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I *Acts whose publication is obligatory*

(Continued overleaf)

EN

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

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

EN

(1) Text with EEA relevance

I

(Acts whose publication is obligatory)

COMMISSION REGULATION (EC) No 361/2005

of 3 March 2005

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

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Commission Regulation (EC) No 3223/94 of 21 December 1994 on detailed rules for the application of the import arrangements for fruit and vegetables [1], and in particular Article 4(1) thereof,

Whereas:

(1) Regulation (EC) No 3223/94 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 the Annex thereto.

(2) In compliance with the above criteria, the standard import values must be fixed at the levels set out in the Annex to this Regulation,

HAS ADOPTED THIS REGULATION:

Article 1

The standard import values referred to in Article 4 of Regulation (EC) No 3223/94 shall be fixed as indicated in the Annex hereto.

Article 2

This Regulation shall enter into force on 4 March 2005.

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

Done at Brussels, 3 March 2005.

For the Commission

J. M. SILVA RODRÍGUEZ

Director-General for Agriculture and Rural Development

[1] OJ L 337, 24.12.1994, p. 66. Regulation as last amended by Regulation (EC) No 1947/2002 (OJ L 299, 1.11.2002, p. 17).

ANNEX

to Commission Regulation of 3 March 2005 establishing the 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	052	115,2
	204	72,9
	212	123,3
	624	183,1
	999	123,6
0707 00 05	052	170,8
	068	164,9
	204	165,5
	220	230,6
	999	183,0
0709 10 00	220	28,9
	999	28,9
0709 90 70	052	190,1
	204	151,0
	999	170,6
0805 10 20	052	51,7
	204	50,1
	212	50,7
	220	51,4
	421	41,6
	624	62,9
	999	51,4
0805 50 10	052	60,8
	220	76,3
	624	67,1
	999	68,1
0808 10 80	388	98,1
	400	110,2
	404	109,3
	508	77,7
	512	102,3
	524	56,8
	528	85,0
	720	71,8
	999	88,9
0808 20 50	052	208,3
	388	70,3
	400	92,1
	512	85,3
	528	59,7
	720	45,1
	999	93,5

(1) Country nomenclature as fixed by Commission Regulation (EC) No 2081/2003 (OJ L 313, 28.11.2003, p. 11). Code '999' stands for 'of other origin'.

COMMISSION REGULATION (EC) No 362/2005

of 3 March 2005

providing for the rejection of applications for export licences in the cereal sector in relation to products of CN code 1101 00 15

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 1784/2003 of 29 September 2003 on the common organisation of the market in cereals (1),

Having regard to Commission Regulation (EC) No 1342/2003 of 27 July 2003 laying down special detailed rules for the application of the system of import and export licences for cereals and rice (2), and in particular Article 8(1) thereof,

Whereas:

The quantity covered by applications for advance fixing of refunds on CN code 1101 00 15 products is of great importance and could give rise to speculation. It has therefore been decided to reject all applications for export licences of such products made on 1 March 2005,

HAS ADOPTED THIS REGULATION:

Article 1

In accordance with Article 8(1) of Regulation (EC) No 1342/2003, applications for export licences with advance fixing of refunds for products falling within CN code 1101 00 15 made on 1 March 2005 shall be rejected.

Article 2

This Regulation shall enter into force on 4 March 2005.

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

Done at Brussels, 3 March 2005.

For the Commission

J. M. SILVA RODRÍGUEZ

Director-General for Agriculture and Rural Development

(1) OJ L 270, 21.10.2003, p. 78.

(2) OJ L 189, 29.7.2003, p. 12. Regulation as last amended by Regulation (EC) No 1092/2004 (OJ L 209, 11.6.2004, p. 9).

COMMISSION REGULATION (EC) No 363/2005

of 3 March 2005

fixing the representative prices and the additional import duties for molasses in the sugar sector applicable from 4 March 2005

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 1260/2001 of 19 June 2001 on the common organisation of the market in sugar [1], and in particular Article 24(4) thereof,

Whereas:

(1) Commission Regulation (EC) No 1422/95 of 23 June 1995 laying down detailed rules of application for imports of molasses in the sugar sector and amending Regulation (EEC) No 785/68 [2], stipulates that the cif import price for molasses established in accordance with Commission Regulation (EEC) No 785/68 [3], is to be considered the representative price. That price is fixed for the standard quality defined in Article 1 of Regulation (EEC) No 785/68.

(2) For the purpose of fixing the representative prices, account must be taken of all the information provided for in Article 3 of Regulation (EEC) No 785/68, except in the cases provided for in Article 4 of that Regulation and those prices should be fixed, where appropriate, in accordance with the method provided for in Article 7 of that Regulation.

(3) Prices not referring to the standard quality should be adjusted upwards or downwards, according to the quality of the molasses offered, in accordance with Article 6 of Regulation (EEC) No 785/68.

(4) Where there is a difference between the trigger price for the product concerned and the representative price, additional import duties should be fixed under the terms laid down in Article 3 of Regulation (EC) No 1422/95. Should the import duties be suspended pursuant to Article 5 of Regulation (EC) No 1422/95, specific amounts for these duties should be fixed.

(5) The representative prices and additional import duties for the products concerned should be fixed in accordance with Articles 1(2) and 3(1) of Regulation (EC) No 1422/95.

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

HAS ADOPTED THIS REGULATION:

Article 1

The representative prices and the additional duties applying to imports of the products referred to in Article 1 of Regulation (EC) No 1422/95 are fixed in the Annex hereto.

Article 2

This Regulation shall enter into force on 4 March 2005.

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

Done at Brussels, 3 March 2005.

For the Commission

J. M. SILVA RODRÍGUEZ

Director-General for Agriculture and Rural Development

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(1) OJ L 178, 30.6.2001, p. 1. Regulation as last amended by Commission Regulation (EC) No 39/2004 (OJ L 6, 10.1.2004, p. 16).

(2) OJ L 141, 24.6.1995, p. 12. Regulation as amended by Regulation (EC) No 79/2003 (OJ L 13, 18.1.2003, p. 4).

(3) OJ 145, 27.6.1968, p. 12. Regulation as amended by Regulation (EC) No 1422/95.

ANNEX

Representative prices and additional duties for imports of molasses in the sugar sector applicable from 4 March 2005

(EUR)

CN code	Amount of the representative price in 100 kg net of the product in question	Amount of the additional duty in 100 kg net of the product in question	Amount of the duty to be applied to imports in 100 kg net of the product in question because of suspension as referred to in Article 5 of Regulation (EC) No 1422/95 (1)
1703 10 00 (2)	10,30	—	0
1703 90 00 (2)	11,00	—	0

(1) This amount replaces, in accordance with Article 5 of Regulation (EC) No 1422/95, the rate of the Common Customs Tariff duty fixed for these products.

(2) For the standard quality as defined in Article 1 of amended Regulation (EEC) No 785/68.

COMMISSION REGULATION (EC) No 364/2005

of 3 March 2005

fixing the export refunds on white sugar and raw sugar exported in its unaltered state

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 1260/2001 of 19 June 2001 on the common organisation of the markets in the sugar sector [1], and in particular the second subparagraph of Article 27(5) thereof,

Whereas:

(1) Article 27 of Regulation (EC) No 1260/2001 provides that the difference between quotations or prices on the world market for the products listed in Article 1(1)(a) of that Regulation and prices for those products within the Community may be covered by an export refund.

(2) Regulation (EC) No 1260/2001 provides that when refunds on white and raw sugar, undenatured and exported in its unaltered state, are being fixed account must be taken of the situation on the Community and world markets in sugar and in particular of the price and cost factors set out in Article 28 of that Regulation. The same Article provides that the economic aspect of the proposed exports should also be taken into account.

(3) The refund on raw sugar must be fixed in respect of the standard quality. The latter is defined in Annex I, point II, to Regulation (EC) No 1260/2001. Furthermore, this refund should be fixed in accordance with Article 28(4) of that Regulation. Candy sugar is defined in Commission Regulation (EC) No 2135/95 of 7 September 1995 laying down detailed rules of application for the grant of export refunds in the sugar sector [2]. The refund thus calculated for sugar containing added flavouring or colouring matter must apply to their sucrose content and, accordingly, be fixed per 1 % of the said content.

(4) In special cases, the amount of the refund may be fixed by other legal instruments.

(5) The refund must be fixed every two weeks. It may be altered in the intervening period.

(6) The first subparagraph of Article 27(5) of Regulation (EC) No 1260/2001 provides that refunds on the products referred to in Article 1 of that Regulation may vary according to destination, where the world market situation or the specific requirements of certain markets make this necessary.

(7) The significant and rapid increase in preferential imports of sugar from the western Balkan countries since the start of 2001 and in exports of sugar to those countries from the Community seems to be highly artificial.

(8) To prevent any abuse through the re-import into the Community of sugar products in receipt of an export refund, no refund should be set for all the countries of the western Balkans for the products covered by this Regulation.

(9) In view of the above and of the present situation on the market in sugar, and in particular of the quotations or prices for sugar within the Community and on the world market, refunds should be set at the appropriate amounts.

(10) The measures provided for in this Regulation are in accordance with the opinion of the Management Committee for Sugar,

HAS ADOPTED THIS REGULATION:

Article 1

The export refunds on the products listed in Article 1(1)(a) of Regulation (EC) No 1260/2001, undenatured and exported in the natural state, are hereby fixed to the amounts shown in the Annex hereto.

Article 2

This Regulation shall enter into force on 4 March 2005.

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

Done at Brussels, 3 March 2005.

For the Commission

Mariann FISCHER BOEL

Member of the Commission

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[1] OJ L 178, 30.6.2001, p. 1. Regulation as last amended by Commission Regulation (EC) No 39/2004 (OJ L 6, 10.1.2004, p. 16).

[2] OJ L 214, 8.9.1995, p. 16.

ANNEX

REFUNDS ON WHITE SUGAR AND RAW SUGAR EXPORTED WITHOUT FURTHER PROCESSING APPLICABLE FROM 4 MARCH 2005 ([1])

Product code	Destination	Unit of measurement	Amount of refund
1701 11 90 9100	S00	EUR/100 kg	33,80 ([2])
1701 11 90 9910	S00	EUR/100 kg	33,81 ([2])
1701 12 90 9100	S00	EUR/100 kg	33,80 ([2])
1701 12 90 9910	S00	EUR/100 kg	33,81 ([2])
1701 91 00 9000	S00	EUR/1 % of sucrose × 100 kg product net	0,3675
1701 99 10 9100	S00	EUR/100 kg	36,75
1701 99 10 9910	S00	EUR/100 kg	36,76
1701 99 10 9950	S00	EUR/100 kg	36,76
1701 99 90 9100	S00	EUR/1 % of sucrose × 100 kg of net product	0,3675

NB: The product codes and the 'A' series destination codes are set out in Commission Regulation (EEC) No 3846/87 (OJ L 366, 24.12.1987, p. 1).

The numeric destination codes are set out in Commission Regulation (EC) No 2081/2003 (OJ L 313, 28.11.2003, p. 11).

The other destinations are:

S00: all destinations (third countries, other territories, victualling and destinations treated as exports from the Community) with the exception of Albania, Croatia, Bosnia and Herzegovina, Serbia and Montenegro (including Kosovo, as defined in UN Security Council Resolution 1244 of 10 June 1999), the former Yugoslav Republic of Macedonia, save for sugar incorporated in the products referred to in Article 1(2)(b) of Council Regulation (EC) No 2201/96 (OJ L 297, 21.11.1996, p. 29).

([1]) The amounts set out in this Annex are not applicable with effect from 1 February 2005 pusrsuant to Council Decision 2005/45/EC of 22 December 2004 concerning the conclusion and the provisional application of the Agreement between the European Community and the Swiss Confederation amending the Agreement between the European Economic Community and the Swiss Confederation of 22 July 1972 as regards the provisions applicable to processed agricultural products (OJ L 23, 26.1.2005, p. 17).

([2]) This amount is applicable to raw sugar with a yield of 92 %. Where the yield for exported raw sugar differs from 92 %, the refund amount applicable shall be calculated in accordance with Article 28(4) of Regulation (EC) No 1260/2001.

COMMISSION REGULATION (EC) No 365/2005

of 3 March 2005

fixing the maximum export refund for white sugar to certain third countries for the 20th partial invitation to tender issued within the framework of the standing invitation to tender provided for in Regulation (EC) No 1327/2004

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 1260/2001 of 19 June 2001 on the common organisation of the markets in the sugar sector [1] and in particular the second indent of Article 27(5) thereof,

Whereas:

(1) Commission Regulation (EC) No 1327/2004 of 19 July 2004 on a standing invitation to tender to determine levies and/or refunds on exports of white sugar [2], for the 2004/2005 marketing year, requires partial invitations to tender to be issued for the export of this sugar to certain third countries.

(2) Pursuant to Article 9(1) of Regulation (EC) No 1327/2004 a maximum export refund shall be fixed, as the case may be, account being taken in particular of the state and foreseeable development of the Community and world markets in sugar, for the partial invitation to tender in question.

(3) The measures provided for in this Regulation are in accordance with the opinion of the Management Committee for Sugar,

HAS ADOPTED THIS REGULATION:

Article 1

For the 20th partial invitation to tender for white sugar issued pursuant to Regulation (EC) No 1327/2004 the maximum amount of the export refund shall be 39,898 EUR/100 kg.

Article 2

This Regulation shall enter into force on 4 March 2005.

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

Done at Brussels, 3 March 2005.

For the Commission

Mariann FISCHER BOEL

Member of the Commission

(1) OJ L 178, 30.6.2001, p. 1. Regulation as last amended by Commission Regulation (EC) No 39/2004 (OJ L 6, 10.1.2004, p. 16).

(2) OJ L 246, 20.7.2004, p. 23. Regulation as amended by Regulation (EC) No 1685/2004 (OJ L 303, 30.9.2004, p. 21).

COMMISSION REGULATION (EC) No 366/2005

of 3 March 2005

fixing the export refunds on cereals and on wheat or rye flour, groats and meal

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 1784/2003 of 29 September 2003 on the common organisation of the market in cereals [1], and in particular Article 13(3) thereof,

Whereas:

(1) Article 13 of Regulation (EC) No 1784/2003 provides that the difference between quotations or prices on the world market for the products listed in Article 1 of that Regulation and prices for those products in the Community may be covered by an export refund.

(2) The refunds must be fixed taking into account the factors referred to in Article 1 of Commission Regulation (EC) No 1501/95 of 29 June 1995 laying down certain detailed rules under Council Regulation (EEC) No 1766/92 on the granting of export refunds on cereals and the measures to be taken in the event of disturbance on the market for cereals [2].

(3) As far as wheat and rye flour, groats and meal are concerned, when the refund on these products is being calculated, account must be taken of the quantities of cereals required for their manufacture. These quantities were fixed in Regulation (EC) No 1501/95.

(4) The world market situation or the specific requirements of certain markets may make it necessary to vary the refund for certain products according to destination.

(5) The refund must be fixed once a month. It may be altered in the intervening period.

(6) It follows from applying the detailed rules set out above to the present situation on the market in cereals, and in particular to quotations or prices for these products within the Community and on the world market, that the refunds should be as set out in the Annex hereto.

(7) The measures provided for in this Regulation are in accordance with the opinion of the Management Committee for Cereals,

HAS ADOPTED THIS REGULATION:

Article 1

The export refunds on the products listed in Article 1(a), (b) and (c) of Regulation (EC) No 1784/2003, excluding malt, exported in the natural state, shall be as set out in the Annex hereto.

Article 2

This Regulation shall enter into force on 4 March 2005.

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

Done at Brussels, 3 March 2005.

For the Commission

Mariann FISCHER BOEL

Member of the Commission

(1) OJ L 270, 21.10.2003, p. 78.

(2) OJ L 147, 30.6.1995, p. 7. Regulation as last amended by Regulation (EC) No 1431/2003 (OJ L 203, 12.8.2003, p. 16).

ANNEX

to the Commission Regulation of 3 March 2005 fixing the export refunds on cereals and on wheat or rye flour, groats and meal

Product code	Destination	Unit of measurement	Amount of refunds
1001 10 00 9200	—	EUR/t	—
1001 10 00 9400	A00	EUR/t	0
1001 90 91 9000	—	EUR/t	—
1001 90 99 9000	A00	EUR/t	0
1002 00 00 9000	A00	EUR/t	0
1003 00 10 9000	—	EUR/t	—
1003 00 90 9000	A00	EUR/t	0
1004 00 00 9200	—	EUR/t	—
1004 00 00 9400	A00	EUR/t	0
1005 10 90 9000	—	EUR/t	—
1005 90 00 9000	A00	EUR/t	0
1007 00 90 9000	—	EUR/t	—
1008 20 00 9000	—	EUR/t	—
1101 00 11 9000	—	EUR/t	—
1101 00 15 9100	C01	EUR/t	13,70
1101 00 15 9130	C01	EUR/t	12,80
1101 00 15 9150	C01	EUR/t	11,80
1101 00 15 9170	C01	EUR/t	10,90
1101 00 15 9180	C01	EUR/t	10,20
1101 00 15 9190	—	EUR/t	—
1101 00 90 9000	—	EUR/t	—
1102 10 00 9500	A00	EUR/t	0
1102 10 00 9700	A00	EUR/t	0
1102 10 00 9900	—	EUR/t	—
1103 11 10 9200	A00	EUR/t	0
1103 11 10 9400	A00	EUR/t	0
1103 11 10 9900	—	EUR/t	—
1103 11 90 9200	A00	EUR/t	0
1103 11 90 9800	—	EUR/t	—

NB: The product codes and the 'A' series destination codes are set out in the Commission Regulation (EEC) No 3846/87 (OJ L 366, 24.12.1987, p. 1), as amended.

C01: All third countries with the exception of Albania, Bulgaria, Romania, Croatia, Bosnia and Herzegovina, Serbia and Montenegro, the former Yugoslav Republic of Macedonia, Lichtenstein and Switzerland.

COMMISSION REGULATION (EC) No 367/2005

of 3 March 2005

fixing the refunds applicable to cereal and rice sector products supplied as Community and national food aid

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 1784/2003 of 29 September 2003 on the common organisation of the market in cereals [1] and in particular Article 13(3) thereof,

Having regard to Council Regulation (EC) No 3072/95 of 22 December 1995 on the common organisation of the market in rice [2] and in particular Article 13(3) thereof,

Whereas:

(1) Article 2 of Council Regulation (EEC) No 2681/74 of 21 October 1974 on Community financing of expenditure incurred in respect of the supply of agricultural products as food aid [3] lays down that the portion of the expenditure corresponding to the export refunds on the products in question fixed under Community rules is to be charged to the European Agricultural Guidance and Guarantee Fund, Guarantee Section.

(2) In order to make it easier to draw up and manage the budget for Community food aid actions and to enable the Member States to know the extent of Community participation in the financing of national food aid actions, the level of the refunds granted for these actions should be determined.

(3) The general and implementing rules provided for in Article 13 of Regulation (EC) No 1784/2003 and in Article 13 of Regulation (EC) No 3072/95 on export refunds are applicable *mutatis mutandis* to the abovementioned operations.

(4) The specific criteria to be used for calculating the export refund on rice are set out in Article 13 of Regulation (EC) No 3072/95.

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

HAS ADOPTED THIS REGULATION:

Article 1

For Community and national food aid operations under international agreements or other supplementary programmes, and other Community free supply measures, the refunds applicable to cereals and rice sector products shall be as set out in the Annex.

Article 2

This Regulation shall enter into force on 4 March 2005.

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

Done at Brussels, 3 March 2005.

For the Commission

Mariann FISCHER BOEL

Member of the Commission

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[1] OJ L 270, 21.10.2003, p. 78.

[2] OJ L 329, 30.12.1995, p. 18. Regulation as last amended by Commission Regulation (EC) No 411/2002 (OJ L 62, 5.3.2002, p. 27).

[3] OJ L 288, 25.10.1974, p. 1.

ANNEX

to the Commission Regulation of 3 March 2005 fixing the refunds applicable to cereal and rice sector products supplied as Comunity and national food aid

(EUR/t)

Product code	Refund
1001 10 00 9400	0,00
1001 90 99 9000	0,00
1002 00 00 9000	0,00
1003 00 90 9000	0,00
1005 90 00 9000	0,00
1006 30 92 9100	0,00
1006 30 92 9900	0,00
1006 30 94 9100	0,00
1006 30 94 9900	0,00
1006 30 96 9100	0,00
1006 30 96 9900	0,00
1006 30 98 9100	0,00
1006 30 98 9900	0,00
1006 30 65 9900	0,00
1007 00 90 9000	0,00
1101 00 15 9100	13,70
1101 00 15 9130	12,80
1102 10 00 9500	0,00
1102 20 10 9200	56,00
1102 20 10 9400	48,00
1103 11 10 9200	0,00
1103 13 10 9100	72,00
1104 12 90 9100	0,00

NB: The product codes are defined in Commission Regulation (EEC) No 3846/87 (OJ L 366, 24.12.1987, p. 1), amended.

COMMISSION REGULATION (EC) No 368/2005

of 3 March 2005

concerning tenders notified in response to the invitation to tender for the export of barley issued in Regulation (EC) No 1757/2004

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 1784/2003 of 29 September 2003 on the common organisation of the market in cereals [1], and in particular Article 13(3) thereof,

Whereas:

(1) An invitation to tender for the refund for the export of barley to certain third countries was opened pursuant to Commission Regulation (EC) No 1757/2004 [2].

(2) Article 7 of Commission Regulation (EC) No 1501/95 of 29 June 1995 laying down certain detailed rules for the application of Council Regulation (EEC) No 1766/92 on the granting of export refunds on cereals and the measures to be taken in the event of disturbance on the market for cereals [3], and in particular Article 13(3) thereof,

(3) On the basis of the criteria laid down in Article 1 of Regulation (EC) No 1501/95, a maximum refund should not be fixed.

(4) The measures provided for in this Regulation are in accordance with the opinion of the Management Committee for Cereals,

HAS ADOPTED THIS REGULATION:

Article 1

No action shall be taken on the tenders notified from 25 February to 3 March 2005 in response to the invitation to tender for the refund for the export of barley issued in Regulation (EC) No 1757/2004.

Article 2

This Regulation shall enter into force on 4 March 2005.

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

Done at Brussels, 3 March 2005.

For the Commission

Mariann FISCHER BOEL

Member of the Commission

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(1) OJ L 270, 21.10.2003, p. 78.

(2) OJ L 313, 12.10.2004, p. 10.

(3) OJ L 147, 30.6.1995, p. 7. Regulation as last modified by Regulation (EC) No 777/2004 (OJ L 123, 27.4.2004, p. 50).

COMMISSION REGULATION (EC) No 369/2005

of 3 March 2005

concerning tenders notified in response to the invitation to tender for the export of oats issued in Regulation (EC) No 1565/2004

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 1784/2003 of 29 September 2003 on the common organisation of the market in cereals [1], and in particular Article 7 thereof,

Having regard to Commission Regulation (EC) No 1501/95 of 29 June 1995 laying down certain detailed rules for the application of Council Regulation (EEC) No 1766/92 on the granting of export refunds on cereals and the measures to be taken in the event of disturbance on the market for cereals [2], and in particular Article 7 thereof,

Having regard to Commission Regulation (EC) No 1565/2004 of 3 September 2004 on a special intervention measure for cereals in Finland and Sweden for the 2004/2005 marketing year [3],

Whereas:

(1) An invitation to tender for the refund for the export of oats produced in Finland and Sweden for export from Finland and Sweden to all third countries, with the exception of Bulgaria, Norway, Romania and Switzerland was opened pursuant to Regulation (EC) No 1565/2004.

(2) On the basis of the criteria laid down in Article 1 of Regulation (EC) No 1501/95, a maximum refund should not be fixed.

(3) The measures provided for in this Regulation are in accordance with the opinion of the Management Committee for Cereals,

HAS ADOPTED THIS REGULATION:

Article 1

No action shall be taken on the tenders notified from 25 February to 3 March 2005 in response to the invitation to tender for the refund for the export of oats issued in Regulation (EC) No 1565/2004.

Article 2

This Regulation shall enter into force on 4 March 2005.

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

Done at Brussels, 3 March 2005.

For the Commission

Mariann FISCHER BOEL

Member of the Commission

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[1] OJ L 270, 21.10.2003, p. 78.

[2] OJ L 147, 30.6.1995, p. 7. Regulation as last amended by Regulation (EC) No 1431/2003 (OJ L 203, 12.8.2003, p. 16).

[3] OJ L 285, 4.9.2004, p. 3.

COMMISSION REGULATION (EC) No 370/2005

of 3 March 2005

fixing the maximum export refund on common wheat in connection with the invitation to tender issued in Regulation (EC) No 115/2005

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 1784/2003 of 29 September 2003 on the common organisation of the market in cereals [1], and in particular Article 13(3) thereof,

Whereas:

(1) An invitation to tender for the refund for the export of common wheat to certain third countries was opened pursuant to Commission Regulation (EC) No 115/2005 [2].

(2) In accordance with Article 7 of Commission Regulation (EC) No 1501/95 of 29 June 1995 laying down certain detailed rules for the application of Council Regulation (EEC) No 1766/92 on the granting of export refunds on cereals and the measures to be taken in the event of disturbance on the market for cereals [3], the Commission may, on the basis of the tenders notified, decide to fix a maximum export refund taking account of the criteria referred to in Article 1 of Regulation (EC) No 1501/95. In that case a contract is awarded to any tenderer whose bid is equal to or lower than the maximum refund.

(3) The application of the abovementioned criteria to the current market situation for the cereal in question results in the maximum export refund being fixed.

(4) The measures provided for in this Regulation are in accordance with the opinion of the Management Committee for Cereals,

HAS ADOPTED THIS REGULATION:

Article 1

For tenders notified on 25 February to 3 March 2005, pursuant to the invitation to tender issued in Regulation (EC) No 115/2005, the maximum refund on exportation of common wheat shall be 10,00 EUR/t.

Article 2

This Regulation shall enter into force on 4 March 2005.

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

Done at Brussels, 3 March 2005.

For the Commission

Mariann FISCHER BOEL

Member of the Commission

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(1) OJ L 270, 21.10.2003, p. 78.
(2) OJ L 24, 27.1.2005, p. 3.
(3) OJ L 147, 30.6.1995, p. 7. Regulation as last amended by Regulation (EC) No 777/2004 (OJ L 123, 27.4.2004, p. 50).

COMMISSION REGULATION (EC) No 371/2005

of 3 March 2005

fixing the maximum reduction in the duty on sorghum imported in connection with the invitation to tender issued in Regulation (EC) No 2275/2004

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 1784/2003 of 29 September 2003 on the common organisation of the market in cereals [1], and in particular Article 12(1) thereof,

Whereas:

(1) An invitation to tender for the maximum reduction in the duty on sorghum imported into Spain from third countries was opened pursuant to Commission Regulation (EC) No 2275/2004 [2].

(2) Pursuant to Article 7 of Commission Regulation (EC) No 1839/95 [3], the Commission, acting under the procedure laid down in Article 25 of Regulation (EC) No 1784/2003, may decide to fix a maximum reduction in the import duty. In fixing this maximum the criteria provided for in Articles 6 and 7 of Regulation (EC) No 1839/95 must be taken into account. Whereas a contract is awarded to any tenderer whose tender is equal to or less than the maximum reduction in the duty.

(3) The application of the abovementioned criteria to the current market situation for the cereal in question results in the maximum reduction in the import duty being fixed at the amount specified in Article 1.

(4) The measures provided for in this Regulation are in accordance with the opinion of the Management Committee for Cereals,

HAS ADOPTED THIS REGULATION:

Article 1

For tenders notified from 25 February to 3 March 2005, pursuant to the invitation to tender issued in Regulation (EC) No 2275/2004, the maximum reduction in the duty on sorghum imported shall be 22,47 EUR/t and be valid for a total maximum quantity of 32 500 t.

Article 2

This Regulation shall enter into force on 4 March 2005.

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

Done at Brussels, 3 March 2005.

For the Commission
Mariann FISCHER BOEL
Member of the Commission

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(1) OJ L 270, 21.10.2003, p. 78.
(2) OJ L 396, 31.12.2004, p. 32.
(3) OJ L 177, 28.7.1995, p. 4. Regulation as last amended by Regulation (EC) No 777/2004 (OJ L 123, 27.4.2004, p. 50).

COMMISSION REGULATION (EC) No 372/2005

of 3 March 2005

fixing the maximum reduction in the duty on maize imported in connection with the invitation to tender issued in Regulation (EC) No 2277/2004

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 1784/2003 of 29 September 2003 on the common organisation of the market in cereals [1], and in particular Article 12(1) thereof,

Whereas:

(1) An invitation to tender for the maximum reduction in the duty on maize imported into Spain from third countries was opened pursuant to Commission Regulation (EC) No 2277/2004 [2].

(2) Pursuant to Article 7 of Commission Regulation (EC) No 1839/95 [3] the Commission, acting under the procedure laid down in Article 25 of Regulation (EC) No 1784/2003, may decide to fix maximum reduction in the import duty. In fixing this maximum the criteria provided for in Articles 6 and 7 of Regulation (EC) No 1839/95 must be taken into account. A contract is awarded to any tenderer whose tender is equal to or less than the maximum reduction in the duty.

(3) The application of the abovementioned criteria to the current market situation for the cereal in question results in the maximum reduction in the import duty being fixed at the amount specified in Article 1.

(4) The measures provided for in this Regulation are in accordance with the opinion of the Management Committee for Cereals,

HAS ADOPTED THIS REGULATION:

Article 1

For tenders notified from 25 February to 3 March 2005, pursuant to the invitation to tender issued in Regulation (EC) No 2277/2004, the maximum reduction in the duty on maize imported shall be 30,18 EUR/t and be valid for a total maximum quantity of 153 000 t.

Article 2

This Regulation shall enter into force on 4 March 2005.

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

Done at Brussels, 3 March 2005.

For the Commission

Mariann FISCHER BOEL

Member of the Commission

(1) OJ L 270, 21.10.2003, p. 78.
(2) OJ L 396, 31.12.2004, p. 35.
(3) OJ L 177, 28.7.1995, p. 4. Regulation as last amended by Regulation (EC) No 777/2004 (OJ L 123, 27.4.2004, p. 50).

COMMISSION REGULATION (EC) No 373/2005

of 3 March 2005

fixing the maximum reduction in the duty on maize imported in connection with the invitation to tender issued in Regulation (EC) No 2276/2004

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 1784/2003 of 29 September 2003 on the common organisation of the market in cereals [1], and in particular Article 12(1) thereof,

Whereas:

(1) An invitation to tender for the maximum reduction in the duty on maize imported into Portugal from third countries was opened pursuant to Commission Regulation (EC) No 2276/2004 [2].

(2) Pursuant to Article 7 of Commission Regulation (EC) No 1839/95 [3], the Commission, acting under the procedure laid down in Article 25 of Regulation (EC) No 1784/2003, may decide to fix maximum reduction in the import duty. In fixing this maximum the criteria provided for in Articles 6 and 7 of Regulation (EC) No 1839/95 must be taken into account. A contract is awarded to any tenderer whose tender is equal to or less than the maximum reduction in the duty.

(3) The application of the abovementioned criteria to the current market situation for the cereal in question results in the maximum reduction in the import duty being fixed at the amount specified in Article 1.

(4) The measures provided for in this Regulation are in accordance with the opinion of the Management Committee for Cereals,

HAS ADOPTED THIS REGULATION:

Article 1

For tenders notified from 25 February to 3 March 2005, pursuant to the invitation to tender issued in Regulation (EC) No 2276/2004, the maximum reduction in the duty on maize imported shall be 29,75 EUR/t and be valid for a total maximum quantity of 89 500 t.

Article 2

This Regulation shall enter into force on 4 March 2005.

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

Done at Brussels, 3 March 2005.

For the Commission
Mariann FISCHER BOEL
Member of the Commission

[1] OJ L 270, 21.10.2003, p. 78.
[2] OJ L 396, 31.12.2004, p. 34.
[3] OJ L 177, 28.7.1995, p. 4. Regulation as last amended by Regulation (EC) No 777/2004 (OJ L 123, 27.4.2004, p. 50).

COUNCIL DIRECTIVE 2005/19/EC

of 17 February 2005

amending Directive 90/434/EEC 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 94 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament [1],

Having regard to the opinion of the European Economic and Social Committee [2],

Whereas:

(1) Directive 90/434/EEC [3] introduced common rules applicable to business restructuring which are neutral from the point of view of competition.

(2) The objective of Directive 90/434/EEC is that taxation of the income, profits and capital gains from business reorganisations should be deferred and Member States taxing rights safeguarded.

(3) One of the aims of Directive 90/434/EEC is to eliminate obstacles to the functioning of the internal market, such as double taxation. In so far as this is not fully achieved by the provisions of that Directive, Member States should take the necessary measures to achieve this aim.

(4) The experience gained following implementation of Directive 90/434/EEC in January 1992 has demonstrated different ways in which the Directive can be improved and how the beneficial effects of the common rules as adopted in 1990 could be extended.

(5) On 8 October 2001 the Council adopted Regulation (EC) No 2157/2001 on the Statute for a European Company (SE) [4] and Directive 2001/86/EC supplementing the Statute for a European company with regard to the involvement of employees [5]. Similarly, on 22 July 2003 the Council adopted Regulation (EC) No 1435/2003 on the Statute for a European Cooperative Society (SCE) [6] and Directive 2003/72/EC supplementing the Statute for a European Cooperative Society with regard to the involvement of employees [7]. One of the most important features of these instruments is that both the SE and the SCE will be able to transfer their respective registered offices between Member States without being dissolved and going into liquidation.

(6) The transfer of the registered office is a means of exercising freedom of establishment as provided for in Articles 43 and 48 of the Treaty. No assets are transferred and the company and its shareholders do not derive any income, profits or capital gains from it. The company decision to reorganise its business by transferring its registered office should not be hampered by discriminatory tax rules or by restrictions, disadvantages or distortions arising from national tax legislation which is contrary to Community Law. The transfer of the registered office of an SE or an SCE from one Member State to another may not always lead to the SE or SCE ceasing to be resident in the first Member State. The tax residence of the SE or SCE continues to be determined by national legislation and tax treaties.

(7) The transfer of the registered office of a company, or an event connected with that transfer, that brings about a change in tax residence, may give rise to some form of taxation in the Member State from which the office is transferred. Taxation may also occur in a case where the transfer of the registered office, or an event connected with that transfer, does not lead to a change in tax residence. In order to deal with that eventuality as far as the SE or SCE is concerned, a number of new rules have been introduced into Directive 90/434/EEC. In a case where, following the transfer of the registered office, the assets of the SE or of the SCE remain effectively connected with a permanent establishment

[1] Opinion delivered on 10 March 2004 (not yet published in the Official Journal).
[2] OJ C 110, 30.4.2004, p. 30.
[3] OJ L 225, 20.8.1990, p. 1. Directive as last amended by the 2003 Act of Accession.
[4] OJ L 294, 10.11.2001, p. 1. Regulation as amended by Regulation (EC) No 885/2004 (OJ L 168, 1.5.2004, p. 1).
[5] OJ L 294, 10.11.2001, p. 22.
[6] OJ L 207, 18.8.2003, p. 1. Regulation as amended by Decision of the EEA Joint Committee No 15/2004 (OJ L 116, 22.4.2004, p. 68).
[7] OJ L 207, 18.8.2003, p. 25.

belonging to the SE or SCE and situated in the Member State from which the registered office was transferred, that permanent establishment should enjoy benefits similar to those provided for in Articles 4, 5 and 6 of Directive 90/434/EEC. Those articles concern tax-exempted provisions and reserves, and the take-over of losses. Moreover, in accordance with Treaty principles, the taxation of shareholders on the occasion of the transfer of the registered office should be excluded. Having regard to the obligation on Member States under the Treaty to take all necessary measures to abolish double taxation, it is not necessary at this stage to establish common rules governing the tax residence of the SE or SCE.

(8) Directive 90/434/EEC does not deal with losses of a permanent establishment in another Member State recognised in the Member State of residence of an SE or SCE. In particular, where the registered office of an SE or SCE is transferred to another Member State, such transfer does not prevent the former Member State of residence from reinstating losses of the permanent establishment in due time.

(9) Directive 90/434/EEC does not cover a type of division where the company transferring branches of activity is not dissolved. Article 4 of that Directive should therefore be extended to cover such cases.

(10) Article 3 of Directive 90/434/EEC defines the companies falling within its scope and the Annex thereto lists the forms of company to which the Directive applies. However, certain forms of company are not listed in that Annex even though they are resident for tax purposes in a Member State and are subject to corporation tax there. In the light of the experience, this appears to be an unjustifiable lacuna and the scope of the Directive should therefore be extended to cover entities which can carry out cross-border activities in the Community and which meet all the relevant requirements.

(11) Since the SE is a public limited liability company and since the SCE is a cooperative society, both similar in nature to other forms of company already covered by Directive 90/434/EEC, the SE and the SCE should be added to the list set out in the Annex to Directive 90/434/EEC.

(12) The other new companies included in the list of the Annex to this Directive are corporate taxpayers in their Member State of residence but some of them are considered fiscally transparent by other Member States. In order for the benefits of Directive 90/434/EEC to be effective, Member States treating non-resident corporate taxpayers as fiscally transparent should apply the benefits of the Directive to them. However, given the difference in tax treatment by Member States of these particular corporate taxpayers, Member States should have the option not to apply the relevant provisions in the Directive when taxing a direct or indirect shareholder of those taxpayers.

(13) Where shareholders of companies entering into the transactions governed by Directive 90/434/EEC are treated as fiscally transparent, persons having an interest in the shareholder should not suffer taxation on the occasion of restructuring transactions.

(14) Some doubts exist as to the application of Directive 90/434/EEC to the conversion of branches into subsidiaries. In these operations, the assets connected to a permanent establishment and constituting a ‘branch of activity’, as defined in Article 2(i) of Directive 90/434/EEC, are transferred to a newly set up company which will be a subsidiary of the transferring company and it should be made clear that this transaction, being the transfer of assets from a company of a Member State of a permanent establishment located in a different Member State to a company of the latter Member State, is covered by the Directive.

(15) The current definition of ‘exchange of shares’ in Article 2(d) of Directive 90/434/EEC does not state whether the term encompasses further acquisitions beyond that granting a simple majority of voting rights. It is not uncommon for company statutes and voting rules to be drafted in such a way that further acquisitions are needed before the acquirer can obtain complete control over the target company. The definition of ‘exchange of shares’ should therefore be amended to state that that term covers all such further acquisitions.

(16) In the case of mergers and divisions, the receiving company may derive gains from the difference in value between the assets and liabilities received and the shares that it may have held in the transferring company that are annulled following these operations. Article 7 of Directive 90/434/EEC provides for the exemption of these capital gains since these profits may be derived just as easily in the form of distributed profits from the transferring company that would have been exempted under Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States [1]. The objectives of both Directive 90/434/EEC and Directive 90/435/EEC coincide with regard to this particular issue but the conditions required are not the same. Directive 90/434/EEC should therefore be amended to assimilate its requirements to those of Directive 90/435/EEC and to take into account the lower shareholding threshold included in that Directive.

[1] OJ L 225, 20.8.1990, p. 6. Directive as last amended by Directive 2003/123/EC (OJ L 7, 13.1.2004, p. 41).

(17) Given the extension of Directive 90/434/EEC to include partial divisions and the transfer of a registered office of an SE or an SCE, the scope of the provision regarding the countering of tax avoidance and tax evasion should be amended accordingly.

(18) Directive 90/434/EEC should therefore be amended accordingly,

HAS ADOPTED THIS DIRECTIVE:

Article 1

Directive 90/434/EEC is hereby amended as follows:

1. the title shall be replaced by the following:

 'Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office, of an SE or SCE, between Member States.';

2. Article 1 shall replaced by the following:

 '*Article 1*

 Each Member State shall apply this Directive to the following:

 (a) mergers, divisions, partial divisions, transfers of assets and exchanges of shares in which companies from two or more Member States are involved,

 (b) transfers of the registered office from one Member State to another Member State of European companies (Societas Europaea or SE), as established in Council Regulation (EC) No 2157/2001 of 8 October 2001, on the statute for a European Company (SE) (*), and European Cooperative Societies (SCE), as established in Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE) (**).

 (*) OJ L 294, 10.11.2001, p. 1. Regulation as amended by Regulation (EC) No 885/2004 (OJ L 168, 1.5.2004, p. 1).
 (**) OJ L 207, 18.8.2003, p. 1. Regulation as amended by Decision of the EEA Joint Committee No 15/2004 (OJ L 116, 22.4.2004, p. 68).';

3. Article 2 shall be amended as follows:

 (a) The following paragraph shall be added:

 '(b)(a) "partial division" shall mean an operation whereby a company transfers, without being dissolved, one or more branches of activity, to one or more existing or new companies, leaving at least one branch of activity in the transferring company, in exchange for the pro-rata issue to its shareholders of securities representing the capital of the companies receiving the assets and liabilities, and, if applicable, a cash payment not exceeding 10 % of the nominal value or, in the absence of a nominal value, of the accounting par value of those securities;'

 (b) Paragraph (d) shall be replaced as follows:

 '(d) "exchange of shares" shall mean an operation whereby a company acquires a holding in the capital of another company such that it obtains a majority of the voting rights in that company, or, holding such a majority, acquires a further holding, in exchange for the issue to the shareholders of the latter company, in exchange for their securities, of securities representing the capital of the former company, and, if applicable, a cash payment not exceeding 10 % of the nominal value, in the absence of a nominal value, of the accounting par value of the securities issued in exchange;'

 (c) The following paragraph shall be added:

 '(j) "transfer of the registered office" shall mean an operation whereby an SE or an SCE, without winding up or creating a new legal person, transfers its registered office from one Member State to another Member State';

4. the eighth indent of Article 3(c) with respect to Italy shall be replaced as follows:

 '— imposta sul reddito delle società in Italy,'

5. the heading of Title II shall be replaced by the following:

 'TITLE II

 Rules applicable to mergers, divisions, partial divisions, and exchanges of shares.'

6. Article 4 shall be replaced by the following:

'*Article 4*

1. A merger, division or partial division shall not give rise to any taxation of capital gains calculated by reference to the difference between the real values of the assets and liabilities transferred and their values for tax purposes.

For the purpose of this Article the following definitions shall apply:

(a) "value for tax purposes": the value on the basis of which any gain or loss would have been computed for the purposes of tax upon the income, profits or capital gains of the transferring company if such assets or liabilities had been sold at the time of the merger, division or partial division but independently of it;

(b) "transferred assets and liabilities": those assets and liabilities of the transferring company which, in consequence of the merger, division or partial division, are effectively connected with a permanent establishment of the receiving company in the Member State of the transferring company and play a part in generating the profits or losses taken into account for tax purposes.

2. Where paragraph 1 applies and where a Member State considers a non-resident transferring company as fiscally transparent on the basis of that State's assessment of the legal characteristics of that company arising from the law under which it is constituted and therefore taxes the shareholders on their share of the profits of the transferring company as and when those profits arise, that State shall not tax any income, profits or capital gains calculated by reference to the difference between the real values of the assets and liabilities transferred and their values for tax purposes.

3. Paragraphs 1 and 2 shall apply only if the receiving company computes any new depreciation and any gains or losses in respect of the assets and liabilities transferred according to the rules that would have applied to the transferring company or companies if the merger, division or partial division had not taken place.

4. Where, under the laws of the Member State of the transferring company, the receiving company is entitled to have any new depreciation or any gains or losses in respect of the assets and liabilities transferred computed on a basis different from that set out in paragraph 3, paragraph 1 shall not apply to the assets and liabilities in respect of which that option is exercised.';

7. Article 6 shall be replaced by the following:

'*Article 6*

To the extent that, if the operations referred to in Article 1, paragraph a, were effected between companies from the Member State of the transferring company, the Member State would apply provisions allowing the receiving company to take over the losses of the transferring company which had not yet been exhausted for tax purposes, it shall extend those provisions to cover the take-over of such losses by the receiving company's permanent establishments situated within its territory.';

8. in Article 7, paragraph 2 shall be replaced by the following:

'2. The Member States may derogate from paragraph 1 where the receiving company has a holding of less than 20 % in the capital of the transferring company.

From 1 January 2007 the minimum holding percentage shall be 15 %. From 1 January 2009 the minimum holding percentage shall be 10 %.';

9. Article 8 shall be replaced by the following:

'*Article 8*

1. On a merger, division or exchange of shares, the allotment of securities representing the capital of the receiving or acquiring company to a shareholder of the transferring or acquired company in exchange for securities representing the capital of the latter company shall not, of itself, give rise to any taxation of the income, profits or capital gains of that shareholder.

2. On a partial division, the allotment to a shareholder of the transferring company of securities representing the capital of the receiving company shall not, of itself, give rise to any taxation of the income, profits or capital gains of that shareholder.

3. Where a Member State considers a shareholder as fiscally transparent on the basis of that State's assessment of the legal characteristics of that shareholder arising from the law under which it is constituted and therefore taxes those persons having an interest in the shareholders on their share of the profits of the shareholder as and when those profits arise, that State shall not tax those persons on income, profits or capital gains from the allotment of securities representing the capital of the receiving or acquiring company to the shareholder.

4. Paragraphs 1 and 3 shall apply only if the shareholder does not attribute to the securities received a value for tax purposes higher than the value the securities exchanged had immediately before the merger, division or exchange of shares.

5. Paragraphs 2 and 3 shall apply only if the shareholder does not attribute to the sum of the securities received and those held in the transferring company, a value for tax purposes higher than the value the securities held in the transferring company had immediately before the partial division.

6. The application of paragraphs 1, 2 and 3 shall not prevent the Member States from taxing the gain arising out of the subsequent transfer of securities received in the same way as the gain arising out of the transfer of securities existing before the acquisition.

7. In this Article the expression "value for tax purposes" means the value on the basis of which any gain or loss would be computed for the purposes of tax upon the income, profits or capital gains of a shareholder of the company.

8. Where, under the law of the Member State in which he is resident, a shareholder may opt for tax treatment different from that set out in paragraphs 4 and 5, paragraphs 1, 2 and 3 shall not apply to the securities in respect of which such an option is exercised.

9. Paragraphs 1, 2 and 3 shall not prevent a Member State from taking into account when taxing shareholders any cash payment that may be made on the merger, division, partial division or exchange of shares.';

10. Article 10 shall be replaced by the following:

'*Article 10*

1. Where the assets transferred in a merger, a division, a partial division or a transfer of assets include a permanent establishment of the transferring company which is situated in a Member State other than that of the transferring company, the Member State of the transferring company shall renounce any right to tax that permanent establishment.

The Member State of the transferring company may reinstate in the taxable profits of that company such losses of the permanent establishment as may previously have been set off against the taxable profits of the company in that State and which have not been recovered.

The Member State in which the permanent establishment is situated and the Member State of the receiving company shall apply the provisions of this Directive to such a transfer as if the Member State where the permanent establishment is situated were the Member State of the transferring company.

These provisions shall also apply in the case where the permanent establishment is situated in the same Member State as that in which the receiving company is resident.

2. By way of derogation from paragraph 1, where the Member State of the transferring company applies a system of taxing worldwide profits, that Member State shall have the right to tax any profits or capital gains of the permanent establishment resulting from the merger, division, partial division or transfer of assets, on condition that it gives relief for the tax that, but for the provisions of this Directive, would have been charged on those profits or capital gains in the Member State in which that permanent establishment is situated, in the same way and in the same amount as it would have done if that tax had actually been charged and paid.';

11. the following Title shall be inserted:

'TITLE IVa

Special case of transparent entities

Article 10a

1. Where a Member State considers a non-resident transferring or acquired company to be fiscally transparent on the basis of that State's assessment of the legal characteristics of that company arising from the law under which it is constituted, it shall have the right not to apply the provisions of this Directive when taxing a direct or indirect shareholder of that company in respect of the income, profits or capital gains of that company.

2. A Member State exercising the right referred to in paragraph 1 shall give relief for the tax which, but for the provisions of this Directive, would have been charged on the fiscally transparent company on its income, profits or capital gains, in the same way and in the same amount as that State would have done if that tax had actually been charged and paid.

3. Where a Member State considers a non-resident receiving or acquiring company to be fiscally transparent on the basis of that State's assessment of the legal characteristics of that company arising from the law under which it is constituted, it shall have the right not to apply Article 8 paragraphs 1, 2 and 3.

4. Where a Member State considers a non-resident receiving company to be fiscally transparent on the basis of that State's assessment of the legal characteristics of that company arising from the law under which it is constituted, that Member State may apply to any direct or indirect shareholders the same treatment for tax purposes as it would if the receiving company were resident in that Member State.';

12. the following Title shall be inserted.

'TITLE IVb

Rules applicable to the transfer of the registered office of an SE or an SCE

Article 10b

1. Where,

(a) an SE or an SCE transfers its registered office from one Member State to another Member State, or

(b) in connection with the transfer of its registered office from one Member State to another Member State, an SE or an SCE, which is resident in the first Member State, ceases to be resident in that Member State and becomes resident in another Member State,

that transfer of registered office or the cessation of residence shall not give rise to any taxation of capital gains, calculated in accordance with of Article 4(1), in the Member State from which the registered office has been transferred, derived from those assets and liabilities of the SE or SCE which, in consequence, remain effectively connected with a permanent establishment of the SE or of the SCE in the Member State from which the registered office has been transferred and play a part in generating the profits or losses taken into account for tax purposes.

2. Paragraph 1 shall apply only if the SE or the SCE computes any new depreciation and any gains or losses in respect of the assets and liabilities that remain effectively connected with that permanent establishment, as though the transfer of the registered office had not taken place or the SE or the SCE had not so ceased to be tax resident.

3. Where, under the laws of that Member State, the SE or the SCE is entitled to have any new depreciation or any gains or losses in respect of the assets and liabilities remaining in that Member State computed on a basis different from that set out in paragraph 2, paragraph 1 shall not apply to the assets and liabilities in respect of which that option is exercised.

Article 10c

1. Where,

(a) an SE or an SCE transfers its registered office from one Member State to another Member State, or

(b) in connection with the transfer of its registered office from one Member State to another Member State, an SE or an SCE, which is resident in the first Member State, ceases to be resident in that Member State and becomes resident in another Member State,

the Member States shall take the necessary measures to ensure that, where provisions or reserves properly constituted by the SE or the SCE before the transfer of the registered office are partly or wholly exempt from tax and are not derived from permanent establishments abroad, such provisions or reserves may be carried over, with the same tax exemption, by a permanent establishment of the SE or the SCE which is situated within the territory of the Member State from which the registered office was transferred.

2. To the extent that a company transferring its registered office within the territory of a Member State would be allowed to carry forward or carry back losses which had not been exhausted for tax purposes, that Member State shall allow the permanent establishment, situated within its territory, of the SE or of the SCE transferring its registered office, to take over those losses of the SE or SCE which have not been exhausted for tax purposes, provided that the loss carry forward or carry back would have been available in comparable circumstances to a company which continued to have its registered office or which continued to be tax resident in that Member State.

Article 10d

1. The transfer of the registered office of an SE or of an SCE shall not, of itself, give rise to any taxation of the income, profits or capital gains of the shareholders.

2. The application of paragraph 1 shall not prevent the Member States from taxing the gain arising out of the subsequent transfer of the securities representing the capital of the SE or of the SCE that transfers its registered office.'

13. In Article 11, paragraph 1 shall be replaced by the following:

'1. A Member State may refuse to apply or withdraw the benefit of all or any part of the provisions of Titles II, III, IV and IVb where it appears that the merger, division, partial division, transfer of assets, exchange of shares or transfer of the registered office of an SE or an SCE:

(a) has as its principal objective or as one of its principal objectives tax evasion or tax avoidance; the fact that one of the operations referred to in Article 1 is not carried out for valid commercial reasons such as the restructuring or rationalisation of the activities of the companies participating in the operation may constitute a presumption that the operation has tax evasion or tax avoidance as its principal objective or as one of its principal objectives;

(b) results in a company, whether participating in the operation or not, no longer fulfilling the necessary conditions for the representation of employees on company organs according to the arrangements which were in force prior to that operation.'

14. The Annex shall be replaced by the text in the Annex to this Directive.

Article 2

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply both with the provisions of this Directive regarding the transfer of the registered office of an SE or of an SCE, and with the entry (a) in the Annex to this Directive by 1 January 2006. Member States shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

When Member States adopt these measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive, as regards the provisions other than those referred to in paragraph 1, by 1 January 2007. Member States shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

When Member States adopt these measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

3. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 3

This Directive is addressed to the Member States.

Done at Brussels, 17 February 2005.

For the Council

The President

J.-C. JUNCKER

ANNEX

'ANNEX

LIST OF COMPANIES REFERRED TO IN ARTICLE 3(a)

(a) companies incorporated under Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) and Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees, and cooperative societies incorporated under Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE) and Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees;

(b) companies under Belgian law known as "société anonyme"/"naamloze vennootschap", "société en commandite par actions"/"commanditaire vennootschap op aandelen", "société privée à responsabilité limitée"/"besloten vennootschap met beperkte aansprakelijkheid" "société coopérative à responsabilité limitée"/"coöperatieve vennootschap met beperkte aansprakelijkheid", "société coopérative à responsabilité illimitée"/"coöperatieve vennootschap met onbeperkte aansprakelijkheid", "société en nom collectif"/"vennootschap onder firma", "société en commandite simple"/ "gewone commanditaire vennootschap", public undertakings which have adopted one of the abovementioned legal forms, and other companies constituted under Belgian law subject to the Belgian Corporate Tax;

(c) companies under Czech law known as: "akciová společnost", "společnost s ručením omezeným";

(d) companies under Danish law known as "aktieselskab" and "anpartsselskab". Other companies subject to tax under the Corporation Tax Act, in so far as their taxable income is calculated and taxed in accordance with the general tax legislation rules applicable to "aktieselskaber";

(e) companies under German law known as "Aktiengesellschaft", "Kommanditgesellschaft auf Aktien", "Gesellschaft mit beschränkter Haftung", "Versicherungsverein auf Gegenseitigkeit", "Erwerbs- und Wirtschaftsgenossenschaft", "Betriebe gewerblicher Art von juristischen Personen des öffentlichen Rechts", and other companies constituted under German law subject to German corporate tax;

(f) companies under Estonian law known as: "täisühing", "usaldusühing", "osaühing", "aktsiaselts", "tulundusühistu";

(g) companies under Greek law known as "ανώνυμη εταιρεία", "εταιρεία περιορισμένης ευθύνης (Ε.Π.Ε.)";

(h) companies under Spanish law known as "sociedad anónima", "sociedad comanditaria por acciones", "sociedad de responsabilidad limitada", and those public law bodies which operate under private law;

(i) companies under French law known as "société anonyme", "société en commandite par actions", "société à responsabilité limitée", "sociétés par actions simplifiées", "sociétés d'assurances mutuelles", "caisses d'épargne et de prévoyance", "sociétés civiles" which are automatically subject to corporation tax, "coopératives", "unions de coopératives", industrial and commercial public establishments and undertakings, and other companies constituted under French law subject to the French Corporate Tax;

(j) companies incorporated or existing under Irish laws, bodies registered under the Industrial and Provident Societies Act, building societies incorporated under the Building Societies Acts and trustee savings banks within the meaning of the Trustee Savings Banks Act, 1989;

(k) companies under Italian law known as "società per azioni", "società in accomandita per azioni", "società a responsabilità limitata", "società cooperative", "società di mutua assicurazione", and private and public entities whose activity is wholly or principally commercial;

(l) under Cypriot law: "εταιρείες" as defined in the Income Tax laws;

(m) companies under Latvian law known as: "akciju sabiedrība", "sabiedrība ar ierobežotu atbildību";

(n) companies incorporated under the law of Lithuania;

(o) companies under Luxembourg law known as "société anonyme", "société en commandite par actions", "société à responsabilité limitée", "société coopérative", "société coopérative organisée comme une société anonyme", "association d'assurances mutuelles", "association d'épargne-pension", "entreprise de nature commerciale, industrielle ou minière de l'État, des communes, des syndicats de communes, des établissements publics et des autres personnes morales de droit public", and other companies constituted under Luxembourg law subject to the Luxembourg Corporate Tax;

(p) companies under Hungarian law known as: "közkereseti társaság", "betéti társaság", "közös vállalat", "korlátolt felelősségű társaság", "részvénytársaság", "egyesülés", "közhasznú társaság", "szövetkezet";

(q) companies under Maltese law known as: "Kumpaniji ta' Responsabilita Limitata", "Soċjetajiet en commandite li l-kapital tagħhom maqsum f'azzjonijiet";

(r) companies under Dutch law known as "naamloze vennootschap", "besloten vennootschap met beperkte aansprakelijkheid", "Open commanditaire vennootschap", "Coöperatie", "onderlinge waarborgmaatschappij", "Fonds voor gemene rekening", "vereniging op coöperatieve grondslag" and "vereniging welke op onderlinge grondslag als verzekeraar of kredietinstelling optreedt", and other companies constituted under Dutch law subject to the Dutch Corporate Tax;

(s) companies under Austrian law known as "Aktiengesellschaft", "Gesellschaft mit beschränkter Haftung", "Erwerbs- und Wirtschaftsgenossenschaften";

(t) companies under Polish law known as: "spółka akcyjna", "spółka z ograniczoną odpowiedzialnością";

(u) commercial companies or civil law companies having a commercial form as well as other legal persons carrying on commercial or industrial activities, which are incorporated under Portuguese law;

(v) companies under Slovenian law known as: "delniška družba", "komanditna družba", "družba z omejeno odgovornostjo";

(w) companies under Slovak law known as: "akciová spoločnosť", "spoločnosť s ručením obmedzeným", "komanditná spoločnosť".

(x) companies under Finnish law known as "osakeyhtiö"/"aktiebolag", "osuuskunta"/"andelslag", "säästöpankki"/"sparbank" and "vakuutusyhtiö"/"försäkringsbolag";

(y) companies under Swedish law known as "aktiebolag", "försäkringsaktiebolag", "ekonomiska föreningar", "sparbanker", "ömsesidiga försäkringsbolag";

(z) companies incorporated under the law of the United Kingdom.'

II

(Acts whose publication is not obligatory)

COUNCIL

COUNCIL DECISION

of 28 February 2005

appointing a Netherlands member of the Committee of the Regions

(2005/172/EC)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 263 thereof,

Having regard to the proposal from the Netherlands Government,

Whereas:

(1) On 22 January 2002 the Council adopted a Decision appointing the members and alternate members of the Committee of the Regions [1].

(2) A seat as a member of the Committee of the Regions has become vacant following the resignation of Mr G.A.A. VERKERK, notified to the Council on 6 October 2004,

HAS DECIDED AS FOLLOWS:

Sole Article

Mr Pieter Theodoor VAN WOENSEL, Wethouder van Den Haag, is hereby appointed a member of the Committee of the Regions in place of Mr G.A.A. VERKERK for the remainder of his term of office, which runs until 25 January 2006.

Done at Brussels, 28 February 2005.

For the Council

The President

F. BODEN

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[1] OJ L 24, 26.1.2002, p. 38.

COMMISSION

COMMISSION DECISION

of 12 May 2004

on the State aid implemented by Spain for further restructuring aid to the public Spanish shipyards

State aid Case C 40/00 (ex NN 61/00)

(notified under document number C(2004) 1620)

(Only the Spanish text is authentic)

(Text with EEA relevance)

(2005/173/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

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

Having regard to Council Regulation (EC) No 1540/98 of 29 June 1998 establishing new rules on aid to shipbuilding [1],

Having regard to Council Regulation (EC) No 1013/97 of 2 June 1997 on aid to certain shipyards under restructuring [2],

Having called on interested parties to submit their comments pursuant to the provisions cited above [3] and having regard to their comments,

Whereas:

I. PROCEDURE

(1) Based on Regulation (EC) No 1013/97, the Commission in a decision of 6 August 1997 [4] authorised restructuring aid for Spanish public shipyards amounting to approximately EUR 1,9 billion. According to the Council Regulation the condition for the approval of the aid was that no more aid for restructuring purposes should be provided.

(2) By information from the press, the Commission was informed that a number of transactions involving the public Spanish civil shipyards took place during the years 1999 and 2000. By letters dated 27 January 2000 and 29 March 2000, the Commission requested information on this matter. Spain did not reply to these letters.

(3) By decision of 12 July 2000 the Commission initiated the procedure laid down in Article 88(2) of the EC Treaty (hereafter the opening) concerning the transaction whereby the State holding company Sociedad Estatal de Participationes Industriales (hereafter SEPI) bought the two shipyards Juliana and Cadiz and the motor factory Manises, each as separate companies, from Astilleros Españoles SA. The Spanish authorities were informed of the decision in a letter from the Commission dated 1 August 2000.

(1) OJ L 202, 18.7.1998, p. 1.
(2) OJ L 148, 6.6.1997, p. 1.
(3) OJ C 328, 18.11.2000, p. 16 and OJ C 21, 24.1.2002, p. 17 and OJ C 199, 23.8.2003, p. 9.
(4) OJ C 354, 21.11.1997, p. 2.

(4) Spain by letters dated 18 May 2001 and 24 September 2001 submitted its comments on the opening of the procedure. It also informed the Commission that the State holding company SEPI in July 2000 had decided to merge all the publicly owned shipyards in Spain into one group.

(5) The Commission decided on 28 November 2001 to extend the procedure laid down in Article 88(2) of the EC Treaty (hereafter first extension), in respect of the further transactions between, on the one hand, SEPI and Bazán and, on the other hand, AESA and Bazán to create the new group IZAR. By letter dated 28 November 2001, the Commission informed Spain of the extension of the procedure and requested all relevant information that may help to assess the aid element of the transactions. By letter dated 29 November 2002 the Commission clarified that, to make the proper evaluations, it needed the annual accounts of the concerned shipyards and AESA, and any other documentation that would clarify how the companies were evaluated at the time of the change in ownership.

(6) Spain by letter dated 31 January 2002 submitted its comments on the first extension of the procedure. The Commission reminded Spain, in a letter dated 28 February 2002, that annual reports for the companies still had to be provided. Spain provided further information by letter dated 29 July 2002, which however did not include the requested annual reports.

(7) Since Spain did not provide the requested annual reports the Commission decided on 12 August 2002 to issue an information injunction pursuant to Article 10(3) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty [1] (hereafter the procedural regulation) to order Spain to submit this information. Spain was informed of this by letter dated 12 August 2002. The Commission underlined that if it did not receive the requested information, it would take a final decision based on the information it had available. Spain by letter dated 16 October 2002 replied to the information injunction but did not provide the requested annual reports.

(8) The Commission decided on 27 May 2003, to further extend the procedure laid down in Article 88(2) of the EC Treaty (hereafter second extension), covering newly found suspected illegal State aid linked to transactions between SEPI and AESA and its shipyards. By letter dated 27 May 2003 the Commission informed Spain of the extension of the procedure and requested all relevant information that may help to assess the suspected aid. By letter dated 10 July 2003, Spain replied to the second extension. By letters dated 16 October and 11 November 2003, the Commission requested further clarifications. Spain replied by letter dated 25 November 2003 and provided further information by letter dated 14 April 2004.

(9) Following the opening, the Commission received comments from Denmark by letter of 18 December 2000, and following the first extension, comments from the UK by letter of 22 February 2002. Following the second extension, comments were received from Royal Van Lent Shipyard by letter dated 24 September 2003, from a party requesting anonymity by letter dated 24 September 2003 and from IZAR by letter dated 6 October 2003. These comments were forwarded to Spain by letters dated 14 February 2001, 6 March 2002 and 13 October 2003. Spain provided its comments by letters dated 14 March 2001, 4 April 2002 and 10 November 2003. IZAR on 14 November 2003 brought an action [2] against the Commission before the Court of First Instance, requesting an annulment of the second extension of the procedure.

II. DETAILED DESCRIPTION OF THE AID

The beneficiaries

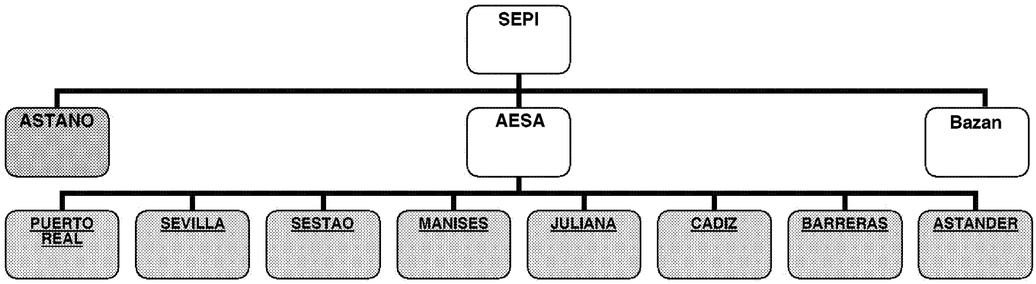
(10) The concerned companies are Astilleros Españoles SA (AESA), E.N. Bazán de Construcciones Navales Militares SA (Bazán), IZAR Construcciones navales (IZAR), Astilleros de Cadiz SRL (Cadiz), Astilleros de Puerto Real SRL (Puerto Real), Astilleros de Sestao SRL (Sestao) Astilleros de Sevilla SRL (Sevilla) Juliana Constructora Gijonesa SA (Juliana), Manises Diesel Engine Company SA (Manises), Astilleros y Talleres del Noroeste (Astano, which later changed name to Fene).

[1] OJ L 83, 27.3.1999, p. 1.

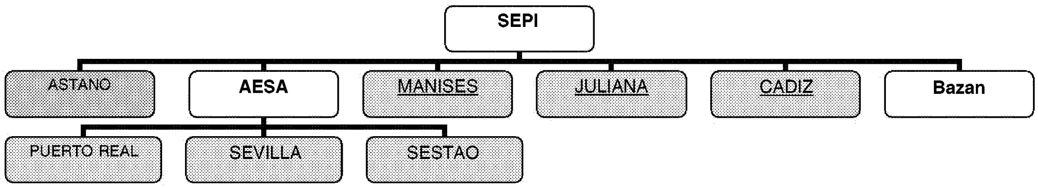
[2] OJ C 21, 24.1.2004, p. 41, Case T-381/03.

Transactions covered by this procedure

(11) Since 1998, all public Spanish shipyard companies belong to the structures of the Spanish State holding company SEPI. By 1998 all civil yards, apart from the directly owned Astano, were independent companies, owned by the holding AESA, a subsidiary of SEPI. AESA thus did not carry out any shipbuilding activities on its own, but was a holding company actively managing its shipyard companies. SEPI also owned Bazán, a company which mainly comprised three military shipyards (not as independent companies). By the beginning of 1998 the structure of ownership of the public shipyards was as follows:

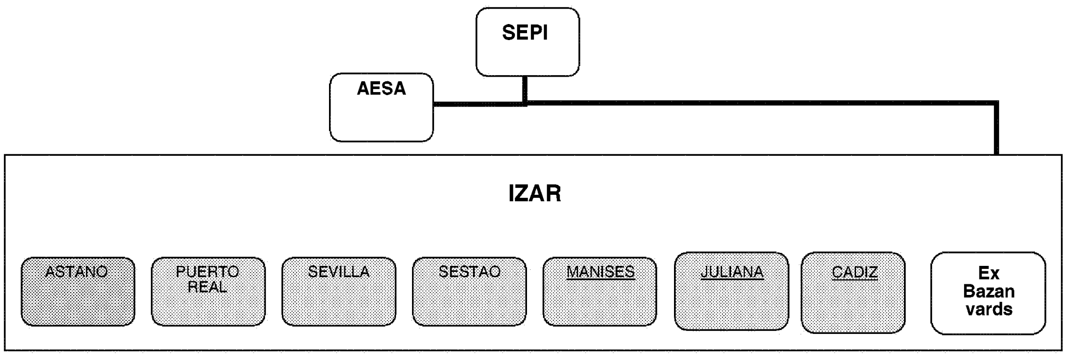


(12) In a first set of transactions (hereafter referred to as transfer 1) on 28 December 1999, SEPI bought shipyard companies Cadiz, Juliana and the ship motor factory company Manises from AESA for a price of EUR 15 300 000 [1]. The yards Barreras and Astander were privatised and are no longer part of the present investigation. This led to the following structure:



(13) SEPI in July 2000 decided to merge all the publicly owned shipyards into one group. The merger took place through two main operations. In one operation (hereafter referred to as transfer 2), the SEPI-owned military shipbuilding group Bazán bought AESA's three remaining shipyard companies (Puerto Real, Sestao and Sevilla) for ESP 1 each.

(14) In the other operation (hereafter referred to as transfer 3), Bazán bought three shipyard companies (Juliana, Cadiz and Astano) and the ship motor factory Manises directly from SEPI, also this for ESP 1 each. All the companies were then dissolved and merged into Bazán, which changed name to IZAR. The current structure of the shipyards is thus as follows:



[1] The monetary amounts in this decision are, in general, rounded figures, in euro, recalculated from Spanish pesetas.

The decision to open the formal investigation procedure

(15) In the opening of the procedure the Commission stated that it had doubts whether transfer 1, where SEPI paid a price, which then was reported to be EUR 60 million to AESA for the three companies Juliana, Cadiz, and Manises contained State aid.

(16) It was also doubtful whether such aid was compatible with the common market as it appeared not to be compatible with the Commission decision of 1997 approving the last restructuring aid package for the public shipyard group and, therefore, constituting incompatible restructuring aid pursuant to the first indent of the second subparagraph of Article 5(1) of Regulation (EC) No 1540/98 establishing new rules on aid to shipbuilding (hereafter the Shipbuilding Regulation). This finding in particular was based on the following arguments:

(17) Firstly, this 'sale' did not appear to be a genuine operation but rather a capital injection to allow AESA and its remaining yards (Puerto Real, Sevilla and Sestao) to continue in business for the time being.

(18) Secondly, given their previous performance and apparently continued poor results, no commercial investor seemed likely to be prepared to purchase the yards on these conditions.

The first decision to extend the formal investigation procedure

(19) The Commission on 25 November 2001 decided to extend the procedure to cover transfer 2 and 3 undertaken to merge all public Spanish yards into one group. In the extension of the procedure the Commission noted that there was a proximity of the transactions that took place in between 1999 and 2000 which ultimately led to the creation of one group for all public yards. The procedure therefore needed to be extended to all transactions that lead to the merger in order to fully and correctly evaluate the possible State aid to civil shipyards contained in the different transactions within the SEPI group.

(20) In this context the Commission underlined that the provision of capital to public undertakings needs to take place under market conditions in order to exclude the existence of State aid. Therefore, it had doubts whether the sales price of ESP 1 per yard and for the motor factory could be considered as the market price, and whether therefore an economic advantage constituting State aid had been conferred to IZAR by the transactions.

(21) Since the applicable community provisions did not allow for more rescue or restructuring aid to the public civil shipyards the Commission had doubts on whether these transactions would be compatible with the common market.

The second decision to extend the formal investigation procedure

(22) In its further investigations on this case the Commission found out that SEPI in 1999 provided loans amounting to EUR 194 400 000 to the three companies Cadiz, Juliana and Manises it just had bought. Since it appears that these loans were provided to companies in difficulties, the Commission considered that they may be considered to be State aid.

(23) Furthermore, the Commission noted that it appeared that on 18 July 2000 AESA received a capital injection from SEPI of EUR 252 400 000. The Commission considered that this could be State aid. It appeared that the shipyards Puerto Real, Sestao and Sevilla at virtually the same time received capital injections from AESA of a similar total amount. This capital injection from AESA to its three shipyards took place only two days before they were transferred to Bazán.

(24) Finally, it appeared that Bazán was compensated for a loss of EUR 68 200 000 in connection with its buying of the shipyards Astano, Cadiz, Juliana and Manises. The Commission therefore had doubts that SEPI may have injected this amount into the four companies in connection with their transfer to Bazán.

(25) Based on this new information, directly related to the transfers that led to the creation of IZAR, the Commission decided on 27 May 2003 to extend the procedure since it had doubts that these loans and capital injections were compatible with the common market.

(26) It can finally be noted that, in the second extension of the procedure, the Commission stressed that in case the doubts concerning the granting of additional aid as expressed within this decision initiating the current procedure are confirmed, aid granted in 1997 for the further restructuring of public Spanish yards may be considered to be incompatible and be recovered.

III. **COMMENTS FROM INTERESTED PARTIES**

Comments to the opening of the procedure

(27) The Commission received comments on the opening of the procedure from Denmark, which was of the opinion that the transaction between AESA and SEPI should be considered as illegal capital injection in violation to the aid package agreed to in 1997 for AESA. Denmark therefore supported the Commission decision to open the procedure.

(28) Denmark furthermore claimed that since Bazán received aid in 1998 on the condition that it would cease with commercial shipbuilding, the takeover by Bazán of a number of civil shipyards would contradict that condition. Finally Denmark claims that Danish yards have suffered from competition from Spanish yards that have received State aid.

Comments to the first extension

(29) The Commission, received comments from the United Kingdom (hereafter the UK) on the extension of the procedure. The UK shares the Commission's doubts as to whether the restructuring of the public shipyards in Spain is compatible with market principles. It underlines that a key concern is the treatment of debts of the State-owned AESA yards, which the UK understands have been considerable at the time of the transaction. The UK considers that the merging of commercial and naval groups into a single entity, IZAR, provides greater opportunities for the possible circumvention of State aid rules.

(30) According to the UK it is a widely held view in the UK industry that Spanish yards secure shipbuilding and major conversion orders not because of their own competitiveness but because of the combination of aid measures at their disposal. It claims that there are concrete examples where Spanish yards have taken work for which UK yards were also bidding, on terms that are hard to explain if normal commercial conditions were applying. It also believes that Spain plays 'pass the parcel' with loss making yards as a device for allowing continued provision of a subsidy to a sector that is avoiding the restructuring that is essential.

Comments to the second extension

(31) The Commission received comments from three parties. A party requesting anonymity made a joint comment for this case and State aid Case C 38/03 [1]. It notes that IZAR is active in the construction, reparation, maintenance and transformation of recreational ships, in particular luxury yachts. It underlines that the investigated aid has created a serious distortion in the market of recreational ships and that IZAR's facilities in the military shipyards Cartagena and San Fernando are used for this purpose. Another joint comment for this case and Case C 38/03 was received from Royal van Lent Shipyard BV, which is active in construction of mega yachts. The company claims that aids granted by the Spanish government during the past years have been extremely prejudicial for many of the current competitors in this market.

(32) The Commission also received comments from IZAR. IZAR firstly claims that any funds provided from SEPI is not to be considered as State resources. Concerning a loan of EUR 194 400 000 from SEPI to AESA, IZAR claims that this was no new loan but only a matter of SEPI taking over the claims of a loan that AESA had given to its shipyards. Concerning the capital injection of EUR 252 400 000 from SEPI to AESA, IZAR claims that this took place in September 2000, at a time when AESA owned no shipyards, and that it therefore can not be considered as aid to the shipyards. Concerning loss covering of EUR 68 200 000 from SEPI to IZAR, IZAR claims that this never took place, as can be seen in the annual report of IZAR. IZAR finally claims that an incorrect legal base was used, and that it can not be question to recover any aid provided to the public Spanish shipyards in 1997.

IV. **COMMENTS FROM SPAIN**

Comments following the opening

(33) In its comments on the opening of the procedure, Spain clarified that the sum SEPI paid to AESA for the two shipyards and the motor factory was considerably lower than what was mentioned in the opening. In fact, the price for the three companies was EUR 15 300 000, instead of EUR 60 million as stated in the opening. Price per company was EUR 8 054 000 for Cadiz, EUR 5 235 000 for Juliana, and EUR 2 013 000 for Manises.

(34) Spain furthermore provided the Commission with arguments why in its view transfer 1 did not contain State aid. The main argument was that the transactions were made in order to prepare for a privatisation of the three companies. Since SEPI is the specialist in privatisation, it was necessary to transfer the three companies to SEPI. However, very soon it became clear that no interested buyer could be found. This was the reason for the subsequent transfer of the companies to Bazán.

[1] OJ C 201, 26.8.2003, p. 3.

(35) Since the alleged purpose of the transactions was to prepare the three companies for privatisation, Spain considers that SEPI did not need to act as a market actor when it bought the companies. It only needed to pay a reasonable price, and in these circumstances the book value seemed to be the optimal solution.

Comments following the first extension

(36) Following the first extension of the procedure, Spain provided the Commission with the following arguments why no State aid was involved in transfer 2 and 3, i.e. why the price of ESP 1 per company was correct.

(37) According to Spain, SEPI as 100 % shareholder of all concerned companies behaved as a market actor when it decided to reorganise all shipbuilding into one group, with the aim of getting advantages from synergies. There was also a necessity to increase the capacity for military production, given the large order book and expected future increase of this sector.

(38) Spain also underlined that there was no link between the first set of transactions involving AESA and SEPI, and the second set of transactions leading to the creation of IZAR. The first aimed at a privatisation of the three concerned companies, while the second aimed at creating one large shipbuilding group in Spain.

(39) Spain claims that the fact that the price for the same companies (Cadiz, Juliana and Manises) changed within a short time frame, from EUR 15 300 000 million to ESP 3, only shows that the two transactions had different objectives.

(40) The transfer of the shipyard companies to Bazán, with all their assets and liabilities unaffected, does not imply any advantage to any of the shipyard companies. Furthermore, Spain claims that there were no public resources provided in the transactions.

(41) Spain also states that if any advantage could be proven to have benefited Bazán in transfer 2, the military nature of Bazán puts doubts as to whether Article 88(2) of the EC Treaty applies, given the exception provided in Article 296 of the EC Treaty.

(42) It is also claimed that the price used in an internal transaction within a group does not necessarily have to be market based. However, Spain furthermore claims that in the transactions under consideration the prices used (ESP 1 each) were fully reasonable and reflected the values of the concerned shipyards. A market investor would not have paid more, and the use of a price equal to the book value would not have been appropriate in this situation.

(43) Spain argues that as a general principle, the reorganisation of activities within the same group does not affect the competitive situation of the new emerging company, or of the companies which are integrated in this new company. Spain in this respect refers to Court Cases 61/79 Denkavit Italiana [1], C-387/92 Banco Exterior de España [2] and C-200/97 Ecotrade and Altiformi [3].

(44) As an ancillary defence, in case the Commission would consider the price too low and therefore constituting an aid to Bazán/IZAR, Spain refers to a Commission decision [4] of 27 July 1994. In this decision it is stated that although a price paid for the transfer of a car plant between two entities of Treuhand was probably too low, the Commission considered this to be irrelevant as it concerned an internal transaction within Treuhand.

(45) Spain further argued that no reasonable market price exists, and failing this, the Commission has not been able to determine the suspected State aid, as is required according to the procedural regulation, the jurisprudence and the Commission's own practice.

(46) Spain furthermore provided information on the book value of the concerned yards, and the economic risks estimated for each of these yards. The risks were divided into three elements; economic risk in existing contracts, economic risk of under-utilisation of capacity and other economic risks (commercial, labour related and fiscal). Spain claimed that by using the book value as a reference, and deducting the estimated risks, the price of ESP 1 per company reflects the real value, and thus no advantage to the buyer Bazán/IZAR (See table 1).

(1) [1980] ECR 1205.
(2) [1994] ECR I-877.
(3) [1998] ECR I-7907.
(4) OJ L 385, 31.12.1994, p. 1.

Table 1

Book values and risks related to the individual transactions in July 2000

(in EUR million)

Company	Book value	Estimated risks	Estimated net value
Companies sold by AESA to Bazán			
Puerto Real	68,8	[…] (*)	[…]
Sestao	91,1	[…]	[…]
Sevilla	37,8	[…]	[…]
Companies sold by SEPI to Bazán			
Cadiz	− 20,9	[…]	[…]
Juliana	− 31,6	[…]	[…]
Manises	− 14,7	[…]	[…]
Astano	1,0	[…]	[…]

(*) Confidential information.

(47) In reaction to the Danish comments Spain considered that the comments on the aid to Bazán fall outside the scope of the procedure and thus are irrelevant. Spain furthermore denied the allegations that the transactions between AESA and SEPI constituted aid as they did not contain any unjustified flow of funds. Finally Spain states that the problems faced by Danish shipyards are not due to competition from Spanish yards but from unfair competition from Korea.

(48) Concerning the comments received from the UK, Spain expresses surprise over allegations of cross subsidies between military and civil production since it alleges that the UK has many yards with mixed civil/military production. It also denies that Spanish shipyards have benefited from any measure that has not been authorised by the European Commission.

Comments following the second extension

(49) Following the second extension of the procedure, Spain provided the Commission with the following arguments on why, in its view, no State aid was involved in the loans and capital injections noted by the Commission.

(50) Firstly, Spain claims that SEPI acted as a private investor in a market economy, that aims at maximising profits, and that the Commission has not proven that SEPI's resources comes from the State or are imputable to the State.

(51) Concerning the loans from SEPI to Cadiz, Juliana and Manises, Spain states that when SEPI on 22 December 1999 took over the three companies, they had debts to AESA of respectively EUR 120 800 000 (Cadiz), EUR 47 200 000 (Juliana) and EUR 24 100 000 (Manises). What SEPI did was to take over these claims from AESA. This can not be considered to be a new aid to the shipyards. Furthermore, the interest rates charged were similar to the market rate (MIBOR plus 8 points).

(52) Concerning the capital injection of EUR 252 400 000 from SEPI to AESA, Spain first states that the capital was not injected on 18 July 2000, as stated in the opening, but in September the same year. At this time, AESA did not have any activity, since it had already sold its last shipyards to Bazán. Therefore, no distortion of competition could be caused by this capital injection. The capital injection to AESA was furthermore intended to organise an orderly closure of AESA. Spain in this respect refers to Court judgment C-303/88, ENI-Lanerossi [1].

(53) Concerning the suspected capital injections to Astano, Cadiz, Juliana and Manises, Spain informs that the annual report for IZAR for year 2000 takes up EUR 68,2 million loss in connection with the acquisition of the four concerned shipyards. According to Spain, there was thus no aid involved from SEPI to the shipyards before they were transferred to Bazán.

(54) Spain furthermore provides extensive argumentation against the possibility that some of the aid authorised in 1997 would become incompatible in case the Commission would declare that further illegal aid has been provided to the public Spanish shipyards.

[1] [1991] ECR I-1433.

(55) In reaction to the comments provided by third parties, Spain fully agrees with all that was stated by IZAR. Concerning the issue of production of luxury yachts, taken up by the other two other commenting parties, Spain claims firstly that these ships are not covered by the Shipbuilding Regulation, and that the comments therefore should not be taken into account. It further states that the luxury yachts are built by IZAR without any State aid, and that IZAR's worldwide share of this market is minimal (less than […] percent). It also denies that some of the claimed investments in the shipyards San Fernando and Cartagena have taken place.

V. **ASSESSMENT**

Legal base

(56) According to Article 87(1) of the EC Treaty, 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 common market. Pursuant to the established case-law of the European Courts, the criterion of trade being affected is met if the recipient firm carries out an economic activity involving trade between Member States.

(57) According to Article 87(3)(e) of the EC Treaty, categories of aid specified by a decision of the Council acting by a qualified majority on a proposal from the Commission may be considered compatible with the common market. The Commission notes that the Council adopted on this basis on 29 June 1998 the Shipbuilding Regulation, which was in force from 1 January 1999 to 31 December 2003. It applies to any illegal aid provided during this period, in line with the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid [1].

(58) Shipbuilding is an economic activity involving trade between Member States. Therefore, aid to shipbuilding falls within the scope of Article 87(1) of the EC Treaty.

(59) The Commission notes that according to the Shipbuilding Regulation, 'shipbuilding' means building of self-propelled seagoing commercial vessels. The Commission further notes that Article 2 of the said Regulation states that aid granted for shipbuilding, ship repair and ship conversion may be compatible with the common market only if it complies with the provisions of the Regulation. This provision applies not only to aid granted to undertakings engaged in such activities but also to related entities.

(1) OJ C 119, 22.5.2002, p. 22.

(60) In August 1997, pursuant to Regulation (EC) No 1013/97, the Commission exceptionally approved a package of restructuring aids for the Spanish public merchant shipyards in order for them to return to viability by the end of 1998. Including aids previously approved, the total package was ESP 318 billion (EUR 1,9 billion).

(61) In giving its agreement, the Council stressed the 'one time, last time' nature of the aid package. The Spanish government had undertaken the commitment that the yards would not receive any further aid for restructuring, rescue, loss compensation or privatisation. This was reflected in the conditions attached to the Commission's decision approving the aid. It was also underlined in the first indent of the second subparagraph of Article 5(1) of the Shipbuilding Regulation. This provision states that no rescue or restructuring aid may be granted to an undertaking that has been granted such aid pursuant to Regulation (EC) No 1013/97.

(62) As a consequence, aid in excess of the aid that was authorised by the initial Commission decision of August 1997 would have to be considered as incompatible with the common market, unless approved under another legal base.

(63) The Commission notes that the shipyards Sestao, Puerto Real, Sevilla, Cadiz, Juliana built or repaired ships at the time and that consequently were undertakings covered by the Regulation. Manises and Fene (ex Astano) can be considered as related entities. The Commission furthermore notes that AESA and IZAR, as parent companies or owners of several shipyards fall within the scope of Article 1 of the Shipbuilding Regulation. This corresponds to the line that the Commission has taken in previous decisions linked to public Spanish shipyards, in particular its decision to approve aid in 1997, and its decision [2] in 1999 to declare aid from SEPI to AESA incompatible.

Assessment of aid in the different transfers

(64) As stated above, this case covers three different transfers of companies between different holding companies, and potential aid provided in connection with these transfers. The assessment will be carried out by examining the relevant aspects in each of these three transfers. Therefore the issues raised in the opening of the procedure and the two extensions cannot be treated separately.

(2) OJ L 37, 12.2.2000, p. 22.

1. *The role of SEPI*

(65) In the opening and extensions the Commission presumed that SEPI acted on behalf of the State, i.e. that its behaviour in the different transactions is imputable to the state. Spain has contested this, and claimed that SEPI functions independently from the State and that therefore its behaviour is not imputable to the State. In any way, in Spain's view, SEPI acted as a market investor and therefore the funds provided from SEPI in this case could not be considered as State aid.

(66) The Commission notes that SEPI is a public holding company which is directly depending on the Ministry of Finance. As such it is considered as a public undertaking in the sense of Commission Directive 2000/52/EC ([1]) amending Commission Directive 80/723/EEC ([2]), since due to its ownership or its financial participation the public authorities can directly or indirectly exercise a dominant influence on SEPI.

(67) The Court has defined when funds are considered to be State resources. It has e.g. stated that even if the sums corresponding to the measure in question are not permanently held by the Treasury, the fact that they constantly remain under public control, and therefore available to the competent national authorities, is sufficient for them to be categorised as State resources (Court judgment in Case C-83/98 *P France* v *Ladbroke Racing and Commission* ([3])). This clearly applies to SEPI's resources.

(68) The Court has further taken a decision (Court judgment C-482/99, Stardust *marine* ([4])), outlining the criteria for imputability to the State of an aid measure taken by a public undertaking. This may, according to the Court, be inferred from a set of indicators arising from the circumstances of the case and the context in which that measure was taken.

(69) Examples of indicators provided by the Court are the integration of the public company into the structures of the public administration, the nature of its activities and the exercise of the latter on the market in normal conditions of competition with private operators, the legal status of the undertaking (in the sense of its being subject to public law or ordinary company law), the intensity of the supervision exercised by the public authorities over the management of the undertaking, or any other indicator showing, in the particular case, an involvement by the public authorities in the adoption of a measure or the unlikelihood of their not being involved, having regard also to the compass of the measure, its content or the conditions which it contains.

(70) SEPI is a company with a particular legal status, with e.g. its annual reports not accessible in the public Spanish registry. The supervision of the company is exercised by its board of directors constituting to a large extent of State secretaries and other persons directly linked to the government. The nature of its activities include privatisation of State owned companies, which is an activity that is closely linked to public policy. Furthermore, SEPI has a history of behaviour towards the shipyards which has been carried out in a manner that can be considered imputable to the State, such as providing part of the authorised restructuring aid in 1997 and unlawful aid in 1998 ([5]). It can also be noted that SEPI in other circumstances provides State aid, such as to the Spanish coal industry ([6]).

(71) It derives from points 66 and 67 above that SEPI's funds are State resources. Furthermore, it derives from points 68 to 70 above that the provision of its funds under investigation in this case, to shipbuilding companies, must be considered imputable to the State in so far as they are provided on terms not in conformity with market economy principles.

(72) The general principle that applies for financial transactions between the State and public companies, is the so called market economy investor principle. Given that SEPI's funds are State resources, it is essential that SEPI, in its economic transactions with its shipbuilding subsidiaries (whether the subsidiaries are companies with economic activities or holding companies to such companies) acts fully in line with the market economy investor principle.

(73) The market economy investor principle is explained in detail in the Commission communication to the Member States on the Application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector ([7]). The Court has also, e.g. in Case-40/85 (*Boch*) ([8]) stated that the appropriate ways of establishing whether the measure is State aid is to apply the criterion to what extent the undertaking would be able to obtain the sums in question on the private capital markets at the same conditions. It continues, 'in particular, whether in similar circumstances a private shareholder, having regard to the forseeability of obtaining a return and leaving aside all social, regional policy and sectoral considerations, would have subscribed the capital in question'.

([1]) OJ L 193, 29.7.2000, p. 75.
([2]) OJ L 195, 29.7.1980, p. 35.
([3]) [2000] ECR I-3271, paragraph 50.
([4]) [2002] ECR I-4397, paragraphs 55-56.
([5]) OJ L 37, 12.2.2000, p. 22.
([6]) OJ L 296, 30.10.2002, p. 73.
([7]) OJ C 307, 13.11.1993, p. 3.
([8]) [1986] ECR 2321.

(74) The Commission does not exclude that funds provided by SEPI may be free of aid as long as SEPI's actions comply with the market investor principle. The Commission will therefore, for each of the transactions under scrutiny, assess whether SEPI acted according to the market investor principle.

(75) Spain further claims that transactions within the SEPI group do not have to correspond to market conditions, and refers to cases where the Commission had not required that intra-group transactions were done on market terms.

(76) The Commission considers that while it could, in certain very specific cases, be accepted that within a State-owned group firms are transferred on non-market terms, this can not be accepted when State resources are transferred to companies in competition with other companies in the common market.

2. *Aid contained in transactions linked to transfer 1, between AESA and SEPI*

(77) SEPI on 28 December 1999 bought the three companies Juliana, Cadiz, and Manises from AESA. There are two aspects that need to be assessed in order to determine the existence of State aid in this transfer. One issue is if the purchase price paid by SEPI to AESA was market price, and the other issue is if SEPI's provision of loans to the companies it bought, complied with the market investor principle.

(a) The purchase price

(78) It can firstly be noted that Spain has informed the Commission that the price paid for the three companies was EUR 15 302 000 and not EUR 60 million, as stated in the opening of the procedure. Spain had previously claimed that the EUR 15 302 000 that SEPI paid for the three companies corresponded to book value at the time of the transaction, but at a late stage of the investigation informed that this was the book value at an earlier, unspecified, date in 1999.

(79) Spain further claims that SEPI did not have to pay the market price since it bought the three shipyards in order to privatise them. However, the classification of a measure as State aid does not depend on its aim but on its effect. The fact that the shipyards were bought for a certain alleged purpose (privatisation) is therefore not a reason to disregard the State aid character of the transaction. In addition, in view of SEPI being a State-owned holding, it needs to be reiterated that financial transactions between SEPI and companies in competition with other companies on the common market always should be based on market principles. Therefore, if SEPI would pay a price above market price for a company, this would be State aid to the seller, in this case AESA.

(80) The Commission notes that SEPI did not succeed in privatising the three companies. Instead they were sold to SEPI's subsidiary Bazán in July 2000, which is seven months after the sales transaction, for ESP 1 each.

(81) From the annual reports of the concerned companies it is apparent that the book value of the three companies at the end of 1999, three days after the sales transaction, was EUR −40 646 000 (Cadiz EUR −13 745 000, Juliana EUR −18 679 000, Manises EUR −8 222 000).

(82) Furthermore, as explained above, Spain evaluated the market value of these three companies in July 2000, when they were transferred to Bazán. Spain argues that, at that point in time, the market value was the book value minus the estimated risks not included in the balance sheet of the companies. The risks were e.g. estimated losses for ships under construction and costs of under-activity. Although these factors may change over time, it is reasonable to assume that they did not change significantly over a seven-month period. For the three companies under consideration here, Spain estimated the total risks to be EUR 25 300 000 in July 2000.

(83) The Commission can thus conclude that SEPI on 28 December 1999 paid EUR 15 302 000 for three companies which had a book value of EUR −40 646 000 three days later, plus risks that seven months later were estimated at EUR 25 300 000. It can therefore be concluded that SEPI paid more than the market price for the companies. Any amount exceeding the market price has to be considered as State aid to the seller, AESA.

(84) In the information injunction of July 2002 the Commission requested copies of all documents that could clarify the evaluation of the companies at the time of the transfer of ownership. Spain did not provide any such information for this transaction, and therefore the Commission has no other option than to make an estimation of the market value based on the available information.

(85) The market value in this case would correspond to the book value minus the financial risks. Because of lack of information the Commission is not able to calculate the exact value of the financial risks. In order to exclude an overestimation of these risks, it therefore takes a prudent approach and assumes the financial risks to be zero. A prudent approximation of the market value would, therefore, in the current circumstances, be to use the best approximation of the book value.

(86) The best available estimation of the book value at the date of the transaction, i.e. on 28 December 1999, is the book value on 31 December 1999, which was EUR – 40,6 million. Based on this, the market value of the three companies would not exceed this amount.

(87) Based on available information, it can therefore be concluded that AESA sold to SEPI, for EUR 15 302 000, three companies worth at the most EUR – 40 646 000. This equals a gain of at least EUR 55 948 000 for AESA.

(88) In conclusion, SEPIs payment of EUR 15 302 000 for the three companies Cadiz, Juliana and Manises cannot be considered to be in accordance with the market investor principle. The gain of EUR 55 948 000 made by AESA should therefore be considered to be State aid to AESA, which, following the sale, still owned three other shipyard companies involved in civil ship construction. This State aid was illegal, given that it has not been notified to the Commission and it is not compatible with the common market, since it cannot be authorised as restructuring aid or any other type of aid.

(89) The 1998 and 1999 annual reports of AESA and the companies it owned, state that the continuation of all the operations were dependent on the financial support of the respective shareholder, i.e. SEPI for AESA and AESA for the shipyards. From this information the Commission concludes that the aid provided by SEPI to AESA in this transaction was transferred to the three companies still owned by AESA (Sestao, Sevilla and Puerto Real). The conclusion that State aid to AESA implied State aid to its shipbuilding activities was already made in the Commission's decision [1] on illegal State aid provided from SEPI to AESA in 1998, which subsequently was upheld by the court [2].

(b) Loans provided by SEPI to three shipyards in December 1999

(90) In its second extension of the procedure, the Commission noted that SEPI had provided the three companies Juliana, Cadiz and Manises with loans of EUR 194 400 000 during the year 1999. The Commission had doubts that this could be State aid to these companies.

(91) Concerning the facts the situation was as follows. The three shipyards companies (Juliana, Cadiz and Manises) had accumulated a debt to AESA of EUR 192 100 000. When SEPI took over the three companies it also provided them with EUR 192 100 000 'advance' payment (Cadiz EUR 120,8 million, Juliana EUR 47,2 million and Manises EUR 24,1 million) which was used to repay the loans to AESA. These loans carried an interest rate of MIBOR plus 8 points. SEPI in turn took over the claim of EUR 192 100 000 from AESA. The difference between EUR 192 100 000 and the EUR 194 400 000 stated in the second extension of the procedure (EUR 2 100 000) is due to small loans that already had been provided by SEPI to the shipyards at an earlier date.

(92) From a State aid point of view, the assessment needs to focus on the transaction by which State resources were transferred from the State to the beneficiaries. Therefore, the assessment will focus on SEPI's loan of EUR 192 100 000 to the three companies Juliana, Cadiz and Manises. The difference between this amount and the EUR 194 400 000 stated in the second extension of the procedure, EUR 2 100 000, will be assumed not to be State aid since it has not been established when and how this amount of money was provided.

(93) The issue to be assessed is, as the Court has established in Case 40/85 (*Boch*) whether in similar circumstances a private shareholder, having regard to the foreseeability of obtaining a return and leaving aside all social, regional policy and sectoral considerations would have provided such loans. Therefore, the question is if a private investor, even if taking a decision at the level of the whole group would under normal market economy conditions expect an acceptable rate of profitability on the capital invested. The Court further stated that an appropriate way of establishing whether a loan is State aid is to apply the criterion of determining to what extent the undertaking would be able to obtain the sums in question on the private capital markets, the so called private creditor test [3].

(94) From the annual reports for Juliana, Cadiz and Manises it is clear that these three companies receiving the loans were in difficulties. Each of the three companies had negative book values at the end of 1998, and recorded losses for 1999. The auditor also stated in the annual accounts both for year 1998 and 1999 that the companies needed support from their shareholders in order to be able to continue operation. There were furthermore no signs that the difficult financial situation for the shipyards would improve.

(1) OJ L 37, 12.2.2000, p. 22.
(2) [2002] ECR I-3243.
(3) Case C-342/96 *Spain* v *Commission* [1999] ECR I-2459, paragraphs 41 and 42, and Case C-256/97 *DMT* [1999] ECR I-3933, paragraphs 22 to 24 and the opinion of AG Jacobs in that case, paragraphs 334 to 336.

(95) For these reasons, it can be established that the three companies would not have been able to obtain the loans on the private capital markets. Therefore, these loans did not comply with the private creditor test. For the same reasons SEPI could not have expected a repayment of the loans and the interest. Therefore the provision of such resources from SEPI to the shipyard companies did not comply with the market creditor principle. Therefore the loans constitute State aid to the three companies. This State aid was illegal, given that it was not notified to the Commission and it is not compatible with the Common market since it cannot be authorised as restructuring aid or any other type of aid.

(96) According to Spain, the loans, amounting to EUR 192 100 000, have on 12 September 2000 been repaid to SEPI, with interest, by IZAR which at that time had taken over and dissolved the companies Juliana, Cadiz and Manises. This illegal aid has therefore been recovered. However, the Commission intends to use this information in another State aid investigation, C 38/03, which concerns the extent to which SEPI's capital injections to IZAR benefited civil shipbuilding.

3. *Aid contained in transactions linked to transfer 2, between AESA and IZAR*

(97) AESA on 20 July 2000 sold to Bazán its remaining three shipyard companies, Puerto Real, Sestao and Sevilla [1].

(98) There are two aspects that need to be assessed, and which were raised in the decisions to extend the procedure, in order to determine the existence of State aid. One is whether the purchase price paid by IZAR to AESA was market price, and the other is whether SEPI's capital injection of EUR 252 425 000 to AESA complied with the market investor principle.

(a) The capital injection

(99) SEPI decided on 18 July 2000 to provide AESA with EUR 252 425 000 capital injection, two days before AESA sold its shipyards companies (Sestao, Sevilla, Puerto Real) to Bazán. This capital was provided in September 2000. Spain claims that since this capital was only provided in September 2000, when AESA already had sold its shipyards, it could not distort competition for shipbuilding.

(100) According to the annual report of AESA for the year 2000, AESA provided EUR 309 million to its three shipyard companies before they were sold to Bazán/IZAR. The annual reports of these shipyards reveal that this capital was provided to the shipyards through debt cancellations. Spain has confirmed that AESA 'adjusted' its debts to its shipyard companies in connection with their sale to Bazán to 'better reflect the value of the yards', but did not provide any figures.

(101) Following the debt cancellation AESA sold the companies for ESP 1 each to Bazán. The sales transaction generated a book loss of EUR 198 million for AESA. Together with other losses generated from shipbuilding activities, the total loss for AESA for year 2000 amounted to EUR 271 million. Without the capital injection from SEPI, AESA would have had a negative own capital of EUR 259 million at the end of 2000 and would have had to be liquidated according to company law.

(102) The issue to be assessed is, as noted above, whether in similar circumstances a private shareholder, would have injected the capital and could expect an acceptable rate of profitability on the capital invested.

(103) It is firstly evident that AESA could not generate any acceptable return on the capital, since it used the funds to cover costs linked to the cancellation of debts to its shipyards and the subsequent loss when selling these shipyards to Bazán. In addition, AESA is a pure holding company, which is not involved in any other economic activity. Thus, it is not able to generate own profits. It can also be excluded that the actual and ultimate beneficiaries of the measures, the shipyards, under the ownership of Bazán/IZAR would generate an acceptable rate of return, due to their past performance and the lack of any restructuring measures foreseen. This is also confirmed by the annual reports for IZAR which state that its civil yards made losses in 2000, 2001, and 2002.

(104) It can therefore be concluded that the capital injection by SEPI to AESA did not comply with the market investor principle and therefore constitute State aid.

(105) It has to be stressed in this regard that AESA, by cancelling debts of its shipyards for EUR 309 million improved their financial situation by the same amount. It can also be established that since AESA's debt cancellation did not involve any cash payment, SEPI's decision on 18 July 2000 to inject EUR 252 425 000 to AESA, although the money was only provided in September 2000, enabled AESA to immediately cancel the debts without having to declare immediate bankruptcy.

[1] It also owned a number of smaller companies, but their total nominal capital was only ESP 161 million (EUR 1,0 million) compared to ESP 9,5 billion (EUR 57,1 million) for the three shipyard companies (Puerto Real ESP 4 billion, Sestao ESP 4 billion and Sevilla ESP 1,5 billion).

(106) From a State aid perspective the aid was granted by SEPI's decision on 18 July 2000 to provide the capital injection, since this decision was the precondition to enable AESA to relieve the shipyards of its debts. The ultimate beneficiary of this aid was the shipyards, since the effect of the operation was that the shipyards were relieved of their debts to AESA.

(107) AESA's debt cancellation improved the financial situation of the concerned shipyards by EUR 309 million. However, the Commission is only assessing the provision of funds from SEPI, which in this transaction amounts to EUR 252 425 000. This State aid was illegal, given that it has not been notified to the Commission and it is not compatible with the common market, since it cannot be authorised as restructuring aid or any other type of aid.

(108) Even if it can be concluded that the market economy investor principle has not been complied with, Spain also refers to the right to make a capital injection in order to ensure an orderly closing, as expressed in the Lanerossi judgment [1]. The Commission considers that Spain's argument cannot be accepted for the following reasons:

(109) Firstly, the Lanerossi judgment is not relevant in this case, since the three shipyards benefiting from the capital injection via the debt reduction are still in operation, and were never intended to be closed when the aid was provided.

(110) Furthermore, even if the Spanish argument is assessed from the point of view of a closure of AESA, instead of a closure of its last three shipyards, it can be noted that procedures to start a closure of AESA only started in the middle of 2002. Furthermore, the Court stated in the Lanerossi judgment that when the injection of capital disregard any prospects of profitability even in the long term, such a provision must be regarded as aid. This is the situation in this case, since SEPI can not be expected to ever receive any remuneration for the capital it has provided to civil shipbuilding companies via AESA. Finally, it can be noted that the closing costs of AESA, according to Spain, consists of social costs linked to the 1994 to 1998 restructuring of the civil shipyards. Any further aid to cover these costs would imply a violation of the 1997 Commission decision authorising the restructuring aid.

(b) The purchase price

(111) The question of whether the purchase price constituted State aid to IZAR was raised in the first extension of the procedure, dated 28 November 2001. The reason why State aid could be provided in this manner is that once AESA had sold its shipyards to Bazán, it was an empty shell with virtually no activities. It could thus be tempting for the Spanish authorities to ensure that as many assets as possible were transferred from AESA to its shipyard companies and thus to the company that would take over the civil shipyards, Bazán. It also appears evident that the probability that the market value of each of these three companies would be exactly the same, ESP 1, is very small.

(112) During the procedure Spain has provided information that the book values of the companies were EUR 91 100 000, EUR 37 800 000 and EUR 68 800 000 respectively for Sestao, Sevilla and Puerto Real, totalling EUR 197 700 000. Furthermore, Spain suggests that the market value of the three shipyards were, EUR […], EUR […] and EUR […], respectively, totalling EUR […].

(113) As already noted above, ESP 1 per yard clearly was not market prices and in theory implied a net gain for Bazán/IZAR of EUR […] if the Spanish estimation of market value is correct.

(114) However, since it has not been established that this gain for Bazán/IZAR directly involved resources from SEPI or the State, the Commission does not consider that the price of ESP 1 per yard can be used to establish further State aid to the buyer, Bazán/Izar.

4. *Aid contained in transactions linked to transfer 3, between SEPI and Bazán*

(115) The four companies Astano, Cadiz, Juliana and Manises were sold from SEPI to Bazán, on 20 July 2000, for ESP 1 each. In the first extension of the procedure the Commission expressed doubts that this was market price and that therefore State aid could have been provided to Bazán/IZAR. In the second extension of the procedure the Commission noted that these companies had a total book value of minus EUR 68 200 000. Since the Commission was not able to determine whether this sum has been booked in the annual report of Bazán/IZAR as a loss, the Commission had doubts that SEPI injected this amount into the four companies in connection with their transfer to Bazán.

(1) See points 21 and 22 of the judgment: 'It must therefore be accepted that a parent company may also, for a limited period, bear the losses of one of its subsidiaries in order to enable the latter to close down its operations under the best possible conditions. Such decisions may be motivated not solely by the likelihood of an indirect material profit but also by other considerations, such as a desire to protect the group's image or to redirect its activities.
However, when injections of capital by a public investor disregard any prospect of profitability, even in the long term, such provision of capital must be regarded as aid within the meaning of Article 92 of the Treaty, and its compatibility with the common market must be assessed on the basis solely of the criteria laid down in that provision.'

(116) Concerning the book values, Spain has informed the Commission that the transferred companies indeed had a total book value of EUR – 68 200 000 at the time of the transaction. However, it appears that this amount in fact was booked as a loss in the annual report for year 2000 for Bazán/IZAR, contrary to what was assumed in the second extension of the procedure [1].

(117) Concerning the price, Spain has provided credible information which indicates that market value for each of the four companies was negative. It can therefore be concluded that the price was not too low, and therefore did not imply State aid to Bazán/IZAR.

Recovery of restructuring aid already granted and approved in 1997

(118) Since the doubts of further illegal State aid to the public shipyards have been confirmed, the Commission must assess, as noted in the second extension of the procedure, whether some of the restructuring aid granted in 1997 will be considered to be incompatible and be recovered.

(119) On this issue, the Commission considers that, taking into consideration the comments made by Spain and IZAR in the context of this procedure, there are no grounds to consider part of the restructuring aid authorised in 1997 to be incompatible. The reason is that, according to the decision [2] authorising the aid, the Commission's right to request recovery of the aid authorised in 1997 expired with the last monitoring report [3], dated 13 October 1999. Therefore, the aid approved in 1997 became existing aid once the monitoring period expired.

Aid recovery following change of ownership

(120) The shipyard companies benefiting from the illegal aid established above are now owned by IZAR, and this illegal aid should therefore be recovered from IZAR. The change of ownership of the yards, from AESA or SEPI to IZAR does not mean that the recovery of the aid could fall on the previous owner of the concerned companies. The reason is that the companies were transferred to IZAR, not on market terms in open and transparent tendering procedures, but in the form of a reorganisation of companies within the same SEPI group, with the use of a symbolic price. The European Court of Justice ruled in two recent judgments [4] that in so far as companies are bought under non-discriminatory competitive conditions and at the market price, that is to say at the highest price which a private investor acting under normal competitive conditions was ready to pay for those companies in the situation they were in, in particular after having enjoyed State aid, the aid element was assessed at the market price and included in the purchase price. Only in such circumstances, the undertakings to which the tenders were granted cannot be regarded as having benefited from an advantage in relation to other market operators. They could not therefore be asked to repay the aid element in question. It is obvious from the description of the facts in the present case that these conditions are not met. In addition, in joined Cases C-328/99 and C-399/00 *Italy* and *SIM 2 Multimedia SpA* v. *Commission* [5], paragraph 38, the Court stressed that 'the sale of shares in a company which is the beneficiary of unlawful aid by a shareholder to a third party does not affect the requirement for recovery'. In the present case, Bazán/IZAR, owned by State holding company SEPI, acquired the shares of companies, also part of the SEPI group, and eliminated them as legal entities after the acquisition of the shares. As successor of the previously legally independent yards (in the form of share companies), IZAR is now the beneficiary and has to recover the aid granted to those yards.

Article 296

(121) In so far as the capital injection into the yards is considered as aid to Bazán Spain claims that this aid would fall under Article 296 and thus outside the scope of the State aid rules, since Bazán was a military company at the time of the acquisition of the yards.

(122) Article 296(1)(b) stipulates that: 'any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes.' Already in its decision [6] concerning restructuring aid to KSG the Commission stated that '[c]onversely, where a measure caught by the definition of State aid within the meaning of Article 87(1) affects military production as well as commercial or dual-use production, it cannot be fully justified on the basis of Article 296. The Commission does not share the viewpoint … to the effect that, by virtue of the military aspects, the whole measure is caught by Article 296, even if there is a clear effect on competition in non-military sectors. That interpretation clearly conflicts with the wording of the Article.'

(1) However, this information will be used in the other procedure open against IZAR, in order to determine whether some of the capital injections provided to IZAR in year 2000 were used for civil purposes.
(2) OJ C 354, 21.11.1997, p. 2. Cf. the penultimate paragraph on page 7.
(3) COM(1999) 480 final.
(4) Case C-390/98, *H.J. Banks* [2001] ECR I-6117, paragraph 77 and C–277/00 *Germany* v *Commission* [2004] not yet published in the ECR, paragraph 80.
(5) [2003] ECR I-4035.
(6) OJ L 14, 21.1.2003, p. 56.

(123) This decision further states that if it is 'clear that the measures have indeed affected the conditions of competition as regards commercial products. Therefore, in accordance with its standard practice, the Commission must assess the measures in the light of the State aid rules in so far as they distort, or threaten to distort, competition in markets for products that are not caught by Article 296.'

(124) The Commission notes that Bazán, which now operates under the name of IZAR, today is active in military and civil shipbuilding. The aid provided to the shipyards bought by Bazán was directly and exclusively linked to the production of civil ships. With reference to its findings in the present case and the decision on KSG, the Commission further notes that the production of civil ships falls under Article 87 of the Treaty and cannot be exempted on ground of Article 296 just because the company that bought the shipyards, Bazán, at the time of the acquisition only was involved in military production.

(125) The opening decision in Case C 38/03 (ex NN 10/03) lists in paragraphs 44 seq. a number of criteria, which have to be fulfilled for the applicability of Article 296 of the EC Treaty. Although these requirements are well known to them, the Spanish authorities did not submit to the Commission any evidence that the measures described above aimed at promoting the production of military goods or activities.

(126) It cannot seriously be disputed that the civil shipyards needed massive capital injections in order to survive. The mere fact that they were sold to a shipbuilding company, which is involved in naval construction, does not alter the nature of these shipyards. In particular, the shipyards do not become military yards through the fact that they are owned by a company which is also involved in naval activities. In particular, providing information on these shipyards cannot be contrary to the essential interests of Spain. In the present case, Spain did not simply fail to give any credible explanation, in which way its essential security interests could be affected, but denied to provide any kind of substantial information.

VI. **CONCLUSION**

The Commission concludes that Spain has unlawfully implemented aid to the sum of EUR 500 473 000 in breach of Article 88(3) of the Treaty. This has been provided in the form of:

1. SEPI's purchase from AESA of the three companies Cadiz, Juliana and Manises, on 28 December 1999, at EUR 55 948 000 above market price, which ultimately benefited AESA's remaining shipyard companies Sestao, Sevilla and Puerto Real.

2. Loans of EUR 192 100 000 from SEPI to three companies in difficulties, Cadiz, Juliana and Manises, on 28 December 1999.

3. Capital injection of EUR 252 425 000 from SEPI to AESA, in September 2000, which ultimately benefited the three companies Sestao, Sevilla and Puerto Real.

The aid is not compatible with the common market, since it cannot be authorised as restructuring aid or any other type of aid.

The aid should be recovered in their totality from the current owners of these shipyards, IZAR, which took over the companies from AESA respectively SEPI.

The loans under point 2 above, amounting to EUR 192 100 000, have in September 2000 been repaid, with interest, by IZAR to SEPI. It can therefore be considered that that amount of the illegal and incompatible aid has been recovered,

HAS ADOPTED THIS DECISION:

Article 1

The State aid which Spain has implemented for the public Spanish shipyards, currently owned by IZAR, amounting to EUR 500 473 000 is incompatible with the common market.

Article 2

1. Spain shall take all necessary measures to recover from the public Spanish shipyards the aid referred to in Article 1, and unlawfully made available to the beneficiaries, except the EUR 192 100 000 already recovered.

2. Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of the decision. The sums to be recovered shall bear interest throughout the period running from the date on which they were first put at the disposal of the beneficiaries until their actual recovery. The interest rate to be applied will be the reference rate used for calculating the grant equivalent of regional aid.

3. The interest rate referred to in paragraph 2 will be applied on a compound basis throughout the entire period referred to in paragraph 2.

Article 3

Spain shall inform the Commission, within two months of notification of this Decision, of the measures planned and already taken to comply with it. It will provide this information using the questionnaire attached in Annex of this Decision.

Article 4

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 12 May 2004.

For the Commission

Mario MONTI

Member of the Commission

ANNEX

Information regarding the implementation of Commission Decision 2005/173/EC

1. *Calculation of the amount to be recovered*

1.1. Please provide the following details on the amount of unlawful State aid that has been put at the disposal of the beneficiary:

Date(s) [1]	Amount of aid [2]	Currency

[1] Date(s) on which (individual instalments of) the aid has been put at the disposal of the beneficiary.
[2] Amount of aid put at the disposal of the beneficiary (in gross aid equivalents).

Comments:

1.2. Please explain in detail how the interests to be paid on the amount of aid to be recovered will be calculated?

2. *Measures planned and already taken to recover the aid*

2.1. Please describe in detail what measures are planned and what measures have already been taken to effect an immediate and effective recovery of the aid. Please also indicate where relevant the legal basis for the measures taken/planned.

2.2. What is the timetable for the recovery process? When will the recovery of the aid be completed?

3. *Recovery already effected*

3.1. Please provide the following details on the amounts of aid that have been recovered from the beneficiary:

Date(s) [1]	Amount of aid repaid	Currency

[1] Date(s) on which the aid has been repaid.

3.2. Please attach proof of the repayment of the aid amounts specified in the table under point 3.1.