of the Committee on organic production,

HAS ADOPTED THIS REGULATION:

Article 1

Amendment of Regulation (EC) No 1235/2008

Regulation (EC) No 1235/2008 is amended as follows:

- (1) Article 2 is amended as follows:

- (a) points 5 and 6 are replaced by the following:

‘5. “verification of the consignment” means the verification carried out by the relevant Member State’s competent authority, in the framework of the official controls provided for in Regulation (EC) No 882/2004 of the European Parliament and of the Council (*), of the fulfilment of the requirements of Regulation (EC) No 834/2007, of Regulation (EC) No 889/2008 and of this Regulation through systematic documentary checks, random identity checks and, as appropriate according to its risk assessment, physical checks, prior to the release of the consignment for free circulation into the Union in accordance with Article 13 of this Regulation;

6. “relevant Member State’s competent authority”: means the customs authority, food safety authority or other authorities designated by the Member States pursuant to Article 27(1) of Regulation (EC) No 834/2007 responsible for the verification of the consignments and the endorsement of the certificates of inspection;

(*) Regulation (EC) No 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules (OJ L 165, 30.4.2004, p. 1).;

- (b) the following points 8 to 11 are added:

‘8. “aquaculture products”: means aquaculture products as defined in point 34 of Article 4(1) of Regulation (EU) No 1380/2013 of the European Parliament and of the Council (*);

9. “unprocessed”: means unprocessed as used in the definition of unprocessed products in point (n) of Article 2(1) of Regulation (EC) No 852/2004 of the European Parliament and of the Council (**), irrespective of packaging or labelling operations;

10. “processed”: means processed as used in the definition of processed products in point (o) of Article 2(1) of Regulation (EC) No 852/2004, irrespective of packaging or labelling operations;

11. “point of entry”: means the point of release for free circulation.

(*) Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC (OJ L 354, 28.12.2013, p. 22).

(**) Regulation (EC) No 852/2004 of the European Parliament and of the Council of 29 April 2004 on the hygiene of foodstuffs (OJ L 139, 30.4.2004, p. 1).;

- (2) in Article 4, paragraph 1 is replaced by the following:

‘1. The Commission shall consider whether to recognise and include a control body or control authority in the list provided for in Article 3 upon receipt of a request thereto from the representative of the control body or control authority concerned on the basis of the model of application made available by the Commission in accordance with Article 17(2). Only complete requests that have been received before 31 October 2017 shall be taken into account for the drawing up of the first list.’;

(3) in Article 7(2), points (e) and (f) are replaced by the following:

- '(e) the name, address, email address, internet address and code number of the control authority or authorities and the control body or bodies recognised by the competent authority referred to in point (d) to carry out controls;
- (f) the name, address, email address, internet address and code number of the authority or authorities and the control body or bodies responsible in the third country for issuing certificates with a view to importing into the Union;';

(4) in Article 9(1), point (a) is replaced by the following:

- '(a) if, after a third country has been included in the list, any changes are made to the measures in force in the third country or their implementation and in particular to its control system, that third country shall notify the Commission thereof without delay; any changes made to the information referred to in points (d), (e) and (f) of Article 7(2) shall be notified to the Commission without delay via the computer system referred to in Article 94(1) of Regulation (EC) No 889/2008;';

(5) in Article 10, paragraph 3 is replaced by the following:

- '3. By way of derogation from paragraph 2(b), those products originating from a recognised third country listed in accordance with Article 7, but not covered by the recognition granted to that third country, may be included in the list provided for in this Article.';

(6) Article 13 is replaced by the following:

'Article 13

Certificate of inspection

1. The release for free circulation in the Union of a consignment of products referred to in Article 1(2) of Regulation (EC) No 834/2007 and imported in accordance with Article 33 of that Regulation shall be conditional on:

- (a) the submission of an original certificate of inspection to the relevant Member State's competent authority;
- (b) the verification of the consignment and the endorsement of the certificate of inspection by the relevant Member State's competent authority; and
- (c) the indication of the number of the certificate of inspection in the customs declaration for release for free circulation as referred to in Article 158(1) of Regulation (EU) No 952/2013 of the European Parliament and of the Council (*).

The verification of the consignment and the endorsement of the certificate of inspection shall be carried out by the relevant Member State's competent authority in that Member State where the consignment is released for free circulation in the Union.

Member States shall designate the points of entry in their territory and inform the Commission of the designated points of entry.

2. The certificate of inspection shall be issued by the relevant control authority or control body, endorsed by the relevant Member State's competent authority and completed by the first consignee on the basis of the model and the notes set out in Annex V and using the electronic Trade Control and Expert System (TRACES) established by Commission Decision 2003/24/EC (**).

The original certificate of inspection shall be a printed and hand-signed copy of the completed electronic certificate in TRACES or, alternatively, a certificate of inspection signed in TRACES with an advanced electronic signature within the meaning of Article 3(11) of Regulation (EU) No 910/2014 of the European Parliament and of the Council (***) or with an electronic signature offering equivalent assurances with regard to the functionalities attributed to a signature by applying the same rules and conditions as those laid down in the Commission's provisions on electronic and digitised documents, set out in the Annex to Commission Decision 2004/563/EC, Euratom (****).

When the original certificate of inspection is a printed and hand-signed copy of the completed electronic certificate in TRACES, control authorities, control bodies, relevant Member State's competent authorities and the first consignee shall verify at each stage of issuing, endorsement and reception of the certificate of inspection that this copy corresponds to the information indicated in TRACES.

3. To be accepted for endorsement, the certificate of inspection shall have been issued by the control authority or control body of the producer or the processor of the product concerned or, where the operator carrying out the last operation for the purposes of preparation is different from the producer or processor of the product, by the control authority or control body of the operator carrying out the last operation for the purposes of preparation as defined in Article 2(i) of Regulation (EC) No 834/2007.

That control authority or control body shall be:

- (a) a control authority or control body listed in Annex III to this Regulation for the products concerned and for the third country in which the products have their origin, or, where applicable, in which the last operation for the purposes of preparation has been carried out; or
- (b) a control authority or control body listed in Annex IV to this Regulation for the products concerned and for the third country in which the products have their origin or in which the last operation for the purposes of preparation has been carried out.

4. The control authority or control body issuing the certificate of inspection shall only issue the certificate of inspection and sign the declaration in box 18 of the certificate after it has carried out a documentary check on the basis of all relevant inspection documents, including in particular the production plan for the product concerned, transport documents and commercial documents and, as appropriate according to its risk assessment, it has carried out a physical check of the consignment.

However, for processed products, if the control authority or control body issuing the certificate of inspection is a control authority or control body listed in Annex III, it shall only issue the certificate of inspection and sign the declaration in box 18 of the certificate after it has verified that all organic ingredients of the product have been controlled and certified by a control authority or control body recognised by the third country concerned listed in that Annex, or if the issuing control authority or control body is a control authority or control body listed in Annex IV, it shall only issue the certificate of inspection and sign the declaration in box 18 of the certificate after it has verified that all organic ingredients of such products have been controlled and certified by a control authority or control body listed in Annex III or IV or have been produced and certified in the Union in accordance with Regulation (EC) No 834/2007.

Where the operator carrying out the last operation for the purposes of preparation is different from the producer or processor of the product, the control authority or control body issuing the certificate of inspection and listed in Annex IV shall only issue the certificate of inspection and sign the declaration in box 18 of the certificate after it has carried out a documentary check on the basis of all relevant inspection documents, including transport documents and commercial documents, it has verified that the production or the processing of the product concerned has been controlled and certified by a control body or control authority recognised for the products concerned and the country concerned in accordance with Article 33(3) of Regulation (EC) No 834/2007 and it has carried out, as appropriate according to its risk assessment, a physical check of the consignment.

At the request of the Commission or of the competent authority of a Member State, the control authority or control body issuing the certificate of inspection in accordance with the second and third subparagraphs shall make available without delay the list of all operators in the organic production chain and the control authorities or control bodies under whose control those operators have placed their operations.

5. The certificate of inspection shall be made in one single original.

The first consignee or, where relevant, the importer may make a copy of the certificate of inspection for the purpose of informing the control authorities and control bodies in accordance with Article 83 of Regulation (EC) No 889/2008. Any such copy shall carry the indication "COPY" printed or stamped thereon.

6. At the verification of a consignment, the relevant Member State's competent authority shall endorse the original certificate of inspection in box 20 and shall return it to the person who submitted the certificate.

7. The first consignee shall, at the reception of the consignment, complete box 21 of the certificate of inspection, to certify that the reception of the consignment has been carried out in accordance with Article 34 of Regulation (EC) No 889/2008.

The first consignee shall then send the original of the certificate to the importer mentioned in box 11 of the certificate for the purposes of the second subparagraph of Article 33(1) of Regulation (EC) No 834/2007.

- (*) Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (OJ L 269, 10.10.2013, p. 1).
- (**) Commission Decision 2003/24/EC of 30 December 2002 concerning the development of an integrated computerised veterinary system (OJ L 8, 14.1.2003, p. 44).
- (***) Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC (OJ L 257, 28.8.2014, p. 73).
- (****) Commission Decision 2004/563/EC, Euratom of 7 July 2004 amending its Rules of Procedure (OJ L 251, 27.7.2004, p. 9).;

(7) the following Articles 13a to 13d are inserted:

Article 13a

Force majeure or exceptional circumstances

1. In cases of *force majeure* or exceptional circumstances preventing the electronic system from working, and in particular of malfunctioning of the system or a lack of a lasting connection, certificates of inspection and their extracts may be issued and endorsed pursuant to Article 13(3) to (7) without using TRACES in accordance with paragraphs 2, 3 and 4 of this Article, and on the basis of the models and the notes set out in Annex V or VI. The competent authorities, control authorities, control bodies and operators shall inform the Commission without delay and shall insert in TRACES all the necessary details within ten calendar days following the re-establishment of the system.

2. When the certificate of inspection is issued without using TRACES, it shall be drawn up in one of the official languages of the Union and filled in, except for the stamps and signatures, either entirely in capital letters or entirely in typescript.

The certificate of inspection shall be in the official language or one of the official languages of the Member State of clearance. Where necessary, the relevant Member State's competent authorities may request a translation of the certificate of inspection into its official language or one of its official languages.

Uncertified alterations or erasures shall invalidate the certificate.

3. The control authority or control body issuing the certificate of inspection shall give a serial number to each issued certificate and keep a register of the issued certificates in chronological order and make the correspondence afterward with the serial number given by TRACES.

4. Where the certificate of inspection is issued and endorsed without using TRACES, the second and third subparagraphs of Article 15(1) and Article 15(5) shall not apply.

Article 13b

Importer

The importer shall indicate the number of the certificate of inspection in the customs declaration for release for free circulation as referred to in Article 158(1) of Regulation (EU) No 952/2013.

Article 13c

Access rights

The Commission shall be in charge of granting and updating access rights to TRACES of the competent authorities as defined in Article 2(n) of Regulation (EC) No 834/2007, of competent authorities of third countries recognised in accordance with Article 33(2) of that Regulation and of control authorities and control bodies listed in Annex III or IV to this Regulation. Before granting access rights to TRACES, the Commission shall verify the identity of the competent authorities, control authorities and control bodies concerned.

The competent authorities as defined in Article 2(n) of Regulation (EC) No 834/2007 shall be in charge of granting and updating access rights to TRACES of operators, control authorities and control bodies in the Union. Before granting access rights to TRACES, the competent authorities shall verify the identity of the operators, control authorities and control bodies concerned. Member States shall designate a single authority responsible to coordinate the cooperation and the contacts with the Commission in this area.

The competent authorities shall communicate the granted access rights to the Commission. The Commission shall activate those access rights in TRACES.

Article 13d

Integrity and legibility of information

TRACES shall protect the integrity of the information encoded in accordance with this Regulation.

In particular, it shall offer the following guarantees:

- (a) it shall allow each user to be unequivocally identified and shall incorporate effective control measures of access rights in order to protect against illegal, malicious or unauthorised access, deletion, alteration or movement of the information, files and metadata;
- (b) it shall be equipped with physical protection systems against intrusions and environmental incidents and software protection against cyber-attacks;
- (c) it shall safeguard stored data in an environment which is secure in both physical and software terms;
- (d) it shall prevent, by various means, any unauthorised changes and incorporate integrity mechanisms to check if the information has been altered over time;
- (e) it shall keep an audit trail for each essential stage of the procedure;
- (f) it shall provide reliable format conversion and migration procedures in order to guarantee that the information is legible and accessible throughout the entire storage period required;
- (g) it shall have sufficiently detailed and up-to-date functional and technical documentation on the operation and characteristics of the system, that documentation being accessible at all times to the organisational entities responsible for the functional and/or technical specifications.;

(8) Article 14 is amended as follows:

(a) Paragraph 1 is replaced by the following:

'1. Where a consignment coming from a third country is placed under customs warehousing or inward processing as provided for in Regulation (EU) No 952/2013, and subject to one or more preparations as referred to in the second subparagraph, the relevant Member State's competent authority shall carry out the verification of the consignment as referred to in point (b) of the first subparagraph of Article 13(1) of this Regulation before the first preparation is carried out. The reference number of the customs declaration by which the goods have been declared for customs warehousing or for inward processing procedure shall be indicated in box 19 of the certificate of inspection.

The preparation shall be limited to the following types of operations:

- (a) packaging or repackaging; or
- (b) labelling concerning the presentation of the organic production method.

After this preparation, the consignment shall be subject, before the release for free circulation, to the measures referred to in Article 13(1) of this Regulation.

After this procedure, the original of the certificate of inspection shall, where relevant, be returned to the importer of the consignment, referred to in box 11 of the certificate for the purposes of the second subparagraph of Article 33(1) of Regulation (EC) No 834/2007.'

(b) Paragraph 2 is amended as follows:

(i) the second subparagraph is replaced by the following:

'For each of the batches which results from the splitting, the importer mentioned in box 11 of the certificate of inspection shall submit an extract of the certificate of inspection through TRACES to the relevant Member State's competent authority, in accordance with the model and the notes set out in Annex VI. After verification of the batch, the relevant Member State's competent authority shall endorse the extract of the certificate of inspection in box 13 for the purpose of the release for free circulation. The verification of the batch and the endorsement of the extract of the certificate of inspection shall be carried out by the relevant Member State's competent authority in that Member State where the batch is released for free circulation in the Union.';

(ii) the fourth subparagraph is deleted;

(9) Article 15 is amended as follows:

(a) in paragraph 1, the following second and third subparagraphs are added:

'When the verification of a consignment by a relevant Member State's competent authority leads to the detection of an infringement or an irregularity that leads to the refusal of the endorsement of the certificate and of the release for free circulation of products, that authority shall without delay notify that infringement or irregularity to the Commission and to the other Member States through TRACES.

Member States shall ensure effective and efficient coordination amongst competent authorities performing official controls with a view to exchanging without delay information on the detection of consignments of products referred to in Article 1(2) of Regulation (EC) No 834/2007 bearing terms referring to the organic production method, but not declared as intended to be imported in accordance with Regulation (EC) No 834/2007. The relevant Member State's competent authority shall without delay notify the Commission and the other Member States of those findings through TRACES.'

(b) the following paragraph 5 is added:

'5. The importer, the first consignee or their control authority or control body shall send the information on infringements or irregularities as regards imported products to the competent authorities of the Member States concerned via the computer system referred to in Article 94(1) of Regulation (EC) No 889/2008 through TRACES.';

(10) in Article 17, paragraph 3 is replaced by the following:

'3. The computer system provided for in paragraph 1 shall be able to collect the requests, documents and information referred to in this Regulation where appropriate.';

(11) in Article 18, the second paragraph is replaced by the following:

'The first list of recognised countries shall include Argentina, Australia, Costa Rica, India, Israel (*), New Zealand and Switzerland. It shall not contain the code numbers referred to in Article 7(2)(f) of this Regulation. These code numbers shall be added before 1 July 2010 by updating the list in accordance with Article 17(2).

(*). Hereafter understood as the State of Israel, excluding the territories under Israeli administration since June 1967, namely the Golan Heights, the Gaza Strip, East Jerusalem and the rest of the West Bank.';

(12) Article 19 is deleted;

(13) the following Article 19a is inserted:

'Article 19a

Transitional rules on the use of certificates of inspection not issued in TRACES

Until 19 October 2017 certificates of inspection as referred to in Article 13(1)(a) and their extracts as referred to in Article 14(2) may be issued and endorsed pursuant to Article 13(3) to (7) without using TRACES in accordance with Article 13a(1), (2) and (3) and on the basis of the models and the notes set out in Annex V or VI.';

- (14) Annex III is amended in accordance with Annex I to this Regulation;
- (15) in Annex IV, in the list of product categories, 'C: Aquaculture products and seaweeds' is replaced by 'C: Unprocessed aquaculture products and algae';
- (16) Annex V is replaced by the text set out in Annex II to this Regulation;
- (17) Annex VI is replaced by the text set out in Annex III to this Regulation.

Article 2

Amendment of Regulation (EC) No 889/2008

Regulation (EC) No 889/2008 is amended as follows:

- (1) in Article 2, the following points (t) and (u) are added:

(t) "preserving" means any action, different from farming and harvesting, that is carried out on products, but which does not qualify as processing as defined in point (u), including all actions referred to in point (n) of Article 2(1) of Regulation (EC) No 852/2004 of the European Parliament and of the Council (*) and excluding packaging or labelling of the product;

(u) "processing" means any action referred to in point (m) of Article 2(1) of Regulation (EC) No 852/2004, including the use of substances referred to in Article 19(2)(b) of Regulation (EC) No 834/2007. Packaging or labelling operations shall not be considered as processing.

(*) Regulation (EC) No 852/2004 of the European Parliament and of the Council of 29 April 2004 on the hygiene of foodstuffs (OJ L 139, 30.4.2004, p. 1).;

- (2) the title of Title II is replaced by the following:

TITLE II

RULES ON PRODUCTION, PRESERVATION, PROCESSING, PACKAGING, TRANSPORT AND STORAGE OF ORGANIC PRODUCTS;

- (3) the title of Chapter 3 of Title II is replaced by the following:

CHAPTER 3

Preserved and processed products;

- (4) Article 26 is replaced by the following:

Article 26

Rules for preserving products and for the production of processed feed and food

1. Operators preserving products or producing processed feed or food shall establish and update appropriate procedures based on a systematic identification of critical processing steps.

The application of those procedures shall guarantee at all times that preserved or processed products comply with the organic production rules.

2. Operators shall comply with and implement the procedures referred to in paragraph 1. In particular, operators shall:

- (a) take precautionary measures to avoid the risk of contamination by unauthorised substances or products;

- (b) implement suitable cleaning measures, monitor their effectiveness and record those measures;
- (c) guarantee that non-organic products are not placed on the market with an indication referring to the organic production method.

3. Where non-organic products are also prepared or stored in the preparation unit concerned, the operator shall:

- (a) carry out the operations continuously until the complete run has been dealt with, separated by place or time from similar operations carried out on non-organic products;
- (b) store organic products, before and after the operations, separate by place or time from non-organic products;
- (c) inform the control authority or control body of the operations referred to in points (a) and (b) and keep available an updated register of all operations and quantities processed;
- (d) take the necessary measures to ensure identification of lots and to avoid mixtures or exchanges with non-organic products;
- (e) carry out operations on organic products only after suitable cleaning of the production equipment.

4. Additives, processing aids and other substances and ingredients used for processing feed or food and any processing practice applied, such as smoking, shall respect the principles of good manufacturing practice.;

(5) in Article 84, the following third paragraph is added:

‘The importer shall transmit the information referred to in the first and second paragraphs by using the electronic Trade Control and Expert System (TRACES) established by Commission Decision 2003/24/EC (*).

(*) Commission Decision 2003/24/EC of 30 December 2002 concerning the development of an integrated computerised veterinary system (OJ L 8, 14.1.2003, p. 44).;

(6) Article 94(1) is amended as follows:

(a) points (a) and (b) are replaced by the following:

- ‘(a) by 30 June 2017, the information referred to in Article 35(a) of Regulation (EC) No 834/2007, including email address and internet address, and afterwards any changes thereto;
- (b) by 30 June 2017, the information referred to in Article 35(b) of Regulation (EC) No 834/2007, including address, email address and internet address, and afterwards any changes thereto;’;

(b) the following point (e) is added:

- ‘(e) by 30 June 2017, the name, address, email address and internet address of the relevant Member State’s competent authorities as defined in point (6) of Article 2 of Regulation (EC) No 1235/2008, and afterwards any changes thereto.’.

Article 3

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

It shall apply from 19 April 2017. However, point (2) of Article 1 shall apply from the date of entry into force of this Regulation and point (15) of Article 1 shall apply from 7 May 2017.

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

Done at Brussels, 14 October 2016.

For the Commission

The President

Jean-Claude JUNCKER

ANNEX I

Annex III to Regulation (EC) No 1235/2008 is amended as follows:

- (1) after the heading '**LIST OF THIRD COUNTRIES AND RELEVANT SPECIFICATIONS REFERRED TO IN ARTICLE 7**' the following Note is inserted:

'Note: According to Article 17(1)(f) of Regulation (EC) No 834/2007 animals and animal products produced during the conversion period shall not be marketed in the Union with the indications referred to in Articles 23 and 24 of that Regulation used in the labelling and advertising of products. Such products are therefore also excluded from the recognitions as regards product categories B and D for all third countries listed in this Annex.'

- (2) in the entries relating to Argentina, Australia, Costa-Rica, India, Israel, Japan, Switzerland, Tunisia and New Zealand, the footnote '(1) Seaweed not included' is deleted;

- (3) the entry relating to Argentina is amended as follows:

(a) in point 1, the limitations on product categories B and D are deleted;

(b) point 2 is replaced by the following:

'2. **Origin:** products of categories A, B and F that have been grown in Argentina and products of category D processed in Argentina with organically grown ingredients that have been grown in Argentina.'

- (4) in the entry relating to Australia, point 2 is replaced by the following:

'2. **Origin:** products of categories A and F that have been grown in Australia and products of category D processed in Australia with organically grown ingredients that have been grown in Australia.'

- (5) the entry relating to Costa-Rica is amended as follows:

(a) the limitation 'Processed crop products only' is replaced by 'Processed plant products only';

(b) point 2 is replaced by the following:

'2. **Origin:** products of categories A and F that have been grown in Costa-Rica and products of category D processed in Costa-Rica with organically grown ingredients that have been grown in Costa-Rica.'

- (6) in the entry relating to Israel, point 2 is replaced by the following:

'2. **Origin:** products of category A and F that have been grown in Israel and products of category D processed in Israel with organically grown ingredients that have been grown in Israel or that have been imported into Israel:

— either from the Union,

— or from a third country in the framework of a regime which is recognised as equivalent in accordance with Article 33(2) of Regulation (EC) No 834/2007.'

- (7) in the entry relating to Japan, point 2 is replaced by the following:

'2. **Origin:** products of categories A and F that have been grown in Japan and products of category D processed in Japan with organically grown ingredients that have been grown in Japan or that have been imported into Japan:

— either from the Union,

— or from a third country for which Japan has recognised that the products have been produced and controlled in that third country in accordance with rules equivalent to those laid down in the Japanese legislation.'

(8) the entry relating to Switzerland is amended as follows:

(a) in point 1, the limitation on product category B is deleted;

(b) point 2 is replaced by the following:

‘2. **Origin:** products of categories A and F that have been grown in Switzerland and products of category D and E processed in Switzerland with organically grown ingredients that have been grown in Switzerland or that have been imported into Switzerland:

— either from the Union,

— or from a third country for which Switzerland has recognised that the products have been produced and controlled in that third country in accordance with rules equivalent to those laid down in the Swiss legislation.’;

(9) in the entry relating to Tunisia, point 2 is replaced by the following:

‘2. **Origin:** products of categories A and F that have been grown in Tunisia and products of category D processed in Tunisia with organically grown ingredients that have been grown in Tunisia.’;

(10) in the entry relating to the United States, in point 1, the limitations on product categories A and D are deleted;

(11) the entry relating to New Zealand is amended as follows:

(a) in point 1, the limitations on product categories B and D are deleted;

(b) point 2 is replaced by the following:

‘2. **Origin:** products of category A, B and F that have been grown in New Zealand and products of category D processed in New Zealand with organically grown ingredients that have been grown in New Zealand or that have been imported into New Zealand:

— either from the Union,

— or from a third country in the framework of a regime which is recognised as equivalent in accordance with Article 33(2) of Regulation (EC) No 834/2007,

— or from a third country whose rules of production and inspection have been recognised as equivalent to the MAF Official Organic Assurance Programme on the basis of assurances and information provided by this country’s competent authority in accordance with the provisions established by MAF and provided that only organically produced ingredients intended to be incorporated, up to a maximum of 5 % of products of agricultural origin, in products of category D prepared in New Zealand are imported.’;

(12) in the entry relating to the Republic of Korea, point 2 is replaced by the following:

‘2. **Origin:** products of category D processed in the Republic of Korea with organically grown ingredients that have been grown in the Republic of Korea or that have been imported into the Republic of Korea:

— either from the Union,

— or from a third country for which the Republic of Korea has recognised that the products have been produced and controlled in that third country in accordance with the rules equivalent to those laid down in the legislation of the Republic of Korea.’.

ANNEX II

ANNEX V

**CERTIFICATE OF INSPECTION
FOR IMPORT OF PRODUCTS FROM ORGANIC PRODUCTION INTO THE EUROPEAN UNION**

1. Issuing control body or authority (name, address and code)	2. Council Regulation (EC) No 834/2007: — Article 33(2) <input type="checkbox"/> or — Article 33(3) <input type="checkbox"/>							
3. Serial number of the certificate of inspection	4. Exporter (name and address)							
5. Producer or processor of the product (name and address)	6. Control body or control authority (name, address and code)							
7. Country of origin	8. Country of export							
9. Country of clearance/Point of entry	10. Country of destination							
11. Importer (name, address and EORI number)	12. First consignee in the Union (name and address)							
13. Description of products <table border="0" style="width:100%"> <tr> <td style="text-align:left">CN code</td> <td style="text-align:left">Trade name</td> <td style="text-align:left">Number of packages</td> <td style="text-align:left">Lot number</td> <td style="text-align:left">Net weight</td> </tr> </table>				CN code	Trade name	Number of packages	Lot number	Net weight
CN code	Trade name	Number of packages	Lot number	Net weight				
14. Container number	15. Seal number	16. Total gross weight						
17. Means of transport before point of entry into the Union Mode Identification International transport document								

18. Declaration of control authority or control body issuing the certificate referred to in box 1

This is to certify that this certificate has been issued on the basis of the checks required under Article 13(4) of Regulation (EC) No 1235/2008 and that the products designated above have been obtained in accordance with rules of production and inspection of the organic production method which are considered equivalent in accordance with Regulation (EC) No 834/2007.

Date

Name and signature of authorised person

Stamp of issuing authority or body

19. Customs warehousing Inward processing

Name and address of operator:

Control body or control authority (name, address and code):

Customs Declaration Reference Number for customs warehousing or inward processing:

20. Verification of the consignment and endorsement by the relevant Member State's competent authority.

Authority and Member State:

Date:

Name and signature of authorised person

Stamp

21. Declaration of the first consignee.

This is to certify that the reception of the products has been carried out in accordance with Article 34 of Regulation (EC) No 889/2008.

Name of the company:

Date:

Name and signature of the authorised person

Notes

- Box 1: Name, address and code of control body or authority in the third country as referred to in Article 13(3) of Regulation (EC) No 1235/2008. This body also completes boxes 4 to 18.
- Box 2: This box indicates the provisions of Regulation (EC) No 834/2007 which are relevant for the issue and use of this certificate; indicate the relevant provision.
- Box 3: Serial number of the certificate automatically assigned by the electronic Trade Control and Expert System (TRACES) referred to in Article 13(2) of Regulation (EC) No 1235/2008, except where Article 13a(3) applies.
- Box 4: Name and address of the operator exporting the products from the country mentioned in box 8. The exporter is the operator performing the last operation for the purposes of preparation as defined in Article 2(i) of Regulation (EC) No 834/2007 on the products mentioned in box 13 and sealing the products in appropriate packaging or containers, pursuant to Article 34 of Regulation (EC) No 889/2008.
- Box 5: Operator(s) who produced or processed the products in the third country mentioned in box 7.
- Box 6: Control body(ies) or authority(ies) for monitoring compliance of the production or processing of the products with the rules of organic production in the country mentioned in box 7.
- Box 7: Country of origin means the country(ies) where the product has been produced/grown or processed.
- Box 8: Country of export means the country where the product has been subject to the last operation for the purposes of preparation as defined in Article 2(i) of Regulation (EC) No 834/2007 and sealed in appropriate packaging or containers.
- Box 9: Country of clearance means the country in which the consignment is released for free circulation into the European Union. Point of entry is the point of release for free circulation and is identified by the United Nations Code for Trade and Transport Locations (UN/LOCODE, five alphabetical characters).
- Box 10: Country of destination means the country of the first consignee in the European Union.
- Box 11: Name, address and the Economic Operators Registration and Identification number (EORI), as set out in Article 9 of Regulation (EU) No 952/2013, of the importer. The importer shall mean the natural or legal person within the European Union who presents the consignment for release for free circulation into the Union, either on its own, or through a representative.
- Box 12: Name and address of the first consignee of the consignment in the European Union. The first consignee shall mean the natural or legal person where the consignment is delivered and where it will be handled for further preparation and/or marketing. The first consignee shall also complete box 24.
- Box 13: Description of products that includes Combined Nomenclature codes for the products concerned (8-digit level where possible), trade name, number of packages (number of boxes, cartons, bags, buckets, etc.), lot number and net weight.
- Box 14: Optional
- Box 15: Optional
- Box 16: Total gross weight expressed in appropriate units (kg of net mass, litre, etc.).
- Box 17: Means of transport arriving at the point of entry.
Mode of transport: aeroplane, vessel, railways, road vehicle, other.
Identification of the means of transport: for aeroplane the flight number, for vessels the ship name(s), for railways the train identity and wagon number, for road transports the registration number plate with trailer number plate if appropriate.
In the case of ferry, indicate vessel and road vehicle with the identification of the road vehicle and of the scheduled ferry.
- Box 18: Declaration of control authority or control body issuing the certificate. The signature and the stamp must be in a colour different to that of the printing.
- Box 19: Shall be filled in by the relevant Member State's competent authority or by the importer.
- Box 20: Shall be completed by the relevant Member State's competent authority, if appropriate, before the preparation or splitting operation in the circumstances referred to in Article 14 of Regulation (EC) No 1235/2008 and at the verification of the consignment in accordance with Article 13(1).
- Box 21: Shall be filled in by the first consignee at the reception of the products, when he has carried out the checks provided for in Article 34 of Regulation (EC) No 889/2008.'
-

14. Declaration of the consignee of the batch

This is to certify that the reception of the batch has been carried out in accordance with Article 33 of Regulation (EC) No 889/2008.

Name of the company

Date:

Name and signature of the authorised person

Notes

Extract No: The extract number corresponds to the number of the batch obtained from the splitting of the original consignment.

Box 1: Name, address and code of control body or authority in the third country having issued the underlying certificate of inspection.

Box 2: This box indicates the provisions of Regulation (EC) No 834/2007 which are relevant for the issue and use of this extract; indicate the relevant provision under which the underlying consignment was imported, see box 2 of the underlying certificate of inspection.

Box 3: Serial number of the underlying certificate automatically assigned by the electronic Trade Control and Expert System (TRACES) referred to in Article 13(2) of Regulation (EC) No 1235/2008, except where Article 13a(3) applies.

Box 4: Operator that physically splits the original consignment into batches or the operator responsible for that operation.

Box 5: Control body or authority in charge of controlling the operator having split the consignment.

Boxes 6, 7 and 8: See relevant information on the underlying certificate of inspection.

Box 9: Country of clearance means the country in which the consignment is released for free circulation into the European Union. Point of entry is the point of release for free circulation and is identified by the United Nations Code for Trade and Transport Locations (UN/LOCODE, five alphabetical characters).

Box 10: Country of destination means the country of the first consignee in the European Union.

Box 11: Consignee of the batch (obtained from the splitting) in the European Union.

Box 12: Description of products that includes Combined Nomenclature codes for the products concerned (8-digit level where possible), number of packages (number of boxes, cartons, bags, buckets, etc.) and net weight expressed in appropriate units (kg of net mass, litre, etc.) and the net weight indicated in box 13 of the underlying certificate of inspection.

Box 13: Shall be completed by the relevant Member State's competent authority for each of the batches resulting from the splitting operation referred to in Article 14(2) of Regulation (EC) No 1235/2008.

Box 14: Shall be filled in at the reception of the batch, when the consignee has carried out the checks provided for in Article 33 of Regulation (EC) No 889/2008.'

COMMISSION IMPLEMENTING REGULATION (EU) 2016/1843**of 18 October 2016****on transitional measures for the application of Regulation (EC) No 882/2004 of the European Parliament and of the Council as regards the accreditation of official laboratories carrying out official testing for *Trichinella*****(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 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules ⁽¹⁾, and in particular the second subparagraph of 63(1) thereof,

Whereas:

- (1) Regulation (EC) No 882/2004 provides for significant changes to the rules and procedures for official controls. It applies from 1 January 2006. However, the application of a number of those rules and procedures with immediate effect from that date would have presented practical difficulties in certain cases.
- (2) Regulation (EC) No 882/2004 requires laboratories carrying out an analysis of samples taken during official controls to be accredited in accordance with certain European standards referred to therein. However, Commission Implementing Regulation (EU) No 702/2013 ⁽²⁾ lays down certain transitional measures, including a derogation from that requirement for laboratories in order to permit a smooth transition to the full implementation of the new rules and procedures. Implementing Regulation (EU) No 702/2013 applies until 31 December 2016.
- (3) The Report of 28 July 2009 from the Commission to the European Parliament and the Council on the experience gained from the application of the hygiene Regulations (EC) No 852/2004, (EC) No 853/2004 and (EC) No 854/2004 of the European Parliament and of the Council of 29 April 2004 ⁽³⁾ 'aims at presenting factually the experience gained, including the difficulties encountered, in 2006, 2007 and 2008 from the implementation of the hygiene package by all interested actors' ('the report').
- (4) The report includes experiences on the transitional measures, including those provided for in Regulation (EC) No 882/2004. The report indicates that difficulties continue to exist in relation to the accreditation of in-house slaughterhouse laboratories.
- (5) On 6 May 2013, the Commission adopted a proposal for a Regulation of the European Parliament and of the Council on official control and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health, plant reproductive material, plant protection products ⁽⁴⁾. That proposal provides for the repeal of Regulation (EC) No 882/2004 and provides for a possible derogation on accreditation of official laboratories whose sole activity is the detection of *Trichinella* in meat.
- (6) Accordingly, this Regulation should provide for further transitional measures pending the adoption of that new Regulation by the European Parliament and by the Council.
- (7) Provision should therefore be made for a further transitional period during which the relevant transitional measures currently laid down in Implementing Regulation (EU) No 702/2013 should continue to apply.

⁽¹⁾ OJ L 165, 30.4.2004, p. 1.⁽²⁾ Commission Implementing Regulation (EU) No 702/2013 of 22 July 2013 on transitional measures for the application of Regulation (EC) No 882/2004 of the European Parliament and of the Council as regards the accreditation of official laboratories carrying out official testing for *Trichinella* and amending Commission Regulation (EC) No 1162/2009 (OJ L 199, 24.7.2013, p. 3).⁽³⁾ COM(2009) 403 final.⁽⁴⁾ COM(2013) 265 final.

- (8) 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

This Regulation lays down transitional measures for the application of Regulation (EC) No 882/2004 for a transitional period from 1 January 2017 until 31 December 2020.

Article 2

By way of derogation from Article 12(2) of Regulation (EC) No 882/2004, the competent authority may designate a laboratory carrying out official testing for *Trichinella* and located in a slaughterhouse or a game handling establishment provided that, although not accredited in accordance with the European standard referred to in point (a) of that paragraph, the laboratory provides the competent authority with satisfactory guarantees that quality control schemes for the analyses of samples it conducts for the purpose of official controls are in place.

Article 3

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

It shall apply from 1 January 2017 to 31 December 2020.

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

Done at Brussels, 18 October 2016.

For the Commission
The President
Jean-Claude JUNCKER

COMMISSION IMPLEMENTING REGULATION (EU) 2016/1844**of 18 October 2016****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 Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 ⁽¹⁾,

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 ⁽²⁾, 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 multilateral trade negotiations, the criteria whereby the Commission fixes the standard values for imports from third countries, in respect of the products and periods stipulated in Annex 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, 18 October 2016.

For the Commission,
On behalf of the President,
Jerzy PLEWA

Director-General for Agriculture and Rural Development

⁽¹⁾ OJ L 347, 20.12.2013, p. 671.

⁽²⁾ 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 ⁽¹⁾	Standard import value
0702 00 00	MA	133,9
	ZZ	133,9
0707 00 05	TR	145,2
	ZZ	145,2
0709 93 10	TR	154,9
	ZZ	154,9
0805 50 10	AR	91,3
	CL	95,5
	TR	85,9
	UY	51,6
	ZA	73,6
	ZZ	79,6
	ZZ	79,6
0806 10 10	BR	278,4
	EG	169,2
	TR	151,7
	ZZ	199,8
0808 10 80	AR	191,8
	AU	196,9
	BR	124,9
	CL	154,2
	NZ	137,0
	ZA	117,5
	ZZ	153,7
	ZZ	153,7
0808 30 90	CN	75,0
	TR	134,9
	ZZ	105,0

⁽¹⁾ Nomenclature of countries laid down by Commission Regulation (EU) No 1106/2012 of 27 November 2012 implementing Regulation (EC) No 471/2009 of the European Parliament and of the Council on Community statistics relating to external trade with non-member countries, as regards the update of the nomenclature of countries and territories (OJ L 328, 28.11.2012, p. 7). Code 'ZZ' stands for 'of other origin'.

COMMISSION IMPLEMENTING REGULATION (EU) 2016/1845**of 18 October 2016****fixing the allocation coefficient to be applied to applications for aid for milk production reduction pursuant to Delegated Regulation (EU) 2016/1612**

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 ⁽¹⁾,Having regard to Commission Delegated Regulation (EU) 2016/1612 of 8 September 2016 providing aid for milk production reduction ⁽²⁾, and in particular Article 4(2) thereof,

Whereas:

- (1) Delegated Regulation (EU) 2016/1612 provides for aid to milk producers committing themselves to reduce their cow milk deliveries for a three month period. That aid is paid on the basis of aid applications. Where the aggregated volume covered by the admissible and plausible aid applications notified exceeds the total maximum volume referred to in Article 1(1) of that Regulation, Member States are to apply an allocation coefficient to the quantity covered by each aid application.
- (2) The quantities covered by the aid applications submitted for the period of, November 2016, December 2016 and January 2017 exceed the total maximum volume. Therefore, an allocation coefficient needs to be fixed.
- (3) For the swift implementation of Delegated Regulation (EU) 2016/1612, this Regulation should enter into force from the day after its publication,

HAS ADOPTED THIS REGULATION:

Article 1

The allocation coefficient to be applied to the quantities covered by aid applications for cow milk delivery reduction in November 2016, December 2016 and January 2017 pursuant to Delegated Regulation (EU) 2016/1612 shall be 0,12462762.

Article 2

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

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

Done at Brussels, 18 October 2016.

*For the Commission,
On behalf of the President,
Jerzy PLEWA*

Director-General for Agriculture and Rural Development

⁽¹⁾ OJ L 347, 20.12.2013, p. 671.

⁽²⁾ OJ L 242, 9.9.2016, p. 4.

DECISIONS

COMMISSION DECISION (EU) 2016/1846

of 4 July 2016

on the measure SA.41187 (2015/C) (ex 2015/NN) implemented by Hungary on the health contribution of tobacco industry businesses

(notified under document C(2016) 4049)

(Only the Hungarian text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

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

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

Whereas:

1. PROCEDURE

- (1) In March 2015, the Commission became aware of a new health contribution imposed by Hungary on tobacco industry businesses. By letter of 13 April 2015, the Commission sent an information request to Hungary on that measure, by which it also informed the Hungarian authorities that it would consider issuing a suspension injunction decision in accordance with Article 11(1) of Council Regulation (EC) No 659/1999 ⁽²⁾.
- (2) By letter of 12 May 2015, Hungary responded to that information request. Hungary did not, however, provide any comments on the possibility of the Commission issuing a suspension injunction.
- (3) On 15 July 2015, the Commission informed Hungary that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union (hereinafter: 'the Treaty') in respect of the health contribution imposed on tobacco industry businesses (the 'Opening Decision'). The Commission also ordered the immediate suspension of the measure in the Opening Decision.
- (4) The Opening Decision was published in the *Official Journal of the European Union* ⁽³⁾. By that decision, the Commission invited interested parties to submit their comments on the measure.
- (5) The Commission received comments from two interested parties. On 20 October 2015, the Commission forwarded those comments to Hungary, which was given the opportunity to react. Hungary did not react to those comments.

2. DETAILED DESCRIPTION OF THE MEASURE

- (6) On 16 December 2014, the Hungarian Parliament adopted Act XCIV of 2014 on the health contribution for the year 2015 of tobacco industry businesses ('the Act'). The Act imposes a tax, referred to as a 'health contribution', which is levied on the annual turnover derived from the production and trade of tobacco products in Hungary

⁽¹⁾ OJ C 277, 21.8.2015, p. 24.

⁽²⁾ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 83, 27.3.1999, p. 1).

⁽³⁾ Cf. footnote 1.

and applies in addition to existing business taxes in Hungary, in particular, corporate income tax. The tax is levied on authorised warehouse keepers, importers, and registered traders of tobacco products. The stated purpose of the Act is to collect funds for the financing of the health system to increase the quality of health services.

- (7) The health contribution tax is due on the annual turnover generated in the year previous to the tax year derived from the production and trade of tobacco products in Hungary, on the condition that the turnover from these activities accounts for at least 50 % of the total annual turnover generated by the undertaking. No deduction of costs is provided, apart from the cost of certain investments in the tax year. The health contribution tax is progressive in nature. The applicable contribution depends on the annual turnover of the taxpayer as follows:
- for the part of the turnover below HUF 30 billion: 0,2 % with a minimum of HUF 30 million,
 - for the part of the turnover between HUF 30 billion and 60 billion: 2,5 %,
 - for the part of the turnover exceeding HUF 60 billion: 4,5 %.
- (8) Pursuant to Section 6(6) of the Act, the tax liability resulting from the health contribution tax can be reduced by up to 80 % of the payable contribution if the company makes investments that comply with the definition set out in point 7 of Article 3(4) of Act C of 2000 on Accounting ⁽⁴⁾. The reduction is equal to the positive difference between 30 % of the amount accounted for as an investment in the tax year and the amount of State or EU subsidy used for the implementation of the investment project.
- (9) The Act provides that a tax declaration has to be submitted by 30 June 2015 and that the health contribution tax has to be paid in 30 days following this deadline.
- (10) The Act entered into force on 1 February 2015 and, in its initial version, was supposed to apply on a temporary basis until 31 December 2015. On 24 June 2015, an amendment to the Act was published in the Hungarian Official Journal, which made the health contribution tax permanent.

3. THE FORMAL INVESTIGATION PROCEDURE

3.1. Grounds for initiating the formal investigation procedure

- (11) The Commission opened the formal investigation procedure because it reached the preliminary conclusion that the progressive structure of the health contribution (rates and turnover brackets) and the provisions on the reduction of the tax liability on the condition of making certain investments (hereafter collectively referred to as: 'the contested measures') constituted unlawful and incompatible State aid.
- (12) The Commission was of the opinion that the progressive tax rates laid down by the Act differentiate between undertakings based on their turnover and grant a selective advantage to undertakings with low turnover and thus smaller undertakings. The Commission was not convinced that undertakings with more significant turnover are able to influence the product market and generate higher negative smoking-related effects on health to such a degree that would justify the application of the progressive tax rates, as the Hungarian authorities had argued.
- (13) The Commission was equally of the opinion that the possibility to reduce a taxpayer's tax liability on the condition of making investments grants a selective advantage to undertakings which have made such investments. The Commission further observed that the possibility to reduce the tax liability in the case of investment, which aims at increasing the production and trading capacity of the undertaking, appeared to be inconsistent with the stated objective of the health contribution tax, which is to create funds for the health system and increase the quality of health services given the fact that smoking plays a prominent role in the development of numerous diseases and significantly contributes to increased health expenses.

⁽⁴⁾ In accordance with this Act, 'investment' includes the purchase or creation of tangible assets, the production of tangible assets by one's own enterprise, the activity carried out in order to install or use the tangible asset purchased for its intended purpose until its installation or first normal use (transportation, customs clearance, intermediary activity, laying the foundations, installation and any activity related to the purchase of the tangible asset, including design, preparation, arrangement, borrowing and insurance); investments also include activities resulting in the upgrading of an existing tangible asset, the change of its purpose, its conversion or directly increasing its useful life or capacity, together with the other activities listed above and related to such activity.

- (14) The Commission therefore reached the preliminary conclusion that the contested measures appeared to be neither justified by the nature or general scheme of the tax system nor compatible with the internal market.

3.2. Comments from interested parties

- (15) The Commission received comments from two interested parties who welcomed the Opening Decision and agreed with the Commission's preliminary State aid assessment. They expressed their concerns about possible amendments to the Act and any other similar measures that might be adopted by the Hungarian authorities.
- (16) One of the interested parties underlined that the reduction of the tax liability in case of certain investments would apply exclusively to investments in Hungary, since, according to Hungarian excise tax regulations, it is necessary for a company to be incorporated and have a seat of management in Hungary for that company to be licensed to sell or manufacture tobacco in Hungary. Therefore, the investments taken into account for the purposes of the Act are the investments made in Hungary either by domestically owned Hungarian companies or by Hungarian-resident subsidiaries of foreign multinationals.

3.3. Position of the Hungarian authorities

- (17) The Hungarian authorities do not agree with the findings of the Commission that the contested measures constitute State aid. In essence, they argue that the measures are not selective. Regarding the progressivity of the tax rates, the Hungarian authorities maintain that in the case of public burdens, the reference framework is specified by the tax base and the tax rate (including a system of progressive tax rates) jointly and that companies in the same factual situation are the ones whose turnover is the same. In this sense, under the progressive system of rates, applying tax brackets, the entities with the same projection tax base are subject to the same rate and the calculated amount of the tax is also identical. Therefore, in the view of the Hungarian authorities, the progressive system of tax rates does not create differentiation because companies in the same legal and factual situation are subject to the same tax rate, and thus is not selective.
- (18) Regarding the reduction of the tax liability in the case of investment, the Hungarian authorities argue that the Act does not distinguish according to the type or the value of the investment and no distinction is made between the operators carrying out an investment. The businesses implementing the same investment value are in the same legal and factual situation. They stress that the reduction does not apply exclusively to investments that are carried out in Hungary and that the value of all investments may be taken into consideration for the calculation. The Hungarian authorities further note that the calculation of the investment value is subject to the definition of investment and the calculation of the value of investment under the Accounting Act which is beyond the scope of the Act on the health contribution of tobacco industry businesses.

3.4. Comments from Hungary on interested parties' comments

- (19) Hungary did not react to the comments from the interested parties, which were forwarded to it by letter of 20 October 2015.

4. ASSESSMENT OF THE AID

4.1. Presence of State aid within the meaning of Article 107(1) TFEU

- (20) According to Article 107(1) of the Treaty, 'save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'.
- (21) The classification of a measure as aid within the meaning of this provision therefore requires the following cumulative conditions to be met: (i) the measure must be imputable to the State and financed through State resources; (ii) it must confer an advantage on its recipient; (iii) that advantage must be selective; and (iv) the measure must distort or threaten to distort competition and affect trade between Member States.

4.1.1. State resources and imputability to the State

- (22) To constitute State aid, a measure must be financed through State resources and be imputable to a Member State.
- (23) Since the contested measures result from an Act of the Hungarian Parliament, it is clearly imputable to the Hungarian State.
- (24) As regards the measure's financing through State resources, where the result of a measure is that the State forgoes revenues which it would otherwise have to collect from an undertaking in normal circumstances, that condition is also fulfilled ⁽⁵⁾. In the present case, the Hungarian State waives resources it would otherwise have to collect from undertakings with a lower level of turnover (and thus smaller undertakings), if they had been subject to the same health contribution as undertakings with a higher level of turnover (and thus larger undertakings).

4.1.2. Advantage

- (25) According to the case-law of the Union Courts, the concept of aid embraces not only positive benefits, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking ⁽⁶⁾. An advantage may be granted through different types of reduction in a company's tax burden and, in particular, through a reduction in the applicable tax rate, taxable base or in the amount of the tax due ⁽⁷⁾. Although a tax reduction measure does not involve a positive transfer of resources from the State, it gives rise to an advantage by virtue of the fact that it places the undertakings to which it applies in a more favourable financial position than other taxpayers and results in a loss of income to the State ⁽⁸⁾.
- (26) The Act lays down progressive rates of taxation that apply to the annual turnover derived from the production of and trade in tobacco products in Hungary depending on the brackets into which an undertaking's turnover falls. The progressive character of those rates has the effect that the percentage of tax levied on an undertaking's turnover increases progressively depending on the number of brackets within which that turnover falls. This has the result that undertakings with low turnover (smaller undertakings) are taxed at a substantially lower average rate than undertakings with high turnover (larger undertakings). Being taxed at this substantially lower average tax rate mitigates the charges that undertakings with low turnover have to bear as compared with undertakings with high turnover and therefore constitutes an advantage to the benefit of smaller undertakings over larger undertakings for the purposes of Article 107(1) of the Treaty.
- (27) Similarly, the possibility of reducing an undertaking's tax liability under the Act by up to 80 % in the case of investments carried out in the tax year constitutes an advantage for undertakings that have made such investments, since it reduces their tax base and thus their tax burden as compared with undertakings that cannot benefit from that reduction.

4.1.3. Selectivity

- (28) A measure is selective if it favours certain undertakings or the production of certain goods within the meaning of Article 107(1) of the Treaty. For fiscal schemes the Court of Justice has established that the selectivity of the measure should in principle be assessed by means of a three-step analysis ⁽⁹⁾. First, the common or normal tax regime applicable in the Member State is identified: 'the reference system'. Second, it should be determined whether a given measure constitutes a derogation from that system in so far as it differentiates between economic

⁽⁵⁾ Case C-83/98 P *France v Ladbroke Racing Ltd and Commission* EU:C:2000:248, paragraphs 48 to 51. Likewise, a measure allowing certain undertakings a tax reduction or to postpone payments of tax normally due can amount to State aid, see Joined Cases C-78/08 to C-80/08 *Paint Graphos and Others*, paragraph 46.

⁽⁶⁾ Case C-143/99 *Adria-Wien Pipeline*, EU: C: 2001:598, paragraph 38.

⁽⁷⁾ See Case C-66/02, *Italy v Commission*, EU: C: 2005:768, paragraph 78; Case C-222/04, *Cassa di Risparmio di Firenze and Others*, EU: C: 2006:8, paragraph 132; Case C-522/13, *Ministerio de Defensa and Navantia*, EU: C: 2014:2262, paragraphs 21 to 31. See also point 9 of the Commission notice on the application of the State aid rules to measures relating to direct business taxation (OJ C 384, 10.12.1998, p. 3).

⁽⁸⁾ Joined Cases C-393/04 and C-41/05, *Air Liquide Industries Belgium* EU: C: 2006:403 and EU: C: 2006:216, paragraph 30 and Case C-387/92 *Banco Exterior de España* EU: C: 1994:100, paragraph 14.

⁽⁹⁾ See, for example, Case C-279/08 P *Commission v Netherlands (NOx)* EU:C:2011:551; Case C-143/99 *Adria-Wien Pipeline* EU: C: 2001:598, Joined Cases C-78/08 to C-80/08, *Paint Graphos and others* EU:C:2011:550, Case C-308/01 *GIL Insurance* EU:C:2004:252.

operators who, in light of the objectives intrinsic to the system, are in a comparable factual and legal situation. If the measure in question does not constitute a derogation from the reference system, it is not selective. If it does (and therefore is *prima facie* selective), it must be established, in the third step of the analysis, whether the derogatory measure is justified by the nature or the general scheme of the reference tax system⁽¹⁰⁾. If a *prima facie* selective measure is justified by the nature or the general scheme of the system, it will not be considered selective and it will thus fall outside the scope of Article 107(1) of the Treaty.

4.1.3.1. System of reference

- (29) In the present case, the reference system is the application of a special health contribution on undertakings in respect of the turnover they derive from the production and trade of tobacco products in Hungary. The Commission does not consider that the progressive rate structure of the health contribution can form a part of that reference system.
- (30) As the Court of Justice has held⁽¹¹⁾, it is not always sufficient to confine the selectivity analysis to whether a measure derogates from the reference system as defined by the Member State. It is also necessary to evaluate whether the boundaries of that system have been designed by the Member State in a consistent manner or, conversely, in a clearly arbitrary or biased way, so as to favour certain undertakings over others. Otherwise, instead of laying down general rules applying to all undertakings from which a derogation is made for certain undertakings, the Member State could achieve the same result, sidestepping the State aid rules, by adjusting and combining its rules in such a way that their very application results in a different burden for different undertakings⁽¹²⁾. It is particularly important to recall in that respect that the Court of Justice has consistently held that Article 107(1) of the Treaty does not distinguish between measures of State intervention by reference to their causes or their aims, but defines them in relation to their effects, and thus independently of the techniques used⁽¹³⁾.
- (31) Whereas the application of a flat tax levied on the annual turnover derived from the production of and trade in tobacco products in Hungary is an appropriate means to collect funds for the financing of the health system, the progressive tax structure introduced by the Act appears deliberately designed by Hungary to favour certain undertakings over others. Under the progressive tax structure introduced under the Act, the undertakings subject to the tax are subject to different tax rates progressively increasing towards 4,5 %, depending on the brackets into which their turnover falls. Consequently, a different average tax rate applies to undertakings subject to the health contribution depending on the level of their turnover (whether it surpasses the thresholds laid down by the Act).
- (32) Because each company is taxed at a different rate, it is not possible for the Commission to identify one single reference rate in the health contribution. Hungary also did not present any specific rate as the reference rate or 'normal' rate and also did not explain why a higher rate would be justified by exceptional circumstances for undertakings with a high level of turnover, nor why lower rates should apply to undertakings with lower levels of turnover.
- (33) The effect of the progressive rate structure introduced by the Act is therefore that different undertakings pay different levels of taxation (expressed as a proportion of their overall annual turnover) depending on their size, since the amount of turnover achieved by an undertaking correlates to a certain extent with the size of that undertaking. However, the stated objective of the health contribution is to collect funds for the health care system and increase the quality of health services in Hungary in the light of the fact that smoking plays a prominent role in the development of numerous diseases and significantly contributes to increased health expenses. The Commission considers that the progressive rate structure of the health contribution does not mirror the relationship between the generation of negative effects on health by the traders and producers of tobacco products and their turnover.
- (34) In the light of that objective, the Commission considers all operators subject to the health contribution to be in a comparable legal and factual situation, regardless of their level of turnover, and Hungary has advanced no convincing justification to discriminate between those types of undertakings when it comes to levying the health

⁽¹⁰⁾ Commission Notice on the application of the State aid rules to measures relating to direct business taxation.

⁽¹¹⁾ Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* EU:C:2011:732.

⁽¹²⁾ *Ibid*, paragraph 92.

⁽¹³⁾ Case C-487/06 P *British Aggregates v Commission* EU:C:2008:757, paragraphs 85 and 89 and the case-law cited, and Case C-279/08 P *Commission v Netherlands (NOx)* EU:C:2011:551, paragraph 51.

contribution. The Commission refers, in this regard, to recitals 42 to 48 below. Hungary has therefore deliberately designed the health contribution in such a manner as to arbitrarily favour certain undertakings, namely those with a lower level of turnover (and thus smaller undertakings), and disadvantage others, namely larger undertakings ⁽¹⁴⁾.

- (35) The reference system is therefore selective by design in a way that is not justified in the light of the objective of the health contribution, which is to collect funds for the Hungarian health system. Consequently, the appropriate reference system in the present case is the imposition of a health contribution on undertakings operating in Hungary based on their turnover, without the progressive rate structure being a part of that system.

4.1.3.2. Derogation from the system of reference

- (36) As a second step, it is necessary to determine whether the measure derogates from the reference system in favour of certain undertakings which are in a similar factual and legal situation in the light of the intrinsic objective of the system of reference.
- (37) As explained in recital 31, the intrinsic objective of the health contribution tax is to fund the health care system and increase the quality of health care services in Hungary. As further explained in recital 34, all operators involved in the production and trade of tobacco products should be considered to be in a comparable legal and factual situation in the light of that objective, regardless of their size and the level of their turnover.
- (38) The progressivity of the health contribution rate structure therefore creates a differentiation amongst undertakings carrying on the activity of production of and trade in tobacco products in Hungary based on their size.
- (39) Indeed, due to the progressive character of the rates laid down by the Act, undertakings with turnover falling in lower brackets are subject to substantially lower taxation than undertakings with turnover falling in higher brackets. This has the result that undertakings with low turnover are subject to both substantially lower marginal tax rates and substantially lower average tax rates as compared with undertakings with high levels of turnover, and therefore to substantially lower taxation for the same activities. Hence, the Commission considers that the progressive rate structure introduced by the Act derogates from the reference system consisting in the imposition of a health contribution on all operators involved in the production of and trade in tobacco products in Hungary in favour of undertakings with lower turnover.
- (40) Similarly, the possibility of reducing an undertaking's tax liability under the Act by up to 80 % in the case of investment differentiates between undertakings that have made investments and undertakings that have not made investments. However, in the light of the intrinsic objective of the health contribution tax identified above, undertakings that have made investments and undertakings that have not made investments are in a comparable factual and legal situation, since the fact that an undertaking makes investments does nothing to reduce the negative externalities caused by smoking. Quite the contrary, the possibility of reducing an undertaking's tax liability in the case of investments, which aims at increasing the production and trading capacity of the undertaking, appears to be inconsistent with the intrinsic objective of the health contribution tax. Therefore, the Commission considers that the provisions of the Act providing for the reduction of the tax liability in the case of investment differentiate between undertakings that are in a comparable factual and legal situation in the light of the intrinsic objective of the health contribution and thus creates a derogation from the system of reference.
- (41) Therefore, the Commission considers that the measures are *prima facie* selective.

⁽¹⁴⁾ Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* EU:C:2011:732. See also, by way of analogy, Case C-385/12 *Hervis Sport- és Divatkereskedelmi Kft.* EU:C:2014:47, in which the Court of Justice held: 'Articles 49 TFEU and 54 TFEU must be interpreted as precluding legislation of a Member State relating to tax on the turnover of store retail trade which obliges taxable legal persons constituting, within a group, "linked undertakings" within the meaning of that legislation, to aggregate their turnover for the purpose of the application of a steeply progressive rate, and then to divide the resulting amount of tax among them in proportion to their actual turnover, if — and it is for the referring court to determine whether this is the case — the taxable persons covered by the highest band of the special tax are "linked", in the majority of cases, to companies which have their registered office in another Member State.'

4.1.3.3. Justification

- (42) A measure which derogates from the reference system is not selective if it is justified by the nature or general scheme of that system. This is the case where it is the result of inherent mechanisms necessary for the functioning and effectiveness of the system ⁽¹⁵⁾. It is for the Member State to provide such justification. For this purpose, external policy objectives — such as regional, environmental or industrial policy objectives — cannot be relied upon by the Member States to justify the differentiated treatment of undertakings under a certain regime.
- (43) The Hungarian authorities have argued that the health contribution is due on the manufacturing of and trade in products causing a health risk and is not linked to the profit of the economic operators, whereas the tax rate is adjusted to the load-bearing capacity of the taxable entities. In the view of the Hungarian authorities, the ability to pay and the degree of the risk generated by the undertakings are reflected by their market share and market leadership and, consequently, their price-orienting role rather than by their profitability. Profit, as the basis of the contribution, is the least suitable factor for the expression of the damage to health generated by the subjects of the contribution through their activity. Furthermore, in comparison with undertakings with low turnover, undertakings with more significant turnover and market share are much more able to influence the market of a product than the difference between their levels of turnover. Therefore, considering the objective of the contribution, this will also entail that an economic operator obtaining a higher turnover on the market of tobacco products will also generate exponentially higher negative smoking-related effects on health.
- (44) In the present case, given the substantial relative increments of the progressive tax rate, the Commission does not consider that ability to pay can serve as a guiding principle for turnover-based taxation. As opposed to taxes based on profit ⁽¹⁶⁾, a turnover-based tax does not take into account costs incurred in the generation of that turnover. Therefore, in the absence of specific evidence to the contrary, it appears doubtful that the mere amount of turnover generated as such — irrespective of the costs incurred — reflects the ability to pay of the undertaking. Furthermore, the Commission is not convinced that, in comparison with undertakings with lower turnover, undertakings with more significant turnover are able to influence the product market and automatically generate higher negative smoking-related effects to such a degree that would justify the application of progressive tax rates in respect of turnover as adopted under the Act.
- (45) In any event, the Commission considers that, even if ability to pay and the negative effects on health might be considered to be inherent principles of the turnover-based health contribution, it would only justify a linear tax rate, unless it is shown that ability to pay and the generation of negative effects on health increase progressively with an increase in the turnover. The Commission considers that progressive rates for taxes on turnover can only be justified if the specific objective pursued by a tax indeed requires progressive rates, i.e., for example, if it is shown that the externalities created by an activity that the tax is supposed to tackle also increase progressively. The pattern of the progressivity would also need to be justified. In particular, it would need to be explained why turnover over HUF 60 billion has 22 times the effect on health of turnover below HUF 30 billion. No such justification was provided by Hungary.
- (46) The Commission is not convinced that the health damage caused by the manufacturing of and trade in tobacco products would increase progressively with the turnover generated and according to the tax rate increments applicable under the measure. Furthermore, the condition that the turnover derived from the production of and trade in tobacco products accounts for at least 50 % of the total annual turnover generated by the undertaking to be subject to the health contribution also appears to contradict the justification of the tax progressivity based on the effects of tobacco products on health. In view of the tax objective, this requirement would mean that tobacco products marketed by companies whose turnover derived from the production of and trade in tobacco products accounts for less than 50 % do not have negative effects on health like the products marketed by companies with a higher proportion of tobacco products in their turnover. This requirement therefore appears to be inconsistent with the alleged objective of the measure.
- (47) As regards the reduction of the tax liability in the case of investments, it cannot be justified by the nature and general scheme of the tax system either. The Commission considers the possibility of reducing the tax liability by up to 80 % in the case of investment to be inconsistent with the intrinsic objective of the health contribution tax. The objective of the health contribution tax is to create funds for the health system and increase the quality of

⁽¹⁵⁾ See, for example, Joined Cases C-78/08 to C-80/08 *Paint Graphos and others* EU:C:2011:550, paragraph 69.

⁽¹⁶⁾ See the Commission notice on the application of the State aid rules to measures relating to direct business taxation, paragraph 24. The statement on the redistributive purpose that can justify a progressive tax rate is explicitly only made as regards taxes on profits or (net) income, not as regards taxes on turnover.

health services given the fact that smoking plays an eminent role in the development of numerous diseases and significantly contributes to increased health expenses. Therefore, the Commission finds the possibility of reducing the tax liability in the case of investment, which aims at increasing the production and trading capacity of the undertaking, to be inconsistent with that objective, since, as already stated in recital 40, such investments would sooner increase the production and trading capacity of the undertaking and thus the negative externalities which the health contribution tax seeks to address. Furthermore, a contribution being based on the taxation of turnover should not take into account any costs.

- (48) Accordingly, the Commission does not consider the measures to be justified by the nature and general scheme of the tax system. The measures should therefore be considered to confer a selective advantage on tobacco undertakings with a lower level of turnover (and thus smaller undertakings) and to undertakings that have made investments eligible for a reduction of their tax liability under the health contribution tax.

4.1.4. *Distortion of competition and effect on intra-Union trade*

- (49) According to Article 107(1) of the Treaty, a measure must distort or threaten to distort competition and have an effect on intra-Union trade to constitute State aid. The measures apply to all undertakings deriving turnover from the production of and trade in tobacco products in Hungary. The Hungarian tobacco industry is open to competition and characterised by the presence of operators from other Member States as well as from international operators, so that any aid in favour of certain industry operators is liable to affect intra-Union trade. To the extent that the measures relieve undertakings with lower levels of turnover and undertakings making eligible investments from a tax liability they would otherwise have been obliged to pay, had they been subject to the same health contribution as undertakings with a high level of turnover and undertakings not making investments, the aid granted under those measures constitute operating aid in that it relieves those undertakings from a charge that they would normally have had to bear in their day-to-day management or normal activities. The Court of Justice has consistently held that operating aid distorts competition⁽¹⁷⁾, so that any aid granted to those undertakings should be considered to distort or threaten to distort competition by strengthening their financial position on the Hungarian tobacco market. Consequently, the measures distort or threaten to distort competition and have an effect on intra-Union trade.

4.1.5. *Conclusion*

- (50) Since all the conditions laid down by Article 107(1) of the Treaty are met, the Commission considers that the health contribution tax on tobacco industry businesses laying down a progressive tax structure for tobacco businesses and the reduction of the tax liability on the condition of making certain investments constitutes State aid within the meaning of that provision.

4.2. **Compatibility of the aid with the internal market**

- (51) State aid is to be deemed compatible with the internal market if it falls within any of the categories listed in Article 107(2) of the Treaty⁽¹⁸⁾ and it may be deemed compatible with the internal market if it is found by the Commission to fall within any of the categories listed in Article 107(3) of the Treaty⁽¹⁹⁾. However, it is the Member State granting the aid which bears the burden of proving that State aid granted by it is compatible with the internal market pursuant to Articles 107(2) or 107(3) of the Treaty⁽²⁰⁾.

⁽¹⁷⁾ Case C-172/03 *Heiser* EU:C:2005:130, paragraph 55. See also Case C-494/06 P *Commission v Italy and Wam* EU:C:2009:272, paragraph 54 and the case-law cited and C-271/13 P *Rousse Industry v Commission* EU:C:2014:175, paragraph 44. Joined Cases C-71/09 P, C-73/09 P and C-76/09 P *Comitato 'Venezia vuole vivere' and Others v Commission* EU:C:2011:368, paragraph 136. See also Case C-156/98 *Germany v Commission* EU:C:2000:467, paragraph 30, and the case-law cited.

⁽¹⁸⁾ The exceptions provided for in Article 107(2) TFEU concern: (a) aid of a social character granted to individual consumers; (b) aid to make good the damage caused by natural disasters or exceptional occurrences; and (c) aid granted to certain areas of the Federal Republic of Germany.

⁽¹⁹⁾ The exceptions provided for in Article 107(3) TFEU concern: (a) aid to promote the development of certain areas; (b) aid for certain important projects of common European interest or to remedy a serious disturbance in the economy of the Member State; (c) aid to develop certain economic activities or areas; (d) aid to promote culture and heritage conservation; and (e) aid specified by a Council decision.

⁽²⁰⁾ Case T-68/03 *Olympiaki Aeroporia Ypiresies v Commission* EU:T:2007:253, paragraph 34.

- (52) The Commission notes that the Hungarian authorities did not provide arguments as to why the measures would be compatible with the internal market and that Hungary did not comment on the doubts expressed in the Opening Decision as regards the compatibility of the measures. The Commission considers that none of the exceptions provided for in the aforementioned provisions of the Treaty apply, since the measures do not appear to aim to achieve any of the objectives listed in those provisions. Consequently, the measures cannot be declared compatible with the internal market.

4.3. Recovery of aid

- (53) The health contribution of tobacco industry businesses was never notified or declared compatible with the internal market by the Commission. Since the progressive structure of the health contribution and the provisions on the reduction of the tax liability on the condition of making certain investments constitute State aid within the meaning of Article 107(1) of the Treaty and new aid within the meaning of Article 1(c) of Council Regulation (EU) 2015/1589 ⁽²¹⁾ and have been put into effect in violation of the standstill obligation laid down in Article 108(3) of the Treaty, those measures also constitute unlawful aid within the meaning of Article 1(f) of Regulation (EU) 2015/1589.
- (54) The consequence of the finding that the measures constitute unlawful and incompatible State aid is that the aid must be recovered from its recipients pursuant to Article 16 of Regulation (EU) 2015/1589.
- (55) However, as a result of the suspension injunction issued by the Commission in the Opening Decision, Hungary confirmed it had suspended the implementation of the health contribution on tobacco businesses.
- (56) Therefore, no State aid has been effectively granted under the measures. For this reason, there is no need for recovery.

5. CONCLUSION

- (57) The Commission finds that the health contribution tax on tobacco industry businesses laying down a progressive tax structure for tobacco businesses and the reduction of the tax liability on the condition of making certain investments constitutes State aid within the meaning of Article 107(1) of the Treaty and that Hungary has unlawfully implemented the aid in question in breach of Article 108(3) of the Treaty.
- (58) This Decision does not prejudice possible investigations into the compliance of the measures with the fundamental freedoms laid down in the Treaty, notably the freedom of establishment as guaranteed by Article 49 of the Treaty,

HAS ADOPTED THIS DECISION:

Article 1

The progressive tax rate structure for tobacco businesses and the provisions on the reduction of tax liability on the condition of making certain investments introduced by Hungary through Act XCIV of 2014 on the health contribution of tobacco industry businesses constitute State aid that is incompatible with the internal market within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union, which were unlawfully put into effect by Hungary in breach of Article 108(3) of that Treaty.

⁽²¹⁾ Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9).

Article 2

Individual aid granted under the scheme referred to in Article 1 does not constitute aid if, at the time it is granted, it fulfils the conditions laid down by a Regulation adopted pursuant to Article 2 of Council Regulation (EC) No 994/98 ⁽²²⁾ or (EU) 2015/1588 ⁽²³⁾, whichever is applicable at the time the aid is granted.

Article 3

Individual aid granted under the scheme referred to in Article 1 which, at the time it is granted, fulfils the conditions laid down by a Regulation adopted pursuant to Article 1 of Regulation (EC) No 994/98, repealed and replaced by Regulation (EU) 2015/1588, or by any other approved aid scheme is compatible with the internal market, up to the maximum aid intensities applicable to that type of aid.

Article 4

Hungary shall cancel all outstanding payments of aid under the scheme referred to in Article 1 with effect from the date of adoption of this Decision.

Article 5

Hungary shall ensure that this Decision is implemented within 4 months following the date of notification of this Decision.

Article 6

1. Within 2 months following notification of this Decision, Hungary shall submit a detailed description of the measures already taken and planned to comply with this Decision;
2. Hungary shall keep the Commission informed of the progress of the national measures taken to implement this Decision. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision.

Article 7

This Decision is addressed to Hungary.

Done at Brussels, 4 July 2016.

For the Commission
Margrethe VESTAGER
Member of the Commission

⁽²²⁾ Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to certain categories of horizontal State aid (OJ L 142, 14.5.1998, p. 1).

⁽²³⁾ Council Regulation (EU) 2015/1588 of 13 July 2015 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to certain categories of horizontal State aid (OJ L 248, 24.9.2015, p. 1).

COMMISSION DECISION (EU) 2016/1847**of 4 July 2016****on the State aid SA.41612 — 2015/C (ex SA.33584 (2013/C) (ex 2011/NN)) implemented by the Netherlands in favour of the professional football club MVV in Maastricht***(notified under document C(2016) 4053)***(Only the Dutch text is authentic)****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

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

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

Having called on interested parties to submit their comments pursuant to Article 108(2) of the Treaty ⁽¹⁾ and having regard to their comments,

Whereas:

1. PROCEDURE

- (1) In 2010, the Commission was informed that the Netherlands had implemented an aid measure for the professional football club MVV in Maastricht. In 2010 and in 2011, the Commission also received complaints concerning measures in favour of other professional football clubs in the Netherlands, namely Willem II in Tilburg, FC Den Bosch in 's-Hertogenbosch, PSV in Eindhoven and NEC in Nijmegen. By letter dated 2 September 2011, the Netherlands provided the Commission with further information on the measure concerning MVV.
- (2) By letter dated 6 March 2013, the Commission informed the Netherlands that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty in respect of the measures in favour of Willem II, NEC, MVV, PSV and FC Den Bosch.
- (3) The Commission decision to initiate the procedure (hereinafter: 'the opening decision') was published in the *Official Journal of the European Union* ⁽²⁾. The Commission invited interested parties to submit their comments on the measures in question.
- (4) The Netherlands submitted observations within the framework of the procedure concerning the measure in favour of MVV by letters dated 31 May 2013 and 12 November 2013. The Netherlands also replied to a request for additional information by letter dated 26 March 2014. On 13 June 2014 a meeting took place between the Commission services and the municipality of Maastricht, which was followed by a letter of 30 July 2014 from the Netherlands.
- (5) The Commission did not receive observations from interested parties concerning the measures in favour of MVV.
- (6) Following the opening decision, and in agreement with the Netherlands, the investigations for the different clubs were pursued separately. The investigation regarding MVV was registered under case number SA.41612.

⁽¹⁾ Commission Decision in Case SA.33584 (2013/C) (ex 2011/NN) — Netherlands aid to certain professional Dutch football clubs in 2008-11 — Invitation to submit comments pursuant to Article 108(2) of the Treaty on the Functioning of the European Union (OJ C 116, 23.4.2013, p. 19).

⁽²⁾ Cf. footnote 1.

2. DETAILED DESCRIPTION OF THE MEASURE

2.1. The measure and its beneficiary

- (7) The national football federation Koninklijke Nederlandse Voetbal Bond (hereinafter: 'KNVB') is the umbrella organisation for professional and amateur football competition. Professional football in the Netherlands is organised in a two-tier system. In the 2014/2015 season it consisted of 38 clubs, of which 18 played in the top league (*eredivisie*) and 20 in the lower league (*eerste divisie*).
- (8) Maastrichtse Voetbal Vereniging, since 2010/2011 called Maatschappelijke Voetbal Vereniging Maastricht (hereinafter: 'MVV'), was founded in 1908 and plays its home matches in the football stadium De Geusselt in Maastricht. MVV was relegated from the top league to the lower league in 2000. MVV has not played in a European tournament since 1970.
- (9) The legal structure of MVV is that of a foundation, Stichting MVV. According to the information submitted by the Netherlands, MVV is a small enterprise ⁽³⁾. In the season 2009/2010 it had 38 employees and in the season 2010/2011 it had 35 employees. Its turnover and balance sheet total remained well below EUR 10 million in both years.
- (10) In the first quarter of 2010 the municipality of Maastricht (hereinafter: 'the municipality') became aware that MVV faced severe financial difficulties. Its debt load had risen to EUR 6,5 million; EUR 1,7 million of this sum was owed to the municipality itself in the form of a subordinated loan. An initiative to avoid the bankruptcy of MVV was launched by supporters, companies and sponsors in April 2010 ('Initiatiefgroep MVV Maastricht'). This initiative entailed a business plan to sanitise MVV's financial situation and to transform MVV into a viable professional football club. The municipality adhered to this plan. In May 2010, as part of an agreement of creditors, but not within a formal suspension of payments procedure, the municipality waived its claim of EUR 1,7 million. It also bought the stadium and the training grounds, which was used only by MVV but was under economic ownership with a third party (the foundation Stichting Stadion Geusselt) based on a transaction involving a long lease, for EUR 1,85 million. This price was based on the basis of an external valuation report.
- (11) The Netherlands did not notify their intention to waive a claim of EUR 1,7 million on MVV and to buy the football stadium and training grounds for EUR 1,85 million to the Commission pursuant to Article 108(3) of the Treaty.

2.2. Grounds for initiating the procedure

- (12) In the opening decision the Commission arrived at the preliminary conclusion that the municipality had provided a selective advantage to MVV with the use of state resources and had, hence, provided aid to the football club. The Commission considered that both measures had been decided together and were closely interlinked. The Commission also took the position that aid measures to professional football clubs are likely to distort competition and to affect trade between Member States within the meaning of Article 107(1) of the Treaty. As regards the remittance of debt by the municipality, the Commission was unable to conclude on the basis of the available information that the behaviour of the municipality had been that of a typical creditor in a market economy. As regards the purchase of the stadium and the training grounds from the third party, the Commission could not conclude, in the absence of a credible business plan established before the purchase, that the behaviour of the municipality had been that of a typical market economy investor. Finally, the Commission requested detailed information regarding statements made in the municipal council that the yield of the purchase of the stadium would be passed on by the third party (the foundation Stadium De Geusselt) to cover preferential parts of MVV's debts, such as contributions for pensions and taxes.
- (13) The Commission notes that MVV had been in a difficult financial situation for several years before 2010. In the season 2007/2008 it made a loss of EUR 0,15 million and had a negative own equity (minus EUR 2,7 million).

⁽³⁾ In Article 2(2) of the annex of the Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36), a small enterprise is defined as an enterprise which employs fewer than 50 persons and whose annual turnover does not exceed EUR 10 million.

In 2008/2009 MVV made a loss of EUR 1,1 million and its own equity was minus EUR 3,8 million. By March 2010 additional losses amounting to EUR 1,3 million had occurred and the own equity had dropped to minus EUR 5,17 million. In April 2010, MVV was no longer able to pay salaries and other current expenditure and was indeed on the brink of bankruptcy.

- (14) On this basis, in the opening decision the Commission noted that MVV had been in financial difficulties at the time the aid was awarded. In order to assess the compatibility of the aid with the 2004 Guidelines on State aid for rescuing and restructuring of firms in difficulty (*) (hereinafter: 'the Guidelines'), the Commission requested information on the compliance with all requirements set out in the Guidelines.
- (15) The Commission was notably unable to verify whether the conditions in points 34-37 of the Guidelines concerning the nature and fulfilment of a restructuring plan had been respected. The Commission was also unable to verify whether adequate compensatory measures within the meaning of points 38-42 of the Guidelines had been taken. It furthermore needed to be demonstrated that the aid had been limited to the minimum necessary, that the beneficiary itself had paid an adequate own contribution to its restructuring and that the 'one time, last time' principle would be respected.

3. COMMENTS FROM THE NETHERLANDS

- (16) As regards the measures for MVV, the Netherlands disagreed that these measures constituted State aid. In the view of the Netherlands, the municipality, having a subordinated claim on a company on the brink of bankruptcy, acted in conformity with the market economy creditor principle by waiving its claim in 2010. It stated that the mere formal application or request for bankruptcy by a creditor would have triggered immediate bankruptcy. According to the Netherlands, in the case of bankruptcy of MVV, the municipality would in all likelihood not have recovered anything of its subordinated loan in any event. The claim was subordinated and hence of lower rank than claims totalling some EUR 3 million (both preferential ('*preferente*') and unsecured ('*concurrente*') claims from other creditors). The Netherlands alleged that therefore there was no probability to obtain any compensation of the loan amount and that even the '*preferente*' and '*concurrente*' creditors had been willing to release their claims in the framework of the overall restructuring plan. At the same time, if the municipality had not waived its claim in May 2010 and had thereby provoked the opening of an official insolvency procedure, MVV was at risk of losing its licence to play professional football according to the rules of the KNVB. There would be no possibility to have this license transferred to another club.
- (17) As regards the acquisition of the stadium De Geusselt and the training facilities used by MVV, the Netherlands argued that this acquisition had taken place at the value established by external expertise and therefore was in conformity with the market economy investor principle. This evaluation consisted of a valuation of the right to a long lease and value of the buildings on the land. The Netherlands also emphasised the strategic location of the stadium in Maastricht and the interests of the municipality in relation to the sizeable (re)development by the municipality of the zone of De Geusselt, in which the stadium and the training grounds are embedded.
- (18) Alternatively, the Netherlands argued that even if the measures were to be considered as having provided a selective advantage to MVV, they would not distort competition or affect trade between Member States. The Netherlands emphasised the weak position of MVV in national professional football, which made participation in competitions at European level a very unlikely event. It was also stated that the Commission had failed to demonstrate that aid to MVV would distort competition or affect trade in any of the markets mentioned in the opening decision.
- (19) As a subsidiary argument, the Netherlands stated that if the measures were to be considered to constitute State aid, they would be compatible with the internal market. These arguments were, firstly, based on the Guidelines and, secondly, by making a compatibility assessment directly on the basis of Article 107(3)(c) and (d) of the Treaty.

(*) Communication from the Commission — Community Guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 244, 1.10.2004, p. 2). The application of those guidelines was prolonged by the Commission communication concerning the prolongation of the application of the Community guidelines on State aid for rescuing and restructuring firms in difficulty of 1 October 2004 (OJ C 296, 2.10.2012, p. 3).

4. ASSESSMENT OF THE MEASURES

4.1. Presence of State aid according to Article 107(1) of the Treaty

- (20) According to Article 107(1) of the Treaty, State aid is aid awarded by a Member State or through state resources in any form whatsoever, which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods in so far as it affects trade between Member States. The conditions laid down in Article 107(1) of the Treaty are cumulative and therefore for a measure to be qualified as State aid all the conditions must be fulfilled.
- (21) On the basis of the opening decision, the Commission has assessed the decision of the municipality of 25 May 2010 to waive a subordinated claim of EUR 1,7 million on MVV and to buy the stadium De Geusselt and MVV's training facilities for a sum of EUR 1,85 million. The Netherlands argue that both measures respect the market economy operator principle (MEOP), so they should not be qualified as entailing State aid.
- (22) The Commission considers — in line with the relevant case-law ⁽⁵⁾ — that there is a necessary and indissoluble link between the two measures. In order to reach this conclusion, the Commission has taken into account the chronology of the measures in question, their purpose, and MVV's situation at the time the decision to support MVV was made by the municipality ⁽⁶⁾. The Commission notes, firstly, that both measures were presented together and were decided in the same meeting of the municipal council on 25 May 2010. The purpose of both measures was to ensure the rescue of MVV in the immediate future and both were discussed — in one proposal — as part of the position of the municipality regarding the rescue plan being formed by the 'Initiatiefgroep MVV Maastricht'. The Commission therefore comes to the view that the measures are closely linked as regards their purpose and the situation of MVV at the time, namely to ensure the rescue of MVV given its evident precarious financial situation.
- (23) Both measures were decided by the municipality and they have financial consequences for this municipality (amounting to EUR 3,55 million). They thus involve the use of state resources, a conclusion not disputed by the Netherlands. The transfer of state resources may take many forms, such as direct grants, loans, guarantees, direct investment in the capital of enterprises and benefits in kind. Waiving claims of the state and investing at other than market conditions also constitutes a transfer of state resources.
- (24) Next, the Netherlands and the municipality claim that the municipality acted in compliance with the market economy creditor principle regarding the waiver of a claim and in compliance with the market economy investor principle regarding the acquisition of the stadium and the training facilities and, hence, did not provide an undue economic advantage to MVV. The Commission does not agree with this view for the following reasons.
- (25) Whenever the financial situation of an undertaking improves as a result of state intervention, an advantage is present. To assess whether this advantage is undue, the financial situation of the undertaking following the measure should be compared with its financial situation had the measure not been granted. It is undisputed that MVV's financial situation improved markedly through the measures under investigation.

4.1.1. Waiver of the subordinated loan/claim

- (26) The measures adopted by the municipality and by other important creditors allowed MVV to clean its balance sheet. The Commission notes that the other important creditors of MVV, i.e. those with claims exceeding EUR 150 000, waived their claims as well, whereas smaller creditors waived part of their claims. These actions, leading to a waiver of EUR 2,25 million of claims by private parties, as well as the actions by the municipality, did not take place in the context of a formal suspension of payments procedure. The absence of a formal framework explains why in the end a minority of creditors, holding claims amounting to EUR 145 347, did not participate in the waiver, even though some of them had promised to do so. The Commission also takes note of the fact that other claims waived were not of a subordinated nature, as was the claim of the municipality.

⁽⁵⁾ Case T-1/12, *France v Commission*, paragraph 37 et seq. and the case-law referred to therein (Case T-11/95, *BP Chemicals v Commission*).

⁽⁶⁾ Case *BP Chemicals*, paragraph 171.

According to the Netherlands, the absence of a formal procedure did not make any material difference in the sense that the result of the debt resolution for the municipality was identical to what would have occurred in a formal suspension of payment procedure under national bankruptcy law, i.e. that other creditors could have been forced to join a creditors' agreement, which, in the case of the municipality, would in any event have resulted in the entire loss of the (subordinate) loan amount.

- (27) However, as already mentioned in the opening decision, the Commission notes that three creditors had not completely waived their claims, but had transformed these into a claim on possible future transfer payments paid to MVV for players leaving the club. In this regard, the Netherlands pointed out that those three creditors had preferential and secured claims amounting to EUR 1,135 million. They would therefore have stood a better chance of recovering at least some part of their claims in the case of a formal bankruptcy procedure than other creditors with unsecured claims, let alone the municipality with its subordinate claim. The Commission considers that although the loan by the municipality was not provided under the same conditions, a private investor would not have completely waived the claim or at least would have secured — or endeavoured to secure — some kind of (possible) collateral for the waiver of such a substantial loan amount, even if the chances of repayment were weak. Furthermore, the Commission notes that the municipality could possibly have secured a benefit from the other creditors, if indeed the rescue plan also hinged on the participation of the municipality. Hence, the Commission considers that the full waiver of the loan by the municipality without any condition or collateral is not in line with the market economy creditor principle.
- (28) As regards the decision to participate in a creditors' agreement outside a formal suspension of payments procedure, the Netherlands pointed out that KNVB would have withdrawn MVV's licence to play professional football in the case of a formal suspension of payments. A formal suspension of payments was therefore not considered in the interest of the municipality and equally for the large majority of other creditors. Hence, this aspect in itself does not make the position of the municipality distinct from that of the other creditors.
- (29) In this context the Dutch authorities refer to the part in the opening decision in which the Commission concluded that the measures of the municipality of Arnhem in favour of the football club Vitesse did not constitute State aid: the principle of equality of treatment requires to appreciate the situation in the same way as to that of the municipality of Arnhem, i.e. as being in compliance with Article 107(1) of the Treaty as the decisions of the municipality would have been in respect of a private creditor principle. In this regard the Commission notes that each case has to be assessed based on its individual merits. In the case of Arnhem/Vitesse, the conditions attached to the creditors agreement meant that the respective positions of the municipality and other creditors were fully equated (each would receive 12 % of their outstanding claims), which is not so in the case of Maastricht/MVV: the other (preferential) creditors, in return for waiving their claim, could benefit from possible income from transfers of players, which was not the case for Maastricht.
- (30) The other reasons advanced by the Netherlands in relation to the socioeconomic consequences of the bankruptcy of MVV cannot be taken into account in the framework of assessing the market economy investor principle.
- (31) Firstly, the socioeconomic consequences of an eventual bankruptcy of MVV relate to the role of the municipality as a public authority, not to a position of a private investor. Although the municipality may have had a position as investor into the De Geusselt area, as referred to in the municipal council minutes of 25 May 2010, these interests are part of a broader interest relating to other general policy objectives, such as the infrastructural and economic development of the area, sports policy of the municipality and its municipal partnership. Hence the loan waiver — at the time it was provided — was not, or only partly, linked to a private commercial interest of the municipality as owner of the land or as an undertaking. Insofar as commercial interests existed, the Netherlands has provided no detail what these would consist of. Secondly, it is noted that the loan waiver as such would not have prevented the bankruptcy of MVV: more support measures were needed, such as the purchase of the stadium and training ground which the Commission considers not to have been in line with the market economy investor principle. As explained above, the measures are to be assessed jointly.
- (32) For these reasons, the Commission comes to the conclusion that the municipality, when deciding to waive its claim of EUR 1,7 million in May 2010, did not act as a market economy operator. This conclusion is also based on the fact that this loan waiver is to be assessed jointly with the purchase of the training grounds and the stadium, which the Commission concludes does not conform with the market economy investor principle, as explained in what follows.

4.1.2. Purchase of the training grounds and the stadium

- (33) The municipality did not only waive a subordinated claim on MVV, it also purchased the stadium De Geusselt and the club's training facilities Klein Geusselt, this purchase also being part of the overall plan to rescue and restructure MVV. The Netherlands claims that this purchase does not constitute State aid, because it took place under market conditions. The argument is based on the Commission communication concerning aid elements in land sales by public authorities ⁽⁷⁾ (hereinafter: 'the land sales communication'), as well as on the market economy investor principle, according to which financial acts of public authorities regarding an undertaking, where those acts would also have been acceptable to other operators under identical conditions, cannot be held to procure an advantage to an undertaking within the meaning of Article 107(1) of the Treaty. Regarding the land sales communication, the Netherlands acknowledges that that communication covers the sale of land and not the purchase of real estate, but they consider that it does apply by analogy.
- (34) The Commission notes that the purchase price of EUR 1,85 million was determined on the basis of an external expert's report, which was submitted to the Commission (report by surveyors Van Der Horst Taxateurs, June 2010). The Commission also notes that the municipality already owned the land on which the stadium was built. It purchased the stadium and the other assets, but also the right of long lease of the land (*recht van erfpacht*). [...] ^(*) The price of EUR 1,85 million includes the training facilities, which had not been included in the expert's report. It is noted that the expert report did not specify the identity of the buyer.
- (35) The Commission notes, firstly, that the municipality's reasons for buying the stadium included considerations related to 'public health' and 'social cohesion', given that it wanted to maintain and develop a 'sports zone' in the De Geusselt area ⁽⁸⁾. Such policy objectives would not be part of an investment decision of a market investor and hence the municipality cannot be equated with a market economy operator. Secondly, the Commission does not agree that a market economy operator would have been willing to purchase the football stadium at its replacement value. Different from land or other commodities, a football stadium is a productive asset, which can be used to generate revenue, but which also entails maintenance cost. A market economy operator would only purchase such a stadium on the basis of a business plan demonstrating the strong likelihood of a sufficiently profitable exploitation. This business plan would also determine the price at which an investor would be willing to purchase the stadium. The municipality did not have such a business plan, neither before the purchase, nor when it decided to purchase the stadium. In fact, in May 2010 the municipal council was informed by the municipal executive that a plan for the future exploitation of the stadium as a multifunctional facility would be drawn up. Such a plan was indeed presented to the council, but in December 2010. The Commission notes that in May 2010, when the decision to purchase the stadium was taken, the municipality estimated that the annual cost of maintaining the stadium would amount to EUR 380 000, whereas the annual rent charged to MVV was EUR 75 000 ⁽⁹⁾. The difference of EUR 305 000 would be financed by income from rent from other events or would have to be covered by the municipality. Whilst the purchase price was established to take account of the potential losses as a result from the low rental price to MVV, one cannot conclude that a private market operator would have engaged in a contract that carried an identified strong risk of being loss-making. The report presented to the municipal council in December 2010 confirms that 'in the current situation a commercial or cost-covering exploitation of the stadium is not possible'. In June 2012 a report drawn up by the municipal Court of Audit ⁽¹⁰⁾ found that the exploitation of the stadium remained loss-making.
- (36) Furthermore, in the case of a sale in the urgency that presented itself in regard of MVV, one might have expected a market operator to use the timing aspect as leverage to obtain a better price than the value estimated by a surveyor. This was not the case for the municipality, which simply took the value of the surveyor as 'realistic'.
- (37) This conclusion is not altered by the specific interest the municipality had in relation to the development plans of the De Geusselt area. In the rescue plan as formulated in 2010, the Netherlands did not point to any plan for the purchase or calculation prior to June 2010 of a potential purchase by the municipality. Such assessment prior to a purchase is, however, something that one might expect of a market investor.

⁽⁷⁾ OJ C 209, 10.7.1997, p. 3.

^(*) Confidential information.

⁽⁸⁾ Minutes of the municipal Council of 25 May 2010, under point 10. Also, under point 5, even though the municipality provided as grounds of buying the stadium securing its position in real estate, it also refers to other economic and societal effects it wishes to achieve.

⁽⁹⁾ A new lease was concluded with MVV on 21 June 2010.

⁽¹⁰⁾ Rekenkamer Maastricht: *De relatie tussen de gemeente Maastricht en MVV*.

- (38) For all these reasons the Commission concludes that the municipality in 2010, when deciding measures for the purchase of the stadium and training grounds, did not act as a market economy operator would have done.

4.1.3. Impact of the aid on MVV

- (39) The advantage to MVV was, firstly, that it was freed of its debt load and, secondly, that it could continue playing football in its home stadium De Geusselt. The monthly rent for the non-exclusive use of both facilities after their purchase by the municipality amounted to 3 % of MVV's budget or a minimum of EUR 75 000 ⁽¹¹⁾. The Commission also notes that according to the terms of the purchase contract, the sum of EUR 1,85 million paid by the municipality would be used by the seller, the third party *Stichting Stadion De Geusselt* ⁽¹²⁾, to cover the debts of MVV in taxes, salaries to players and pension obligations; those debts fell outside the agreement of creditors. This sum of EUR 1,85 million is indeed booked as extraordinary income in MVV's accounts for the season 2009/2010 with the explanation 'contribution municipality of Maastricht' (*Bijdrage Gemeente Maastricht*). The proceeds of the sale accruing to the *Stichting Stadion De Geusselt* were indeed to be used for the debt relief and restructuring of MVV (see letter of the foundation to the municipality of 9 June 2010).
- (40) The Netherlands have questioned the impact of any aid on the internal market for clubs not playing football at European level and more especially for MVV. In this regard, the Commission points out that MVV is a potential participant in European football tournaments each year. Even as a second league club it is in principle able to influence the contest for the national football cup and to win the cup, which would allow it to play for the European cup the year after. Over a short period of time, even a low ranking football club can advance to a higher level ⁽¹³⁾. The Commission further points out that professional football clubs deploy economic activities in several markets other than participating in football competitions, such as the transfer market for professional players, publicity, sponsorship, merchandising or media coverage. Aid to a professional football club strengthens its position on each of those markets, most of which cover several Member States. Therefore, if state resources are used to provide a selective advantage to a professional football club, such aid is likely to have the potential of distorting competition and to affect trade between Member States within the meaning of Article 107(1) of the Treaty ⁽¹⁴⁾. More specifically regarding MVV, during 2010 several players of MVV had the nationality of other Member States, notably the Belgian nationality.
- (41) In view of the above the Commission comes to the conclusion that the loan waiver and the purchase of the training grounds and the stadium (totalling EUR 3,55 million), constitute State aid in the sense of Article 107(1) of the Treaty. Their compatibility with the internal market will be assessed in the following.

4.2. Assessment under Article 107(3)(c) of the Treaty

- (42) The Commission must assess whether the aid measures to MVV can be considered to be compatible with the internal market. According to the jurisprudence of the Court, it is up to the Member State to invoke possible grounds of compatibility and to demonstrate that the conditions for such compatibility are met ⁽¹⁵⁾.
- (43) None of the derogations mentioned in Article 107(2) of the Treaty applies to the aid measure in question. The Netherlands has also not claimed that this would be the case.
- (44) As regards the derogations provided for in Article 107(3) of the Treaty, the Commission notes that none of the Dutch regions falls under the derogation in Article 107(3)(a) of the Treaty. Also, the aid measures in question do not promote an important project of common European interest, nor do they serve to remedy any serious disturbance in the Dutch economy as per Article 107(3)(b) of the Treaty.

⁽¹¹⁾ The new rent was pegged to MVV's turnover with a minimum of EUR 75 000; if MVV should prosper, the rent will increase. The rental income from the stadium for other uses would also accrue to the municipality.

⁽¹²⁾ A foundation, which according to the Netherlands is independent from both MVV and the municipality of Maastricht.

⁽¹³⁾ This has in fact been demonstrated by another Dutch professional football club, PEC Zwolle, which also played in the second league in 2010/2011. PEC was promoted to the first league in 2012/2013 and in 2013/2014 it won the national football cup entitling it to play at European level in 2014/2015.

⁽¹⁴⁾ Commission Decisions regarding Germany of 20 March 2013 on *Multifunktionsarena der Stadt Erfurt* (Case SA.35135 (2012/N)), point 12, and *Multifunktionsarena der Stadt Jena* (Case SA.35440 (2012/N)), summary notices in OJ C 140, 18.5.2013, p. 1, and of 2 October 2013 on *Fußballstadion Chemnitz* (Case SA.36105 (2013/N)), summary notice in OJ C 50, 21.2.2014, p. 1.

⁽¹⁵⁾ Case C-364/90, *Italy v Commission*, ECLI:EU:C:1993:157, point 20.

- (45) As regards the derogation in Article 107(3)(c) of the Treaty, i.e. aid to facilitate the development of certain economic activities where such aid does not adversely affect trading conditions to an extent contrary to the common interest, the Netherlands has argued that this derogation could be applied if the Commission were to find that the measures in question constitute State aid. In this regard, the Netherlands also argued that Article 107(3)(d) of the Treaty for aid to promote culture or heritage conservation in combination with Article 165 of the Treaty should be taken into account in the Commission's analysis.
- (46) In its assessment of the notion of 'development of economic activities' in the sports sector, the Commission takes due account of Article 165(1) of the Treaty and the last indent of Article 165(2) of the Treaty, which provide that the Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function. However, the Treaty distinguishes between the notions of sport and culture; therefore, Article 107(3)(d) of the Treaty cannot serve as basis for the assessment of the compatibility of the aid to MVV.
- (47) For its assessment of the aid measures under Article 107(3)(c) of the Treaty, the Commission has issued a number of regulations, frameworks, guidelines and communications concerning aid forms and horizontal or sector purposes for which aid is awarded. Given that MVV faced financial difficulties at the time the measures were taken and that the aid was awarded by the municipality to address those difficulties, the Commission believes that it is appropriate to assess whether the criteria laid down in the Guidelines ⁽¹⁶⁾ might apply. In this regard the Commission notes that the Guidelines do not exclude professional football. This economic activity is, hence, covered by the Guidelines.
- (48) In July 2014, the Commission published new Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty ⁽¹⁷⁾. They are, however, not applicable to this non-notified aid granted in 2010. According to point 137 of the new Guidelines, this would only be the case for any rescue or restructuring aid granted without prior authorisation if some or all of the aid is granted after the publication of those Guidelines in the *Official Journal of the European Union*. According to point 138 of the new Guidelines, in all other cases the Commission will conduct the examination on the basis of the Guidelines which applied at the time the aid was granted. Therefore, in the present case, the Commission will base its analysis on the 2004 Guidelines (see recital 14 above).
- (49) According to point 11 of the Guidelines, a firm is considered to be in difficulties where the usual signs of a firm being in difficulty are present, such as increasing losses, diminishing turnover, growing stock inventories, excess capacity, declining cash flow, mounting debt, rising interest charges and falling or nil net asset value. In acute cases the firm may already have become insolvent or may be the subject of collective insolvency proceedings brought under domestic law. As indicated in recital 13 above, MVV had negative equity since the season 2007/2008 and in the first quarter of 2010 the own equity reached minus EUR 5,1 million, while MVV's debts totalled EUR 6,4 million. As pointed out by the Netherlands, MVV was in the spring of 2010 virtually bankrupt. MVV therefore clearly was a company in difficulty within the meaning of the Guidelines. This fact is not disputed by the Netherlands. Therefore, the compatibility of the State aid to MVV must be assessed under the Guidelines.
- (50) In section 3.2, the Guidelines require that the grant of the aid must be conditional on the implementation of a restructuring plan. However, in accordance with point 59 of the Guidelines, for SMEs (like it is the case of MVV) the restructuring plan does not need to be endorsed by the Commission, although it must meet the requirements laid down in points 35, 36 and 37 of the Guidelines and be approved by the Member State concerned and communicated to the Commission. The Commission notes that the Netherlands has communicated a restructuring plan which addresses the conditions set out in points 34 to 37 of the Guidelines. The overall restructuring costs were nearly EUR 6 million. In this regard, the Commission notes that the decision of the municipality to award aid to MVV was subordinated to a number of conditions. These conditions were laid down in the business plan of 2010 referred to in recital 10.
- (51) In this regard, the Commission notes that the decision of the municipality to waive its loan and pay for De Geusselt followed an analysis on the nature and the causes of the difficulties of MVV. The transaction was based on a number of conditions which aim at restoring the long-term viability of the club within a reasonable time-scale of three years and at meeting the requirements of the KNVB to continue licensing MVV for professional competitions. The restructuring plan entailed a new management, cuts in staff and in the group of players. The restructuring plan does not rely on external factors which MVV can pursue but not entirely control, such as

⁽¹⁶⁾ Cf. footnote 4.

⁽¹⁷⁾ Communication from the Commission — Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (OJ C 249, 31.7.2014, p. 1).

finding new sponsors and an increase in the number of spectators. The continued improvement of the financial situation of the club is envisaged as well as its continued operation as a professional football club. The development as set out in the recital below shows that the plan was indeed realistic.

- (52) The measures taken were necessary to restore the viability of MVV. The club's financial health was indeed restored. As a result of those measures, over the whole season 2009/2010, MVV booked a profit of EUR 3,9 million and for the first time in several years had a positive own equity of EUR 0,051 million. The following season 2010/2011 ended with a profit of EUR 0,021 million and MVV's own equity amounted to EUR 0,072 million. MVV broke even in 2011/2012. KNVB upgraded the financial status of MVV from category 1 (insufficient) to 3 (good) in the beginning of the season 2011/2012.

4.2.1. *Compensatory measures*

- (53) Points 38 to 42 of the Guidelines require that compensatory measures be taken by the beneficiary in order to minimise the distortive effect of the aid and its adverse effects on trading conditions. However, according to point 41 of the Guidelines this condition does not apply to small enterprises, such as MVV.

4.2.2. *Aid limited to a minimum*

- (54) The Commission also notes that the restructuring plan is to a considerable extent financed by external private entities in addition to the internal savings made, in accordance with points 43 and 44 of the Guidelines. Several private entities had agreed to waive their debts as well. The overall contribution of the creditors and the municipality to the refinancing of MVV was around EUR 5,8 million (combined debt waivers and stadium and long lease purchase). The contribution by debt waivers of private entities other than the State was EUR 2,25 million and thus higher than the 25 % required for small enterprises.
- (55) The amount of the aid was necessary. According to the restructuring plan it should lead to smaller losses in the 2011/2012 and 2012/2013 seasons and moderate positive results later. This would not have allowed MVV to buy new players or attract them with higher salaries.
- (56) The plan was designed to enable a slimmed-down MVV to make a fresh start, without its debt load, but with a new structure. The measures should lead to a healthy financial position of MVV, also meeting the requirements of the KNVB. In this regard the Commission recalls that each Dutch professional football club receives a licence from the KNVB, under which it has to comply with various obligations. One of the obligations relates to the financial health of the club. Each season, a club is obliged to submit financial reports by 1 November, 1 March and 15 June depicting, inter alia, its current financial situation, as well as the budget for the next season. On the basis of these reports clubs are scaled in three categories (1: insufficient, 2: sufficient, 3: good). Clubs in category 1 may be obliged to present a plan for improvement in order to reach categories 2 or 3. If the club fails to comply with the plan, sanctions may be imposed by the KNVB, including an official warning, a reduction of competition points and — as ultimate sanction — withdrawal of the licence. A professional football club in the Netherlands, which is declared bankrupt, loses its licence. If a successor club is founded, it would not be admitted to the professional football leagues directly, but it would have to start in the second-highest amateur league.
- (57) The restructuring plan entailed a new management, a new structure, a new name, cuts in salaries and in staff, including the group of players. Several players were transferred, existing contracts were either terminated or prolonged for lower pay, new contracts were either concluded free of transfer payments or players were rented from other clubs, some amateur contracts were concluded; this entailed a reduction of cost of personnel and players of 40 %. As described in recitals 26 et seq., other creditors than the municipality waived claims on MVV totalling EUR 2,25 million. MVV was thus almost entirely freed of its debt.
- (58) The Commission finds that the restructuring plan tackles the causes of the financial difficulties of MVV, especially the cost of players in the form of wages and transfer payments. A professional football club cannot be expected to diversify into other markets in the sense of the Guidelines; it can however be expected to make savings on its core activity and this MVV has done. The Netherlands also provided a list of measures taken by MVV to cut other costs in the exploitation of the club. The restructuring plan does not rely on external factors which MVV can pursue but not entirely control, such as finding new sponsors and an increase in the number of spectators. The

Commission therefore finds that implementation of the plan allows MVV to continue to operate on a healthy basis in Dutch professional football, as was also recognised by KNVB, which awarded the category 3 status. The Commission also notes that the restructuring plan is to a considerable extent financed by external private entities in addition to the internal savings made. This meets the requirement in point 44 of the Guidelines that for a small company like MVV at least 25 % of the cost of the restructuring should be met by the own contribution of the beneficiary, including external financing demonstrating a belief in the viability of the beneficiary.

- (59) The Netherlands has furthermore supplied information on additional activities of the restructured MVV in favour of society, including a number of schools in Maastricht and in the Euregio. These activities can be said to contribute to the social and educational function of sports, as mentioned in Article 165 of the Treaty.

Monitoring and annual report and 'one-time,last-time' principle

- (60) Point 49 of the Guidelines requires that the Member State communicates on the proper implementation of the restructuring plan through regular detailed reports. Point 51 sets out less stringent conditions for small and medium-sized enterprises, where the transmission of yearly copies of the balance sheet and profit-and-loss accounts is normally considered sufficient. The Netherlands has committed to submit these reports. In accordance with the Guidelines, the Netherlands committed to sending a final report on the completion of the restructuring plan.
- (61) Points 72-77 of the Guidelines refer to the 'one time, last time' principle, according to which restructuring aid should be granted only once in a period of 10 years. The Netherlands has specified that MVV did not receive rescue or restructuring aid in the 10 years before the grant of the present aid. The Netherlands has also committed not to award any new rescue or restructuring aid to MVV during a period of 10 years.

5. CONCLUSION

- (62) The Commission concludes that the Netherlands has failed to respect its obligations under Article 108(3) of the Treaty by not notifying in advance State aid amounting to EUR 3,55 million, which was awarded to MVV in 2010, when it was in financial difficulty. This aid can, however, be considered compatible with the internal market as restructuring aid within the meaning of the Guidelines, as all conditions for such aid set out in the Guidelines are met,

HAS ADOPTED THIS DECISION:

Article 1

The State aid which the Netherlands has implemented in favour of the football club MVV in Maastricht, amounting to EUR 3,55 million, is compatible with the internal market within the meaning of Article 107(3)(c) of the Treaty on the Functioning of the European Union.

Article 2

This Decision is addressed to the Kingdom of the Netherlands.

Done at Brussels, 4 July 2016.

For the Commission
Margrethe VESTAGER
Member of the Commission

COMMISSION DECISION (EU) 2016/1848**of 4 July 2016****on the measure SA.40018 (2015/C) (ex 2015/NN) implemented by Hungary on the 2014 Amendment to the Hungarian food chain inspection fee***(notified under document C(2016) 4056)***(Only the Hungarian text is authentic)****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

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

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

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

Whereas:

1. PROCEDURE

- (1) By press articles published in December 2014, the Commission became aware of the 2014 amendment to the 2008 Hungarian Food Chain Act, regulating the food chain inspection fee. By letter of 17 March 2015, the Commission sent a request for information to the Hungarian authorities, who replied by letter of 16 April 2015.
- (2) By letter dated 15 July 2015, the Commission informed Hungary that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union (hereinafter: 'the Treaty') in respect of the aid measure (the 'Opening Decision'). The Commission also ordered the immediate suspension of the measure in accordance with Article 11(1) of Regulation (EC) No 659/1999 ⁽²⁾ in the Opening Decision.
- (3) The Opening Decision was published in the *Official Journal of the European Union* ⁽³⁾. The Commission invited interested parties to submit their comments on the aid measure.
- (4) The Commission received comments from one interested party. By letter of 13 October 2015, the Commission forwarded the comments to Hungary, which was given the opportunity to react. Hungary did not react to those comments.

2. DETAILED DESCRIPTION OF THE MEASURE**2.1. The 2008 Food Chain Act establishing a food chain inspection fee**

- (5) The provisions applicable to the food chain inspection fee are set forth in Act XLVI of 2008 on the food chain and the official supervision thereof (the 'Food Chain Act') and in Decree No 40 of 27 April 2012 of the Minister for Rural Development on the rules of making a declaration on and paying the food chain inspection fee.

⁽¹⁾ OJ C 277, 21.8.2015, p. 12.

⁽²⁾ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the treaty on the functioning of the European Union (OJ L 83, 27.3.1999, p. 1).

⁽³⁾ Cf. footnote [1].

Undertakings regarded as food chain operators pursuant to the Food Chain Act have to pay the fee in respect of their turnover made in relation to certain activities. The Act provides a list of the activities ⁽⁴⁾ in respect of which companies are obliged to pay the inspection fee.

- (6) All undertakings (companies and other legal persons, but also private persons who pursue their activities as sole traders or primary producers) operating in Hungary that generated turnover from the listed activities in the year preceding the declaration are subject to the payment of the food chain inspection fee. The purpose of the food chain inspection fee is to cover the cost of performance by the National Food Chain Safety Office (a State agency) of tasks relating to certain food chain regulatory and supervisory activities. The supervisory fee is calculated on a yearly basis and the person subject to the fee is obliged to declare and pay regardless of whether specific on-the-spot official controls have been carried out.
- (7) Until 31 December 2014, the rule established by the Food Chain Act was that all food chain operators had to pay the fee in respect of the relevant turnover at a flat rate of 0,1 %.
- (8) The collected food chain inspection fee may be spent only on the tasks set forth in the food chain safety strategy and the activities of the food chain authority.

2.2. The 2014 amendment of the Food Chain Act

- (9) Pursuant to the amendment of Article 47/B of the Food Chain Act by Act LXXIV of 2014 ⁽⁵⁾ that entered into force on 1 January 2015 (hereinafter: 'the 2014 amendment'), specific rules were introduced for the calculation of the inspection fee applicable to turnover generated by stores selling fast-moving consumer goods ⁽⁶⁾ on the Hungarian market.
- (10) The 2014 amendment of the Food Chain Act introduces a progressive fee structure for operators of stores selling fast-moving consumer goods ⁽⁷⁾, with rates ranging from 0 % to 6 %. More precisely, the following rates applied to turnover subject to the food chain inspection fee:
 - 0 % on the part of the turnover not exceeding HUF 500 million (approximately EUR 1,6 million),
 - 0,1 % on the part of the turnover exceeding HUF 500 million but not exceeding HUF 50 billion (approximately EUR 160,6 million),
 - 1 % on the part of the turnover exceeding HUF 50 billion but not exceeding HUF 100 billion (approximately EUR 321,2 million),

⁽⁴⁾ According to the Hungarian authorities in their response letter of 16 April 2015 to the Commission: 'The following qualify as activities subject to the inspection fee:

- distribution of animals kept for food production, breeding or experimental purposes,
- distribution of plants, sowing seeds, plant products and propagation and planting stock grown for food or animal feed production purposes,
- food production or distribution, including restaurant catering and public catering,
- production or distribution of animal feed,
- production or distribution of veterinary preparations and veterinary products,
- production or distribution of pesticides, yield-increasing materials or EC fertilisers,
- treatment, use, further processing and transport of by-products of animal origin or placing products made of them on the market,
- operation of a company engaged in the transport of livestock, a facility washing and disinfecting livestock-transporting vehicles, a quarantine station selected for receiving animals of foreign stock, an animal-loading facility, a collection station, a trading site, a feeding and watering station, a resting station or an animal market,
- production or storage of reproductive materials,
- operation of a phytosanitary, veterinary or food or animal feed analysis laboratory,
- distribution of devices used for marking animals.'

⁽⁵⁾ Act LXXIV of 2014 amending specific tax acts, other acts relating to them and Act CXXII of 2010 on the National Tax and Customs Administration.

⁽⁶⁾ Fast-moving consumer goods are defined as follows in Article 2(18a) of the Act on Commerce: 'fast-moving consumer goods: with the exception of products sold in the catering business, those foodstuffs, cosmetics, drugstore products, household cleaners and chemicals, hygiene paper products satisfying the daily needs and requirements of the population which the consumer typically consumes, depletes or replaces within one year'. In accordance with Article 2(18b) of the Act on Commerce, 'stores selling fast-moving consumer goods' are 'those shops for which fast-moving consumer goods constitute the vast majority of the turnover'.

⁽⁷⁾ For the purpose of the present Decision, reference to operators of stores selling fast-moving consumer goods includes all undertakings subject to the food chain inspection fee with respect to turnovers derived from stores selling fast-moving consumer goods.

- 2 % on the part of the turnover exceeding HUF 100 billion but not exceeding HUF 150 billion (approximately EUR 481,8 million),
 - 3 % on the part of the turnover exceeding HUF 150 billion but not exceeding HUF 200 billion (approximately EUR 642,4 million),
 - 4 % on the part of the turnover exceeding HUF 200 billion but not exceeding HUF 250 billion (approximately EUR 803 million),
 - 5 % on the part of the turnover exceeding HUF 250 billion but not exceeding HUF 300 billion (approximately EUR 963,5 million),
 - 6 % on the part of turnover exceeding HUF 300 billion.
- (11) Pursuant to the 2014 amendment of the Food Chain Act, all other food chain operators remained subject to the fee calculated on the relevant turnover at a flat rate of 0,1 %.
- (12) Neither the amended provision of the Hungarian Food Chain Act nor its explanatory memorandum make reference to the reasons behind the introduction of specific rules with regard to the fee rate for stores selling fast-moving consumer goods. No explanation is given either as to the determination of the different turnover brackets and corresponding fee rates.
- (13) The fee is subject to declaration by the food chain operators. It is payable annually in two equal instalments by 31 July and 31 January. The law also provides for simplified procedures in cases where the fee is less than HUF 1 000 (approximately EUR 3,20). In that case, the fee is still subject to declaration, but it does not have to be paid.
- (14) A penalty for belated payment is payable on any inspection fee unpaid by the deadline. A default penalty may be imposed if the persons or entities subject to the food chain inspection fee fail to fulfil their obligation to make a declaration, or fulfil it belatedly, incompletely or with untrue data.

3. THE FORMAL INVESTIGATION PROCEDURE

3.1. Grounds for initiating the formal investigation procedure

- (15) The Commission opened the formal investigation procedure because it considered at that stage that the progressive fee structure (rates and turnover brackets) introduced by the 2014 amendment constituted unlawful and incompatible State aid.
- (16) In particular, the Commission considered that the progressive rates introduced by the 2014 amendment differentiate between undertakings based on their turnover and therefore on their size and grant a selective advantage to undertakings with low turnover and thus smaller undertakings. Hungary had not provided evidence that the progressive fee structure applicable to stores selling fast-moving consumer goods, such as supermarkets, corresponds to a similar progressive pattern observed in the costs incurred by the National Food Chain Safety Office for the inspection of those stores. Hungary had therefore not demonstrated that the measure was justified by the nature or general scheme of the tax system. Therefore, the Commission considered that the measure constituted State aid, since all the other conditions laid down by Article 107(1) of the Treaty appeared to have been met.
- (17) Finally, the Commission raised doubts as to the compatibility of the measure with the internal market. In particular, the Commission recalled that it cannot declare compatible a State aid measure that breaches other rules of Union law, such as the fundamental freedoms established by the Treaty or the provisions of Union regulations and directives. At that stage, the Commission could not exclude that the measure predominantly targeted foreign-owned undertakings, which could entail a breach of Article 49 of the Treaty establishing the fundamental freedom of establishment and also expressed doubts that the differences in tax treatment entailed by the measure were necessary and proportionate to the objective of fulfilling the obligations laid down by Regulation (EC) No 882/2004 of the European Parliament and of the Council ⁽⁸⁾.

⁽⁸⁾ Regulation (EC) No 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules (OJ L 165, 30.4.2004, p. 1).

3.2. Modifications of the legal base of the inspection fee after the opening of the formal investigation procedure

- (18) On 27 October 2015, the Hungarian government submitted to the Hungarian Parliament a proposal for an Act amending Act XLVI of 2008 on the food chain and its official supervision. On 17 November 2015, the Hungarian Parliament adopted Act CLXXXII of 2015 amending Act XLVI of 2008 on the food chain and its official supervision, which was published in the Hungarian Official Gazette (*Magyar Közlöny*) No 182/2015 on 26 November 2015. The new law entered into force on the 31st day following that of its publication, i.e. on 27 December 2015.
- (19) The amendment of November 2015 abolishes the progressive fee structure introduced by the 2014 amendment and reintroduces a 0,1 % flat inspection fee for all food chain operators, as was the case before the 2014 amendment to the Act.

3.3. Comments from Hungary

- (20) Hungary did not send any comments to the Commission in response to the Opening Decision.
- (21) Instead, by letter of 16 September 2015 addressed to the Commissioner for Competition, Hungary sent a proposal for an amended food chain inspection fee to the Commission. In this proposal, the 0 % rate would be repealed and, instead of the progressive fee structure with eight rates (between 0 % and 6 %), a two-rate system would be introduced (0,1 % for retail sector operators with low turnover and 0,3 % for retail sector operators with higher turnover).
- (22) By letter of 7 October 2015, the Commission's services informed Hungary that even though, the difference between the fee rates decreased under the new proposal, the proposed new fee would still feature a progressive fee structure, which would be problematic from a State aid perspective if it was not justified by the guiding principles of the inspection fee system.
- (23) By letter of 7 October 2015, Hungary sent additional information and data aimed at justifying the dual progressive fee structure on the basis of the supervision cost of major market players and other commercial units. In particular, Hungary argued that major players have a complex structure, which requires a more complicated control and far more resources from the authority performing such controls.
- (24) Following Hungary's request to receive feedback on the proposal made in its letter of 16 September 2015 and on the additional information provided in its letter of 7 October 2015, the Commission's services informed Hungary by letter of 17 March 2016 that the data provided does not demonstrate that the cost of controls as a proportion of turnover increases in the same way as the fee rates. In particular, the Commission's services confirmed their view that the figures provided did not show that the cost of inspections for companies falling under the 0,3 % rate are three times higher — for each forint of turnover controlled — than those for the companies falling under the 0,1 % rate. Hence, the progressive two-fee structure would have to be considered to provide a selective advantage to the undertakings falling under the lower bracket.
- (25) In the end, Hungary did not submit this legislative proposal to the Hungarian Parliament to amend the Act XLVI of 2008 on the food chain and its official supervision.

3.4. Comments from interested parties

- (26) The Commission received comments from one interested party. That interested party operates in the Hungarian market and agrees with the Commission's assessment in the Opening Decision. That interested party argues that the measure was designed to specifically target foreign companies, which it contends is possible because of the structure of the Hungarian retail market. According to that party, foreign companies in the retail sector in Hungary operate branches or subsidiaries, which increases the level of their (consolidated) turnover. By contrast, Hungarian undertakings are organised in a franchise system, with each individual store — or a limited number of them — being operated by a different legal entity which is not part of the franchisor's corporate entity or group.

According to estimates provided by the interested party, foreign retailers (corporate groups) together would currently have a market share of approximately 50 % in Hungary, but they bear around 95 % of the inspection fee volume, while Hungarian retailers generally fall within the 0 % or 0,1 % fee brackets under Article 47/B of the Food Chain Act.

- (27) In other words, Hungarian food retailers, due to their franchise system organisation, automatically fall within lower fee brackets (subject to 0 % or 0,1 % rates), while branches/subsidiaries of foreign EU parents which are not organised according to a franchise system, are generally affected by high fee levels. Hence, according to the interested party, the food chain inspection fee grants a selective advantage both to smaller undertakings and to those undertakings operating in the retail trade which are not organised in a branch system, i.e. to Hungarian vs foreign-owned undertakings.

3.5. Comments from Hungary on interested parties' comments

- (28) The Commission has not received any response from Hungary on the comments from the sole interested party, which were forwarded to it by letter of 13 October 2015.

4. ASSESSMENT OF THE AID

- (29) The Commission limits its assessment in the present Decision to the provisions of the 2014 amendment to the Food Chain Act, more specifically to the amended provision laying down a progressive fee structure (rates and turnover brackets) on stores selling fast-moving consumer goods in Hungary as set out in recital 10 above.

4.1. Presence of State aid within the meaning of Article 107(1) of the Treaty

- (30) According to Article 107(1) of the Treaty, '[s]ave as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'.
- (31) The classification of a measure as aid within the meaning of this provision therefore requires the following cumulative conditions to be met: (i) the measure must be imputable to the State and financed through State resources; (ii) it must confer an advantage on its recipient; (iii) that advantage must be selective; and (iv) the measure must distort or threaten to distort competition and affect trade between Member States.

4.1.1. State resources and imputability to the State

- (32) To constitute State aid, a measure must be financed through State resources and be imputable to a Member State.
- (33) Since the measure results from an Act of the Hungarian Parliament, it is clearly imputable to the Hungarian State. Hungary's argument that, given that the legal basis of the fee is Regulation (EC) No 882/2004, the fee cannot be imputed to the Hungarian State, cannot be accepted.
- (34) The Union Courts have previously held that a tax exemption adopted by a Member State implementing a Union directive in accordance with its obligations under the Treaty is not imputable to that Member State, but stems from an act of the Union legislature and therefore does not constitute State aid⁽⁹⁾. However, Regulation (EC) No 882/2004 sets out general obligations for Member States and does not impose upon them the obligation to establish progressive fees based on turnover for the performance of controls, so that the 2014 amendment cannot be said to stem from an act of the Union legislature. Article 26 of Regulation (EC) No 882/2004 provides that 'Member States shall ensure that adequate financial resources are available to provide the necessary staff and

⁽⁹⁾ Case T-351/02 *Deutsche Bahn v Commission* EU:T:2006:104, paragraph 102.

other resources for official controls by whatever means considered appropriate, including through general taxation or by establishing fees or charges'. Pursuant to Article 27(1), 'Member States may collect fees or charges to cover the costs occasioned by official controls'. It is thus the responsibility of individual Member States to set the amount of the fees within the bounds of the said legislation, and in particular in compliance with Article 27 thereof. Any choice made in that context is therefore imputable to the Hungarian State.

- (35) As regards the measure's financing through State resources, where the result of a measure is that the State forgoes revenues which it would otherwise have to collect from an undertaking in normal circumstances, that condition is also fulfilled ⁽¹⁰⁾. In the present case, the Hungarian State waives resources it would otherwise have to collect from operators of stores selling fast-moving consumer goods with a lower level of turnover (and thus smaller undertakings), if they had been subject to the same inspection fee as operators of stores selling fast-moving consumer goods with a high level of turnover.

4.1.2. Advantage

- (36) According to the case law of the Union Courts, the notion of aid embraces not only positive benefits, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking ⁽¹¹⁾. Although a measure that entails a reduction to a tax or a levy does not involve a positive transfer of resources from the State, it gives rise to an advantage because it places the undertakings to which it applies in a more favourable financial position than other taxpayers and results in a loss of income to the State ⁽¹²⁾. An advantage may be granted through different types of reduction in a company's tax burden and, in particular, through a reduction in the applicable tax rate, taxable base or in the amount of tax due ⁽¹³⁾.
- (37) The 2014 amendment to the Food Chain Act lays down a progressive fee structure that applies to operators of stores selling fast-moving consumer goods depending on the brackets into which those undertakings' turnover falls. The progressive character of those fees has the effect that the average percentage of the fee levied on a store's turnover increases when its turnover increases and reaches the next upper brackets. This has the result that undertakings with low turnover (smaller undertakings) are subject to the fee at substantially lower average rates than undertakings with high turnover (larger undertakings). Being subject to the fee at this substantially lower average rate mitigates the charges that undertakings with low turnover have to bear as compared to undertakings with high turnover and therefore constitutes an advantage to the benefit of smaller undertakings over larger undertakings for the purposes of Article 107(1) of the Treaty.

4.1.3. Selectivity

- (38) A measure is selective if it favours certain undertakings or the production of certain goods within the meaning of Article 107(1) of the Treaty.
- (39) For fiscal schemes the Court of Justice has established that the selectivity of a measure should in principle be assessed by means of a three-step analysis ⁽¹⁴⁾. First, the common or normal tax regime applicable in the Member State is identified: 'the reference system'. Second, it should be determined whether a given measure constitutes a derogation from that system in so far as it differentiates between economic operators who, in light of the objectives intrinsic to the system, are in a comparable factual and legal situation. If the measure in question does not constitute a derogation from the reference system, it is not selective. If it does (and therefore is *prima facie* selective), it must be established, in the third step of the analysis, whether the derogatory measure is justified by

⁽¹⁰⁾ Case C-83/98 P *France v Ladbroke Racing Ltd and Commission* EU:C:2000:248, paragraphs 48 to 51. Likewise, a measure allowing certain undertakings a tax reduction or to postpone payments of tax normally due can amount to State aid, see Joined Cases C-78/08 to C-80/08 *Paint Graphos and Others*, EU:C:2011:550, paragraph 46.

⁽¹¹⁾ Case C-143/99 *Adria-Wien Pipeline* EU:C:2001:598, paragraph 38.

⁽¹²⁾ Joined Cases C-393/04 and C-41/05 *Air Liquide Industries Belgium* EU:C:2006:403, paragraph 30 and Case C-387/92 *Banco Exterior de Espana* EU:C:1994:100, paragraph 14.

⁽¹³⁾ See Case C-66/02 *Italy v Commission* EU:C:2005:768, paragraph 78; Case C-222/04 *Cassa di Risparmio di Firenze and Others* EU:C:2006:8, paragraph 132; Case C-522/13 *Ministerio de Defensa and Navantia* EU:C:2014:2262, paragraphs 21 to 31. See also point 9 of the Commission notice on the application of the State aid rules to measures relating to direct business taxation (OJ C 384, 10.12.1998, p. 3).

⁽¹⁴⁾ See, for example, Case C-279/08 P *Commission v Netherlands (NOx)* [2011] EU:C:2011:551; Case C-143/99 *Adria-Wien Pipeline* EU:C:2001:598; Joined Cases C-78/08 to C-80/08, *Paint Graphos and others* EU:C:2011:550; Case C-308/01 *GIL Insurance* EU:C:2004:252.

the nature or the general scheme of the (reference) tax system ⁽¹⁵⁾. If a *prima facie* selective measure is justified by the nature or the general scheme of the system, it will not be considered selective and it will thus fall outside the scope of Article 107(1) of the Treaty.

(a) *System of reference*

- (40) In the present case, the Commission considers the reference system to be the inspection fee on food chain undertakings operating in Hungary ⁽¹⁶⁾. The Commission does not consider that the progressive fee structure introduced by the 2014 amendment can form a part of that reference system.
- (41) As the Court of Justice has specified ⁽¹⁷⁾, it is not always sufficient to confine the selectivity analysis to whether the measure derogates from the reference system as defined by the Member State. It is also necessary to evaluate whether the boundaries of that system have been designed by the Member State in a consistent manner or, conversely, in a clearly arbitrary or biased way, so as to favour certain undertakings over others. Otherwise, instead of laying down general rules applying to all undertakings from which a derogation is made for certain undertakings, the Member State could achieve the same result, side stepping the State aid rules, by adjusting and combining its rules in such a way that their very application results in a different burden for different undertakings ⁽¹⁸⁾. It is particularly important to recall in that respect that the Court of Justice has consistently held that Article 107(1) of the Treaty does not distinguish between measures of State intervention by reference to their causes or their aims, but defines them in relation to their effects, and thus independently of the techniques used ⁽¹⁹⁾.
- (42) Whereas the application of a flat fee to the turnover of food chain operators is an appropriate means to cover the costs incurred by the State for its inspection activities in line with Regulation (EC) No 882/2004, the progressive fee structure introduced by the 2014 amendment to the Food Chain Act appears deliberately designed by Hungary to favour certain undertakings over others. Prior to the 2014 amendment, all food chain operators, including store selling fast moving consumer goods, had to pay the fee in respect of their turnover at a flat rate of 0,1 %. Under the progressive fee structure introduced under the 2014 amendment operators of stores selling fast-moving consumer goods are potentially subject to a series of eight different fee rates, starting from 0 % and progressively increasing towards 6 %, depending on the brackets into which their turnover falls. Consequently, as a result of the 2014 amendment, a different average tax rate applies to undertakings subject to the fee depending on the nature of their activities (whether they operate stores selling fast moving consumer goods) and the level of their turnover (whether it surpasses the thresholds laid down by that amendment).
- (43) Because each company is taxed at a different rate, it is not possible for the Commission to identify one single reference rate in the fees as amended in 2014. Hungary also did not present any specific rate as the reference rate or 'normal' rate and also did not explain why a higher rate would be justified by exceptional circumstances for operators of stores selling fast moving consumer goods with a high level of turnover, nor why lower rates should apply to certain categories of operators or operators of stores selling fast moving consumer goods with lower levels of turnovers.
- (44) The effect of the 2014 amendment is therefore that different undertakings pay different levels of taxation (expressed as a proportion of their overall annual turnover) depending on their activities and, since the amount of turnover achieved by an undertaking correlates to a certain extent with the size of that undertaking, their size. However, the objective of the food inspection fee is to finance health and safety-related checks of food as it passes through the food chain and the progressive fee structure, with rates ranging between 0 % and 6 %, does not mirror the relationship between the cost of inspections on the premises of the undertakings covered by the measure and their turnover.
- (45) In light of that objective, the Commission considers all food chain operators, in general, and all operators of stores selling fast-moving consumer goods, in particular, to be in a comparable legal and factual situation, regardless of their activities or their level of turnover, and Hungary has advanced no convincing justification to discriminate between those types of undertakings when it comes to levying the food chain inspection fee. The Commission refers, in this regard, to recitals 52 to 57 below. Hungary has therefore deliberately designed the food chain inspection fee in such a manner so as to arbitrarily favour certain undertakings, namely operators of

⁽¹⁵⁾ Commission Notice on the application of the State aid rules to measures relating to direct business taxation (OJ C 384, 10.12.1998, p. 3).

⁽¹⁶⁾ See above footnote 4.

⁽¹⁷⁾ Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* EU:C:2011:732.

⁽¹⁸⁾ *Ibid*, paragraph 92.

⁽¹⁹⁾ Case C-487/06 P *British Aggregates v Commission* EU:C:2008:757, paragraphs 85 and 89 and the case-law cited, and Case C-279/08 P *Commission v Netherlands (NOx)* EU:C:2011:551, paragraph 51.

stores selling fast-moving consumer goods with a lower level of turnover (and thus smaller undertakings), and disadvantage others, namely larger undertakings, which also tend to be foreign-owned ⁽²⁰⁾.

- (46) The reference system is therefore selective by design in a way that is not justified in light of the objective of the food inspection fee, which is to finance health and safety-related checks of food as it passes through the food chain. Consequently, the appropriate reference system in the present case is the imposition of an inspection fee on food chain undertakings operating in Hungary based on their turnover, without the progressive fee structure being a part of that system.

(b) *Derogation from the system of reference*

- (47) As a second step, it is necessary to determine whether the measure derogates from reference system in favour of certain undertakings which are in a similar factual and legal situation in light of the intrinsic objective of the system of reference.
- (48) As explained in recital 44, the intrinsic objective of the food inspection fee is to finance health and safety-related checks of food as it passes through the food chain in Hungary. As further explained in that recital, all food chain operators, in general, and all operators of stores selling fast-moving consumer goods, in particular, should be considered to be in a comparable legal and factual situation in light of that objective, regardless of their activities or their level of turnover.
- (49) As explained in recital 37, the progressive fee structure, which pursuant to the 2014 amendment applies only to operators of stores selling fast-moving consumer goods, has the result that undertakings with high levels of turnover are subject to both substantially higher marginal inspection fees and substantially higher average inspection fee rates as compared to operators of stores with low levels of turnover and other food chain operators. In other words, the progressive fee structure introduced by the 2014 amendment differentiates between undertakings in a comparable factual and legal situation as regards the objective of the food inspection fee based on their activities and their size.
- (50) The Commission notes, in particular, that the fee rates laid down by the 2014 amendment to the Food Chain Act and the brackets to which they apply result in an increase of the fee for undertakings subject to the fee depending on their turnover from certain activities and thus their size. The marginal fee rate is 0,1 % for undertakings generating a turnover higher than HUF 500 million, but not exceeding HUF 50 billion. That marginal rate is multiplied by 60 to reach 6 % for undertakings selling fast-moving consumer goods that generate a turnover exceeding HUF 300 billion. The consequence of that increase in the marginal fee rate is that for a store with turnover in the top bracket, the average level of fee is substantially higher than the one applicable to undertakings with lower levels of turnover (and thus smaller undertakings).
- (51) Consequently, the progressive rate structure introduced by the 2014 amendment derogates from the reference system consisting of the imposition of an inspection fee on food chain undertakings operating in Hungary in favour of operators of stores selling fast-moving consumer goods with a lower level of turnover (and thus smaller undertakings). The Commission therefore considers the contested measure to be *prima facie* selective.

(c) *Justification*

- (52) A measure which derogates from the reference system is not selective if it is justified by the nature or general scheme of that system. This is the case where the selective treatment is the result of inherent mechanisms necessary for the functioning and effectiveness of the system ⁽²¹⁾. For this purpose, external policy objectives —

⁽²⁰⁾ Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* EU:C:2011:732. See also, by way of analogy, Case C-385/12 *Hervis Sport- és Divatkereskedelmi Kft.* EU:C:2014:47, by which the Court of Justice held: 'Articles 49 TFEU and 54 TFEU must be interpreted as precluding legislation of a Member State relating to tax on the turnover of store retail trade which obliges taxable legal persons constituting, within a group, "linked undertakings" within the meaning of that legislation, to aggregate their turnover for the purpose of the application of a steeply progressive rate, and then to divide the resulting amount of tax among them in proportion to their actual turnover, if — and it is for the referring court to determine whether this is the case — the taxable persons covered by the highest band of the special tax are "linked", in the majority of cases, to companies which have their registered office in another Member State.'

⁽²¹⁾ See for example Joined Cases C-78/08 to C-80/08 *Paint Graphos and others* EU:C:2011:550, paragraph 69.

such as regional, environmental or industrial policy objectives — cannot be relied upon by the Member States to justify the differentiated treatment of undertakings under a certain regime. It is for the Member State, i.e. for the Hungarian authorities, to provide a justification.

- (53) The Hungarian authorities have argued that the purpose of the derogation is to ensure that the rate of the inspection fee is more proportional to the resources of the authority required for the inspection of significant market players (e.g. certificates, time required for inspection with IT and quality assurance systems, number of company sites, use of experts and motor vehicle costs). In the view of the Hungarian authorities, food chain operators with larger turnovers or which represent a greater risk by virtue of the greater number of consumers they deal with should contribute more to the financing of food chain inspection.
- (54) The Commission considers that progressive turnover fees can only be justified if the specific objective pursued by the fee requires such progressive rates, i.e. if the costs that the fee is supposed to cover or the negative externalities created by an activity that the fee is supposed to address also increase — and increase more than proportionately ⁽²²⁾ — in respect of turnover. As the retail chain supervision fee is supposed to finance health and safety-related checks of food as it passes through the food chain, the Commission has found no reason why the cost of such controls should increase more than proportionately with the turnover of larger undertakings.
- (55) For example, Hungary has not provided evidence explaining why the operator of a retail store with substantial levels of turnover selling, for example, a package of sugar would represent 60 times the hazards or warrant controls 60 times more costly compared to the operator of a small supermarket with low turnover selling the same package of sugar. Indeed, while the turnover resulting from the sale of that package of sugar is similar for both undertakings, the fee due for each forint of turnover generated by the sale of that package is 60 times lower for the operator of the small supermarket.
- (56) The Commission further observes that Hungary's purported justification that food chain operators with larger turnovers should contribute more to the financing of food chain inspection is undermined by the fact that a store selling fast moving consumer goods that generates a high level of turnover will be subject to higher rates on that turnover than food chain operators other than undertakings selling fast-moving consumer goods which generate the same level of turnover but remain subject to a 0,1 % flat fee.
- (57) Accordingly, the Commission does not consider that the measure is justified by the nature and general scheme of the reference system. The measure should therefore be considered to confer a selective advantage on undertakings operating stores selling fast-moving consumer goods with a lower level of turnover (and thus smaller undertakings).

4.1.4. *Distortion of competition and effect on intra-Union trade*

- (58) According to Article 107(1) of the Treaty, a measure must distort or threaten to distort competition and have an effect on intra-Union trade to constitute State aid. The measure applies to undertakings deriving turnover from certain food chain related activities and selling fast-moving consumer goods on the Hungarian market, including operators from other Member States. The market served by undertakings selling fast-moving consumer goods is characterised — both in Hungary and in other Member States — by the presence of operators from other Member States that effectively operate — or could develop their operations — on an international scale. The progressive character of the turnover fee may substantially favour some of those operators, to the detriment of others and reinforce their position both on the Hungarian market and on the European market at large. The measure therefore has an influence on the competitive situation of the undertakings subject to the progressive fee, distorts or threatens to distort competition and has an effect on intra-Union trade.

4.1.5. *Conclusion*

- (59) Since all the conditions laid down by Article 107(1) of the Treaty are met, the Commission considers that the 2014 amendment to the Food Chain Act laying down a progressive fee rate structure for undertakings selling fast-moving consumer goods constitutes State aid within the meaning of that provision.

⁽²²⁾ Indeed, a flat rate fee already imposes a higher fee on stores with a higher turnover.

4.2. Compatibility of the aid with the internal market

- (60) State aid shall be deemed compatible with the internal market if it falls within any of the categories listed in Article 107(2) of the Treaty ⁽²³⁾ and it may be deemed compatible with the internal market if it is found by the Commission to fall within any of the categories listed in Article 107(3) of the Treaty ⁽²⁴⁾. However, it is the Member State granting the aid which bears the burden of proving that State aid granted by it is compatible with the internal market pursuant to Articles 107(2) or 107(3) of the Treaty ⁽²⁵⁾.
- (61) The Commission notes that the Hungarian authorities have not provided any arguments why the 2014 amendment to the Food Chain Act would be compatible with the internal market. Hungary did not comment on the doubts expressed in the Opening Decision as regards the compatibility of the measure and did not react to the comments expressed by the third party on compatibility ⁽²⁶⁾. The Commission considers that none of the exceptions referred to in the aforementioned provisions apply, since the measure does not appear to aim to achieve any of the objectives listed in those provisions. Consequently, the measure cannot be declared compatible with the internal market.
- (62) The Commission further recalls that it cannot declare compatible a State aid measure that breaches other rules of Union law such as the fundamental freedoms established by the Treaty or the provisions of Union regulations and directives. In that respect, the doubts expressed by the Commission in the Opening Decision that the measure predominantly targets foreign-owned undertakings, which could entail a breach of Article 49 of the Treaty establishing the fundamental freedom of establishment, have not been alleviated. Hungary did not comment on the possible breach of Article 49 of the Treaty or the comments of the interested third party on this aspect.
- (63) Hungary claimed that Regulation (EC) No 882/2004 is the legal basis for the food chain inspection fee as amended by the 2014 amendment. However, based on the information provided by the Hungarian authorities ⁽²⁷⁾, the Commission disagrees that the measure — as amended in 2014 — complies with Regulation (EC) No 882/2004 for the following four reasons.
- (64) First, on the basis of the information provided by Hungary, it has not been established that the inspection fee — as amended in 2014 — was calculated in accordance with the criteria for the calculation of fees enshrined in Regulation (EC) No 882/2004, nor that it did not exceed the overall costs that the competent authorities incur in the performance of official controls, as is expressly required by Article 27(4)(a) of that Regulation.
- (65) Second, the costs that were taken into account when the calculation method of the inspection fee was established do not appear to be in line with those referred to in Article 27(4)(a) when read in conjunction with Annex VI to Regulation (EC) No 882/2004. In particular, whilst the latter states that the costs to be considered for the calculation of fees can include those of staff *'involved in official controls'*, the Hungarian authorities have informed the Commission that the inspection fee they charge also covers the (wider) costs stemming from the broader category of *'staff salaries'* ⁽²⁸⁾.
- (66) Third, although the Hungarian authorities are entitled to charge flat rate fees in accordance with Article 27(4)(b) of Regulation (EC) No 882/2004, they have failed to provide a convincing justification for the progressive nature of the inspection fee and for its structures (fee bands and rates). In particular, Hungary has not provided any evidence that the progressive rate structure (rates and turnover brackets) applicable to operators of stores selling fast-moving consumer goods corresponds to a similar progressive pattern observed in the costs incurred by the National Food Chain Safety Office for the inspection of the said undertakings.

⁽²³⁾ The exceptions provided for in Article 107(2) of the Treaty concern: (a) aid of a social character granted to individual consumers; (b) aid to make good the damage caused by natural disasters or exceptional occurrences; and (c) aid granted to certain areas of the Federal Republic of Germany.

⁽²⁴⁾ The exceptions provided for in Article 107(3) of the Treaty concern: (a) aid to promote the development of certain areas; (b) aid for certain important projects of common European interest or to remedy a serious disturbance in the economy of the Member State; (c) aid to develop certain economic activities or areas; (d) aid to promote culture and heritage conservation; and (e) aid specified by a Council decision.

⁽²⁵⁾ Case T-68/03 *Olympiaki Aeroporia Ypiresies v Commission* EU:T:2007:253 paragraph 34.

⁽²⁶⁾ As indicated in recital 4, those comments were forwarded to Hungary for possible comments on 13 October 2015.

⁽²⁷⁾ Information provided to the Directorate General for Health and Food Safety by letters dated 26 February [Ares(2015)835210] and 19 May 2015 respectively [Ares (2015)2083309].

⁽²⁸⁾ See letter of the Hungarian authorities of 7 October 2015 to the Commission services.

- (67) Finally, although the progressive rate is allegedly justified under Regulation (EC) No 882/2004 by the need to have a fee proportionate to the greater administrative resources that the competent authorities need to obtain for controls on major market operators, the Commission fails to see how, given the nature of official controls, the control of several outlets of large retailers can be any more expensive or complex than the control of several outlets of franchised operators (which, however, are subject to substantially lower inspection fees given that the turnover of each outlet taken individually is much lower).
- (68) In view of the above, the Commission does not consider the differences in tax treatment entailed by the measure to be necessary and proportionate to the objective of fulfilling the obligations laid down by Regulation (EC) No 882/2004.

4.3. The Amended Act food chain inspection fee

- (69) As indicated in Section 3.2, the food chain inspection fee as amended on 17 November 2015 no longer applies progressive rates. Act CLXXXII of 2015 amending Act XLVI of 2008 on the food chain and its official supervision provides instead a 0,1 % flat rate for all food chain operators. The abolishment of the progressive structure of the fee addresses the State aid concerns raised by that progressive structure in the Opening Decision.

4.4. Recovery of the aid

- (70) The 2014 amendment was never notified nor declared compatible with the internal market by the Commission. Since the 2014 amendment constitutes State aid within the meaning of Article 107(1) of the Treaty and new aid within the meaning of Article 1(c) of Council Regulation (EU) 2015/1589 ⁽²⁹⁾ that has been put into effect in violation of the standstill obligation laid down in Article 108(3) of the Treaty, that measure also constitutes unlawful aid within the meaning of Article 1(f) of Regulation (EU) 2015/1589.
- (71) The consequence of the finding that the measure constitutes unlawful and incompatible State aid is that the aid has to be recovered from its recipients pursuant to Article 16 of Regulation (EU) 2015/1589.
- (72) However, as a result of the suspension injunction issued by the Commission in its Opening Decision, Hungary confirmed it had suspended the payment of the food chain inspection fee for those subject to the relevant category of the progressive inspection fee.
- (73) Therefore, no State aid has been effectively granted under the measure. For this reason, there is no need for recovery.

5. CONCLUSION

- (74) The Commission finds that Hungary has unlawfully implemented the aid in question in breach of Article 108(3) of the Treaty on the Functioning of the European Union.
- (75) This Decision does not prejudice possible investigations on the compliance of the measure with the fundamental freedoms laid down in the Treaty, notably the freedom of establishment as guaranteed by Article 49 of the Treaty,

HAS ADOPTED THIS DECISION:

Article 1

The progressive fee structure (rates and turnover brackets) applicable to operators of stores selling fast-moving consumer goods introduced in the Hungarian food chain inspection fee through the amendment by Act LXXIV of 2014 constitutes State aid that is incompatible with the internal market within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union which was unlawfully put into effect by Hungary in breach of Article 108(3) of that Treaty.

⁽²⁹⁾ Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9).

Article 2

Individual aid granted under the scheme referred to in Article 1 does not constitute aid if, at the time it is granted, it fulfils the conditions laid down by the regulation adopted pursuant to Article 2 of Council Regulation (EC) No 994/98 ⁽³⁰⁾ or (EU) 2015/1588 ⁽³¹⁾ whichever is applicable at the time the aid is granted.

Article 3

Hungary shall cancel all outstanding payments of aid under the scheme referred to in Article 1 with effect from the date of adoption of this Decision.

Article 4

Hungary shall ensure that this Decision is implemented within 4 months following the date of notification of this Decision.

Article 5

This Decision is addressed to Hungary.

Done at Brussels, 4 July 2016.

For the Commission
Margrethe VESTAGER
Member of the Commission

⁽³⁰⁾ Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to certain categories of horizontal State aid (OJ L 142, 14.5.1998, p. 1).

⁽³¹⁾ Council Regulation (EU) 2015/1588 of 13 July 2015 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to certain categories of horizontal State aid (OJ L 248, 24.9.2015, p. 1).

COMMISSION DECISION (EU) 2016/1849**of 4 July 2016****on the measure SA.41613 — 2015/C (ex SA.33584 — 2013/C (ex 2011/NN)) implemented by the Netherlands with regard to the professional football club PSV in Eindhoven***(notified under document C(2016) 4093)***(Only the Dutch text is authentic)****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

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

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

Having called on interested parties to submit their comments pursuant to Article 108(2) of the Treaty ⁽¹⁾ and having regard to their comments,

Whereas:

1. PROCEDURE

- (1) In May 2011, the Commission learnt from press reports and through submissions from citizens that the municipality of Eindhoven was planning to support the professional football club Philips Sport Vereniging (hereinafter: 'PSV') through a financial transaction. In 2010 and in 2011 the Commission also received complaints concerning measures in favour of other professional football clubs in the Netherlands, namely MVV in Maastricht, Willem II in Tilburg, FC Den Bosch in 's-Hertogenbosch and NEC in Nijmegen. On 26 and 28 July 2011, the Netherlands provided the Commission with information on the measure concerning PSV.
- (2) By letter dated 6 March 2013, the Commission informed the Netherlands that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty in respect of the measures in favour of Willem II, NEC, MVV, PSV and FC Den Bosch.
- (3) The Commission decision to initiate the procedure (hereinafter: 'the opening decision') was published in the *Official Journal of the European Union* ⁽²⁾. The Commission invited interested parties to submit their comments on the measures in question.
- (4) Concerning the measure in favour of PSV, the Netherlands submitted observations by letter dated 6 June and 12 November 2013, and 12 and 14 January and 22 April 2016.
- (5) The Commission received observations from the following interested parties: from the municipality of Eindhoven (hereinafter: 'the municipality') on 23 May 2013, 11 September 2013 and 26 September 2013, and from PSV on 24 May 2013. The Commission forwarded them to the Netherlands, which was given the opportunity to react. The Netherlands provided comments by letter dated 12 November 2013.
- (6) Meetings with the Netherlands took place on 9 July 2013, 25 February 2015 and 13 October 2015.

⁽¹⁾ Commission Decision in Case SA.33584 (2013/C) (ex 2011/NN) — Netherlands aid to certain professional Dutch football clubs in 2008-11 — Invitation to submit comments pursuant to Article 108(2) of the Treaty on the Functioning of the European Union (OJ C 116, 23.4.2013, p. 19).

⁽²⁾ Cf. footnote 1.

- (7) On 17 July 2013, the municipality appealed against the opening decision of 6 March 2013 in the General Court ⁽³⁾.
- (8) Following the opening decision, and in agreement with the Netherlands, the investigations for the different clubs were pursued separately. The investigation concerning PSV was registered under the case number SA.41613.

2. DETAILED DESCRIPTION OF THE MEASURE

2.1. The measure

- (9) The national football federation Koninklijke Nederlandse Voetbal Bond (hereinafter: 'KNVB') is the umbrella organisation for professional and amateur football competition. Professional football in the Netherlands is organised in a two-tier system. In the 2014/2015 season it consisted of 38 clubs, of which 18 played in the top league (*eredivisie*) and 20 in the lower league (*eerste divisie*).
- (10) PSV was founded in 1913 and plays its home matches in Eindhoven. In 1999, the commercial activities of PSV were grouped in a limited liability company (*naamloze vennootschap*). All shares but one are owned by the Foundation PSV Football. The remaining share is owned by the Eindhoven Football Club PSV. PSV plays in the top league and has been consistently competing for the top spots in the league. It ended first in the top league in 2014/2015 and in 2015/2016. PSV regularly participates in European tournaments and has won both the European cup (1987/1988) and the UEFA cup (1977/1978).
- (11) PSV owns its football stadium, the Philips stadium (hereinafter: 'the stadium'). Until 2011, it also owned the land under the stadium and the training block De Herdgang. In 2011, PSV was facing serious liquidity problems, for which it approached the municipality, Philips and several other companies in Eindhoven, as well as certain banks. Some of these companies did indeed agree to award new loans or to amend existing ones in order to help PSV bridge the difficult period.
- (12) At that time, the municipality and PSV negotiated a sale-and-lease-back transaction. They agreed that the municipality would buy the land under the stadium and the training block for EUR 48 385 000. The stadium land was valued at EUR 41 160 000. In order to finance this purchase, the municipality contracted a long-term loan of a similar amount at a fixed interest rate from a bank. The land under the stadium was then made available to PSV through a long lease (*erfpacht*) of 40 years, which may be extended if PSV so requests. The annual lease fee is EUR 2 463 030. This annual lease fee comprises the lease fee for the stadium ground (EUR 1 863 743), the ground under the training complex (EUR 327 151) and a car park (EUR 272 135). The contract contained a clause that the lease fee will be reviewed after 20 years.
- (13) The Netherlands did not notify to the Commission, pursuant to Article 108(3) of the Treaty, its intention to enter into this sale-and-lease-back construction.

2.2. Grounds for initiating the procedure

- (14) In the opening decision, the Commission took the position that aid measures to professional football clubs are likely to distort competition and to affect trade between Member States within the meaning of Article 107(1) of the Treaty. The Commission also doubted the appropriateness of the determination of the sale price for the land under the stadium and the ground lease fee. It arrived at the preliminary conclusion that the municipality had provided a selective advantage to PSV with the use of state resources and had, hence, provided aid to the football club.
- (15) In particular, as regards the reliance of the Netherlands on the Commission's communication concerning aid elements in land sales by public authorities ⁽⁴⁾ (hereinafter: 'the land sales communication'), the Commission reiterated that the guidance provided by that communication, as stated in its introduction, only 'concerns sales of publicly owned land and buildings. It does not concern the public acquisition of land and buildings or the letting or leasing of land and buildings by public authorities. Such transactions may also include State aid elements.'

⁽³⁾ Case T-370/13 *Gemeente Eindhoven v Commission*.

⁽⁴⁾ OJ C 209, 10.7.1997, p. 3.

- (16) Regarding the outside expertise relied on by the municipality, the Commission questioned the validity of the valuation experts' use of the price of land for mixed use rather than the price of land for a stadium for their calculations. The Commission also questioned whether the profit and risk margins used for calculating the value of the land for future development after the long lease has ended were realistic.
- (17) The Commission at that stage was not convinced that the municipality had had any intention of ensuring that the transaction was in conformity with the market economy investor principle (hereinafter: 'MEIP'). Rather, it had attempted to avoid making a loss; in other words, safeguards were introduced to make the transactions neutral to its budget. This would not have been acceptable for a typical market economy investor, even if it had based itself on outside expertise for the valuation of the grounds and the determination of the lease fee.

3. COMMENTS FROM THE NETHERLANDS

- (18) The Netherlands considers that the transaction does not constitute State aid for the following reasons: (a) the value of the land and the annual lease fee were established by outside experts in line with the land sales communication. This communication would provide the relevant framework to assess the State aid quality of the transaction; (b) PSV will pay the municipality under the long lease a rent which is higher than the amount of instalments the municipality pays to the bank, which ensures that the operation is not only financially neutral for the municipality; (c) PSV will provide a guarantee for those payments covered by the sale of season tickets; (d) if PSV goes bankrupt, the ground and the stadium will fall to the municipality; (e) the lease fee amount will be reviewed after 20 years on the basis of a new valuation report.
- (19) In the view of the Netherlands, with the acquisition of the land of the stadium site the municipality acted under market conditions, in conformity with the market economy investor principle and the market economy creditor principle. It requested an independent land valuation to determine the transaction price on the basis of the market value of the land.
- (20) Regarding the land evaluation as land for mixed use, the Netherlands notes that any evaluation in the context of the comparison between the conduct of public and private investors must be made by reference to the attitude which a private investor would have had at the time of the transaction in question, having regard to the available information and foreseeable developments at that time. Therefore the expert was mandated to determine the value which the property has in its current state, in the case of a sale to the supposedly best offer, after a well-prepared bid following from the market, taking into account the development potential of the terrain.
- (21) Accordingly, the Netherlands refers to the independent valuation report which notes that the evaluation has to take into consideration possible realistic and foreseeable future developments affecting the land. The report considers the possible development of the stadium site and observes that, in the event of the stadium disappearing, the most likely use would be a mixed-use zone with office and apartment buildings. It would be appropriate to base the valuation on this prospect even if such a development might not occur for decades. The Netherlands and the valuation report underline that this assumption is realistic in particular because the land is situated in the centre of the town. For centrally situated plots of land the potential for a progressive value development is much higher than for those situated on the periphery. In the case at hand, the municipality is furthermore in the comfortable position that it itself decides about urban planning and thereby also about the potential future use of the stadium.
- (22) According to the Netherlands, the assumed prospective/possible mixed apartment/office use of the land is within the logic of the urban development in the recent past of the area in which the stadium is situated and with its further prospects. The direct surroundings of the land have evolved from a predominantly industrial area to a mixed residential and office area, in the centre of the city. The municipality has an own interest in the stadium area because the acquisition of strategic land is part of its urban development strategy as set out in its '*Interim-structuurvisie 2009*'. This document sets the scene for a redevelopment of abandoned industrial areas into central urban areas with a mixture of dwellings, creative activities, shops and offices. Declared part of this strategy is the early securing of strategic land as part of a long-term investment strategy to realise the plans. Within that logic, and because it cannot realise all single area plans simultaneously, the municipality also wants to combine acquisition of land (to secure it) with long leases. The stadium agreement is within that planning logic. The municipality found, having taken ownership, that this offered it a welcome opportunity that served its interests. At the same time this would secure a reliable inflow of revenues with the land acquisition for the duration of the long lease.
- (23) Therefore the valuation report considers, referring to a generally accepted standard that the value of land should be estimated on the basis of the highest and best use of the area, that the price should be based on land for mixed use. The valuation report includes also the expected costs of demolishing the existing buildings and

developing the area and the expected price of the construction of apartments and offices. The valuation compares the possible value of the offices and apartments by reference to neighbouring recent developments. As an additional risk buffer, the valuer assumes a floor space index of only 80 % compared with similar projects.

- (24) For the determination of the annual lease fee amount, the land valuation report takes as a basis the assumed value of the ground under the stadium and the training complex (valued together at EUR 48 385 000) and in addition of a car park which was already owned by the municipality (valued at EUR 6 010 000). It uses as a reference the interest rate for long-term Dutch government bonds in 2011 of 3,54 %. To this it adds a premium of 1,5 % to cover the risk of land value decrease and/or default of payment. The lease fee is thus determined so as to provide for the municipality a return of 5,04 %.
- (25) The valuation by the outside expert assumes an increase in the land value over the 40 years in line with expected average annual inflation of 1,7 %. On that basis the valuation finds appropriate that PSV pays an annual lease fee of EUR 2 463 030. The Netherlands claims that this amount is in line with the rent paid elsewhere in the country by professional football clubs for stadium rent and that it therefore was in conformity with market conditions. Regarding the assumed land value increase of 1,7 %, the study allows after 20 years for a reduction in the accumulated value of the land of 22,5 % as a safety margin and determines the annual estimated lease fee from year 21 on that lower base. Given the safety margin of 22,5 %, the actual appreciation rate used in the valuation amounts to 1,01 % for the whole 40 years (0,4 % for the first 20 years).
- (26) The report acknowledges that a long-term lease of more than 15 years may include certain risks. From the perspective of a market investor, the long period during which it cannot yet realise the value of a property situated in a mixed-use zone is, however, offset by the lease fee rate which is already based on the assumed value of a mixed-use plot of land. It will be fully reviewed after 20 years, on the basis of a new valuation report. This review would cover the value of the land and the appropriate return on that value. This lease provides income during the lease term, with the subsequent possibility of realising the potential of the land.
- (27) The risks for the municipality would be limited also by further factors. Regarding the land zoning risk, the assumption of the valuation report on the zoning is based on the fact that the areas around the stadium have already been re-zoned from industrial use to mixed use. In one case, that re-zoning was obtained by the investor within eight weeks. Therefore the valuation experts took that assumption as a realistic one. It did not factor in the municipality's power to influence the planning process but looked at development in the surrounding areas and the administrative practice of delivering permits and re-classifications to private developers. The planning laws allow for flexible re-designation. To further reduce the risks in the calculation, the valuation report assumed a lower construction density than in neighbouring plots.
- (28) Even if the zoning for the stadium is maintained in its current state, that would not constitute a high risk. The current zoning is for stadium and commercial use. This zoning, if maintained, may lead to an only moderately lower land value. According to the Netherlands, it would allow any commercial use on the premises and developing profitable commercial activities. The independent valuer found that a mixed use was the appropriate basis for valuation. It was not suggested by the municipality.
- (29) The long-lease contract provides that, should PSV fail to pay the lease fee or go bankrupt, the ground and the stadium will be at the full disposal of the municipality, which may develop the land's potential. The buildings on the land will become the property of the municipality. As indicated above, the transaction price of EUR 48 385 000 already takes into account the expected demolishing and development costs and the lease fee amount will be fully reviewed after 20 years. Furthermore, PSV pledged the proceeds of its season tickets to guarantee the lease fee payment and made a deposit equal to two years' ground rent (for an initial period of 10 years).
- (30) At the end of the lease contract the municipality will not only have collected the interest but will still be the owner of the land under the stadium with a supposedly higher value than today and have various possibilities for its use. The buildings on the land will also be at the disposal of the municipality, without any compensation for PSV.

4. COMMENTS FROM INTERESTED PARTIES

- (31) The municipality and PSV submitted observations under the procedure which were identical with the observations submitted by the Netherlands. In addition, the municipality described the procedure leading to the

decision to buy the stadium land and the motives which guided it. According to the municipality, in January 2011 deliberations started to enter into a sale-and-lease-back agreement with PSV. The underlying objective was to help PSV with a budgetary neutral transaction which would not confer a financial advantage on the club that it might not have obtained under market conditions.

- (32) For that purpose and with this objective in mind, the municipality asked the independent land valuation firm Troostwijk Taxaties BV (hereinafter: 'Troostwijk') to determine the market price for the land concerned and a reasonable amount for the annual lease. In March 2011, Troostwijk provided a valuation of the stadium land and other plots of land which PSV wanted to sell to the municipality. It determined as the market price for the land under the stadium in its then state and in consideration of its development prospects a price of EUR 41 160 000. The methodology of the land value determination and the lease fee was approved by an external accountancy firm working for the municipality. The lease fee would be higher than the interest the municipality has to pay for the loan it took to finance the land acquisition.
- (33) Following the receipt of an information request from the Commission on the planned transaction in May 2011, the municipality put particular emphasis on ensuring that the measure follows market terms and will not affect its budget. The municipality underlined that the land acquisition is interesting for it also because it fits into its land acquisition and development strategy. The municipality would have an own interest in buying this land which may constitute for it a higher value than for another possible investor.

5. ASSESSMENT OF THE MEASURE — PRESENCE OF STATE AID ACCORDING TO ARTICLE 107(1) OF THE TREATY

- (34) According to Article 107(1) of the Treaty, State aid is aid awarded by a Member State or through state resources in any form whatsoever, which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods in so far as it affects trade between Member States. The conditions laid down in Article 107(1) of the Treaty are cumulative and therefore for a measure to be classed as State aid all the conditions must be fulfilled.

5.1. State resources and imputability to the state

- (35) The measure to buy the land under the stadium and the training complex De Herdgang for EUR 48 385 000 and subsequently to lease it back to PSV was decided on by the municipality. This measure involves the budget of the municipality and thereby the use of state resources. Hence it is imputable to the state.

5.2. Possible effect of the aid on trade and competition

- (36) The Netherlands has questioned the impact of possible aid on the internal market for clubs not playing football at European level. However, professional football clubs are considered to be undertakings and are subject to State aid control. Football takes the form of gainful employment and provides services for remuneration; it has developed a high level of professionalism and thereby increased its economic impact ⁽⁵⁾.
- (37) Professional football clubs carry on economic activities in several markets, other than participating in football competitions, which have an international dimension, such as the transfer market for professional players, publicity, sponsorship, merchandising or media coverage. Aid to a professional football club strengthens its position on each of those markets, most of which cover several Member States. Therefore, if State resources are used to provide a selective advantage to a professional football club, regardless of the league in which it plays, such aid is likely to have the potential of distorting competition and to affect trade between Member States within the meaning of Article 107(1) of the Treaty ⁽⁶⁾.

⁽⁵⁾ Case C-325/08 *Olympique Lyonnais* ECLI:EU:C:2010:143, paragraphs 27 and 28; Case C-519/04 P *Meca-Medina and Majcen v Commission* ECLI:EU:C:2006:492, paragraph 22; Case C-415/93 *Bosman* ECLI:EU:C:1995:463, paragraph 73.

⁽⁶⁾ Commission Decisions regarding Germany of 20 March 2013 on *Multifunktionsarena der Stadt Erfurt* (Case SA.35135 (2012/N)), paragraph 12, and *Multifunktionsarena der Stadt Jena* (Case SA.35440 (2012/N)), summary notices in OJ C 140, 18.5.2013, p. 1, and of 2 October 2013 on *Fußballstadion Chemnitz* (Case SA.36105 (2013/N)), summary notice in OJ C 50, 21.2.2014, p. 1, paragraphs 12-14; Commission Decisions regarding Spain of 18 December 2013 on possible State aid to four Spanish professional football clubs (Case SA.29769 (2013/C)), paragraph 28, Real Madrid CF (Case SA.33754 (2013/C)), paragraph 20, and alleged aid in favour of three Valencia football clubs (Case SA.36387 (2013/C)), paragraph 16, published in OJ C 69, 7.3.2014, p. 99.

5.3. Selective advantage

- (38) In order to constitute State aid, a measure needs to bestow an economic advantage on the recipient undertaking which it would not have obtained under normal market conditions. The acquisition of land from PSV and the subsequent lease to it would constitute such an advantage if the terms were more advantageous for PSV than justified by market conditions.
- (39) The typical interests for the investor/landlord in a commercial sale-and-lease-back operation are a fair return on the investment in the form of rent during the lease term and ownership of an asset already occupied by a reliable tenant. The investor/landlord will hold a long-term, fully leased asset with a steady income stream.

5.3.1. Application of the land sales communication

- (40) The Netherlands refers for this assessment to the land sales communication. According to that communication, a sale of land and buildings by a public authority does not constitute aid, first, where the public authority accepts the highest or only bid following an unconditional bidding procedure and, second, where in the absence of such a bidding procedure the sales price is set at least at the value established by an independent expert valuation.
- (41) The Commission reiterates that the guidance provided by the land sales communication, as stated in its introduction, only 'concerns sales of publicly owned land and buildings. It does not concern the public acquisition of land and buildings or the letting or leasing of land and buildings by public authorities. Such transactions may also include State aid elements.' Furthermore, in the case at hand, the land value determination is in itself not sufficient. The sale-and-lease-back operation also contains a lease fee. The market conformity of this fee also needs to be established.
- (42) In any case, the mechanisms in the land sales communication are only tools to establish whether the state acted as a market economy investor and are therefore specific examples for the application of the MEIP test to land transactions between public and private entities (⁷).

5.3.2. Observance of the market economy investor principle

- (43) The Commission therefore has to assess whether a private investor would have entered into the transactions under assessment on the same terms. The attitude of the hypothetical private investor is that of a prudent investor whose goal of a normal expected return is tempered with caution about the level of risk acceptable for a given rate of return. The MEIP would not be respected if the price for the land was set at a higher level than the market price and the fee for the lease at a lower level.
- (44) The Netherlands and the municipality claim that the municipality acted on the basis of an (*ex ante*) independent expert valuation and therefore in compliance with the MEIP. The transaction was made on the basis of the market value of the land and, hence, did not provide an advantage to PSV.
- (45) The Commission considers that compliance with market terms can in principle be determined by independent expert valuation.
- (46) Regarding the market conformity of the results of the outside expert's valuation relied on by the municipality, the Netherlands was requested in the opening decision to justify why the experts used the price of land for mixed use rather than the price of land for a stadium for their calculations. The Commission also wished to see a justification for the profit and risk margins that are used for calculating the value of the land for future development after the long-term lease has ended.
- (47) On the basis of the information supplied by the Netherlands and the municipality, the Commission observes that the land acquisition by the municipality was preceded by a valuation of the land carried out by Troostwijk, an independent land valuation firm. When in January 2011 deliberations started on entering into a sale-and-lease-back agreement with PSV, the underlying objective was to help PSV with a transaction which would not confer

⁽⁷⁾ According to the MEIP test, no State aid would be involved where, in similar circumstances, a private investor, operating in normal market conditions in a market economy, could have been prompted to provide to the beneficiary the measures in question.

a financial advantage on the club that it might not have obtained under market conditions. Therefore the municipality asked Troostwijk to determine the market price for the land concerned and a market-compliant amount for the annual lease fee.

- (48) The assumptions underlying the valuation appear to have been reasonable. In its valuation report of March 2011, Troostwijk assessed the market price for the land under the stadium on the basis of its then state and in consideration of its development prospects and determined a price of EUR 41 160 000. The methodology of the determination of the land value and the lease fee was approved by the external accountancy firm working for the municipality.
- (49) The valuation report by Troostwijk takes into consideration possible realistic and foreseeable future developments affecting the land. The report considers the possible development of the stadium site and observes that, in the event of the stadium disappearing, the most likely use would be a mixed-use zone with office and apartment buildings. The valuation report underlines that this assumption is realistic in particular because the land is situated in the centre of the town. For centrally situated plots of land the potential for a progressive value development is much higher than for land on the periphery. The valuation report also refers to a general valuation standard whereby the basis for determining the value of the land is the highest and best use of the area.
- (50) The future use as described by the Netherlands also fits within the longer term urban development strategy of the municipality for the entire area where the stadium is situated, as described in recital 22. As described by the municipality, the likelihood of obtaining the re-zoning of the land would be very high for any owner of the land in question.
- (51) In any event, according to the Netherlands the current zoning of the land for stadium and commercial use also has a substantial economic potential.
- (52) It can therefore be concluded that it seems acceptable that the expert valuation values the land on the basis of mixed use. The Commission has already accepted that a municipality may base the valuation of land on the long-term prospect of the development of the value of a plot of land in an area which may be subject to expected improvements in line with a business planning strategy ⁽⁸⁾.
- (53) PSV will pay the municipality a long-lease rent determined by the independent valuation firm and calculated on the basis of the price assumed for the land in view of its later possible use for apartments and offices and with reference to the interest rate for long-term government bonds in 2011 plus a risk premium of 1,5 %.
- (54) Thus, the lease fee already reflects the price estimated for the land for a purpose other than sport use. It is therefore higher than a lease fee calculated on the basis of the current use of the land.
- (55) The report acknowledges that a long-term lease of more than 15 years may include certain risks in terms of fluctuation of the land value. Those risks are, however, limited by several factors, which will be discussed further in recitals 56 to 59.
- (56) The assumptions of the valuation report can be considered conservative. The valuation report determines the expected possible value of the offices and apartments by reference to neighbouring recent developments and inserts as an additional risk buffer on the possible sale price of the apartments a floor space index of only 80 % compared with similar projects.
- (57) Regarding the assumed land value increase of 1,7 %, taken as the assumed inflation rate, the valuation includes a correction mechanism: after 20 years a deduction from the accumulated value of the land of 22,5 % is included as a safety margin. Combining both assumptions together, the expected increase is estimated to be 1,01 % per year over the 40 years lease period and 0,4 % per year for the first 20 years. Thus, the initial assumption of 1,7 % in combination with the safety margin appears reasonable given that the asset concerned is land which can be expected to retain its value or increase in value and that it is located in the town centre (although the land is currently classified for commercial use, the lease fee rate is already based on the assumed value of a mixed-use plot of land). Furthermore, the 2011 inflation rate for the Netherlands was 2,3 % ⁽⁹⁾, while the ECB has an inflation target of 2 %. Both these values are significantly above the expected growth rates for the ground value which the valuer has used.

⁽⁸⁾ Commission Decision 2011/529/EU of 20 April 2011 on measure C-37/04 (ex NN 51/04), implemented by Finland for Componenta Oyj (OJ L 230, 7.9.2011, p. 69), recitals 68 to 74.

⁽⁹⁾ <http://data.worldbank.org/indicator/FP.CPI.TOTL.ZG/countries/NL?display=graph>

- (58) Apart from those safeguards regarding the lease fee, the lease contract negotiated by the municipality contains various other provisions to cover possible risks, in particular the risk of default by PSV. The football club will provide a guarantee for the rent payments with its income from the sale of season tickets. PSV has also provided a surety of EUR 5 million corresponding to about two years' rent, which is taken from the purchase price and kept by the notary involved for 10 years.
- (59) The parties have agreed that the lease fee amount can be fully reviewed after 20 years at the request of either party. This review will be based on a new valuation report. The ground value at that time together with an appropriate return on government securities and a risk premium will determine the new ground lease fee. As a further safeguard for the municipality, the parties have agreed that the rights of use of the land and of the stadium would fall to the municipality if PSV failed to honour its lease fee payments or fell into bankruptcy. This clause constitutes a deviation from the standard consequence under Dutch civil law, according to which a leasehold right would become part of the bankruptcy estate and hence escape control by the land owner. In the current case, at the end of the lease, the municipality will remain the owner of the land and control its use.
- (60) Whilst the assumptions in the valuation report appear to be reasonable as indicated in recitals 48 to 57, a comparison with other commercial transactions remains difficult since the lease agreements presented by the Netherlands for benchmarking purposes may concern different sectors (such as the Amsterdam housing sector). Therefore, in assessing whether the current transaction is MEIP compliant, the Commission has ascertained whether a different basis for a commercial transaction — based on a loan transaction by Eindhoven to PSV, with the land as collateral — would have served as a benchmark.
- (61) The Commission observes that the lease fee to be paid by PSV is higher than the market rate of such a loan, once the differences between a sale-and-lease-back transaction and a loan are taken into account. The most significant difference relates to the fact that, if PSV were to default after obtaining a loan from the municipality, the municipality would at best receive back the notional amount of the loan. It would not be able to benefit from any increase in the value of the land beyond the notional amount of the loan. In the sale-and-lease-back agreement, the municipality becomes owner of the land at the start of the lease contract and will have full ownership rights in case of default. The municipality put emphasis on that aspect when deciding on the measure, given in particular that the guaranteed full disposal over the land after a potential default by PSV deviates in the municipality's favour from the general provisions of Dutch law (recital 59). Any increase in the value of the land (after fixing the loan terms) will hence only benefit the municipality.
- (62) Thus, one would expect a sale-and-lease-back transaction to have a priori a lower expected return than a loan. The rate of return of a loan with high-quality collateral given to a company with a rating similar to PSV football club would thus constitute an upper bound for a benchmark.
- (63) In the absence of reliable market proxies ⁽¹⁰⁾, the market reference rate for the alternative scenario of a loan to PSV would have to be established on the basis of the Communication from the Commission on the revision of the method for setting the reference and discount rates ⁽¹¹⁾. That calculation would be done, in order to be conservative, considering that PSV exhibited a poor credit quality in 2011 and assuming high collateralisation for the loan (i.e. the land). The resulting reference rate would amount to 6,05 %.
- (64) A loan investor thus expects a 1,01 % higher return than the municipality in the sale-and-lease-back transaction. However, the municipality still acts as a market economy investor if the loan investor is willing to forgive a return of 1,01 % in exchange for a possible increase in land value (see recital 61). Based on the characteristics of the transaction, such an upside potential is worth at least 1,01 % and the return expected by the municipality in the sale and leaseback transaction therefore appears in line with market benchmarks.
- (65) Therefore, it appears that the sale-and-lease-back construction does not result in an undue advantage for PSV and provides the municipality with a return that falls within the MEIP.
- (66) Last, it should be noted that the annual lease fee, according to the Netherlands, is comparable with the rent paid elsewhere in the country by professional football clubs for stadium rent. While any such comparison remains difficult because of different locations, it should be emphasised that these other clubs pay the annual rent not only for the land under the stadium but for the entire stadium complex. In comparison, PSV owns the stadium, carries the costs of its operation and maintenance and pays in addition a lease fee for the land under it.

⁽¹⁰⁾ In this case, there were insufficient data to construct a market proxy for the benchmark rate.

⁽¹¹⁾ OJ C 14, 19.1.2008, p. 6.

6. CONCLUSION

- (67) The Commission therefore concludes that the doubts expressed in the opening decision have been sufficiently dispelled. The municipality, when it bought the stadium land and leased it back to PSV, behaved in the way a hypothetical private investor in a comparable position could have done. Therefore, the transaction does not entail State aid within the meaning of Article 107(1) of the Treaty,

HAS ADOPTED THIS DECISION:

Article 1

The measure which the Netherlands has implemented in favour of the football club PSV in Eindhoven does not constitute aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

Article 2

This Decision is addressed to the Kingdom of the Netherlands.

Done at Brussels, 4 July 2016.

For the Commission
Margrethe VESTAGER
Member of the Commission

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