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([1]) Text with EEA relevance

(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.

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EN

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 5 July 2005

on State aid C 20/04 (ex NN 25/04) in favour of Huta Częstochowa SA

(notified under document number C(2005) 1962)

(Only the Polish version is authentic)

(Text with EEA relevance)

(2006/937/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 Protocol No 8 of the Accession Treaty on the restructuring of the Polish steel industry [1] (hereinafter referred to as 'Protocol No 8').

Having called on interested parties to submit their comments pursuant to the provisions cited above [2] and having regard to their comments.

Whereas:

I. PROCEDURE

(1) By letter dated 4 August 2003 the Commission requested information on the control of state aid in Poland including, if applicable, measures to restructure the recipient. Thereafter the matter was discussed by the Commission and the Polish authorities at various technical meetings and formed the subject of intensive correspondence between the Commission and Poland.

(2) On 23 January 2004 the consultant in charge of the independent evaluation of the restructuring programme in Poland under Protocol No 8 submitted his assessment of the case to the Commission.

(3) By letter dated 19 May 2004 the Commission informed Poland that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the measures and asked for information to be provided on a number of matters.

(4) The Commission decision to initiate the procedure was published in the Official Journal of the European Union [2] . The Commission invited interested parties to submit their comments on the measure.

(1) OJ L 236, 23.9.2003, p. 948.
(2) OJ C 204, 12.8.2004, p. 6.

(5) By letter of 26 June 2004, Poland replied to the questions raised. Poland also requested a Commission decision under point 10 of Protocol No 8 obtaining agreement to amend the Polish national iron and steel restructuring programme.

(6) The Commission received comments from interested parties and forwarded them to Poland by letter of 27 September 2004.

(7) By letter dated 22 November 2004, Poland replied to the comments from interested parties. The Commission subsequently met the Polish authorities on several occasions. Additional information was eventually provided by letter of 8 June 2005.

II. DETAILED DESCRIPTION OF THE MEASURES

1. Introduction

(8) The recipient is a company in difficulties, namely steel producer Huta Częstochowa S.A (hereinafter referred to as 'HCz'; see point 2 a). In October 2002, HCz leased its production assets to a new company, Huta Stali Częstochowa Sp z o.o. (hereinafter referred to as 'HSCz'; see point 2 b).

(9) Two types of measure are concerned: the financial restructuring of HCz (see point 3) and several other direct measures (see point 4).

(10) The 'restructuring' took place in three phases, of which only the last one is of interest for the purposes of monitoring state aid: A first attempt in November 2001 under a court-led conciliation procedure ended in a fiasco. As a result, HCz was obliged to file for bankruptcy in October 2002. In February 2003 HCz was accepted for restructuring under a new law, as a result of which the bankruptcy procedure was suspended. Under the restructuring plan the assets are to be split between various companies and the companies or assets will be sold off. One company will get the steel production assets in order to pay off the debts vis-à-vis commercial creditors (banks and public service providers) and another company will mainly receive land in order to pay off debts vis-à-vis public creditors (debts to public institutions, such as tax). In addition, the remaining subsidiaries of HCz will be sold to service the non-restructurable public and commercial debts.

2. The recipient

a) *Huta Częstochowa*

(11) HCz is the second biggest steel producer in Poland. It produces mainly quarto plate ([3]) , a type of finished steel that accounts for more than 60 % of its sales. The product is used in shipbuilding and for construction purposes.

(12) HCz's first plant was set up between 1896 and 1902. Currently HCz consists of a relatively modern steel plant and a plate mill comprising an electric arc furnace, a continuous caster and a heavy plate mill with finishing facilities. The nominal capacity of the steelmaking shop (which produces semi-finished products, i.e. slabs) is 700,000 tonnes and that of the plate mill (which converts the semi-finished products into finished products) is about 780,000 tonnes.

(13) HCz owns 14 subsidiaries which provide it with additional services. Among them are tube producer Rurexpol Sp. z o.o ([4]) , coking plant Koksownia Sp. z o.o. and electricity company Elsen Sp. z o.o. Together with its subsidiaries HCz employed about 5,000 workers in 2002.

(14) HCz is 100 % owned by the Polish Treasury. Its share capital amounts to PLN 370 million (about EUR 70 million) ([5]) . The book value of the company assets on 31 December 2003 was PLN 768,5 million (about EUR 160 million).

([3]) For details see: COMP/ECSC 1351 Usinor/Arbed/Aceralia, Commission decision of 21 November 2001, para. 88.

([4]) Rurexpol is specialised in the production of seamless tubes, products used for drilling applications and boilers. It has a capacity of 60,000 tonnes. Its sales in 2003 and 2004 exceeded PLN 200 million annually.

([5]) On the assumption that EUR 1 is about PLN 4,75. This was the average exchange rate in May 2004 when Poland joined the EU and the opening decision was taken.

(15) Since summer 2001 HCz has been in serious financial difficulties. Because it was unable to service its debt (which at the end of 2003 was around PLN 1,4 billion, about EUR 310 million) most of its assets, including all steel assets, have been pledged to major creditors.

(16) On 11 November 2001 HCz applied for a court-led conciliation procedure, further to which payment of its debts was suspended. The conciliation process is designed to allow the company to restructure through a partial debt write-off by its creditors. In October 2002 the court cancelled the conciliation process because the creditors had failed to agree to a restructuring package. According to the Polish authorities, the conciliatory process failed because the creditors demanded that HCz should use aid provided by the state to repay its debts in full.

(17) On 28 October 2002 HCz filed for bankruptcy. Under Polish law HCz was obliged to apply for bankruptcy after the conciliation procedure was terminated because it was not able to pay its debts, which became payable once the conciliation procedure was abandoned. On that date HCz leased its production assets and ceased steel production and since then it has acted only as a holding company for its subsidiaries; today it consists purely of a management body consisting of about 40 persons..

b) **Huta Stali Częstochowa**

(18) In view of HCz's bankruptcy proceedings, and in order to ensure continuity of production without the risk of the receiver suspending operations in the course of the proceedings, a new business, HSCz, was set up under the control of Towarzystwo Finansowe Silesia Sp. z o.o. (hereinafter referred to as 'TFS', a limited liability company operating in the steel industry which is majority owned by the Treasury).

(19) On 28 October 2002, HSCz leased HCz's steel production facilities (including the steel plant, the plate mill, the coking plant and some essential services). The lease agreement stipulates that HSCz has to pay PLN [...] (*) million per month for the lease and take over 2 057 employees from HCz (currently 1 950).

(20) The lease agreement granted HSCz a 14-month postponement of payment of the leasing fee. Although the agreement does not explicitly provide for interest to be paid for the deferral, statutory interest for delayed payments was calculated on 30 November 2004, resulting in an amount of PLN [...], which HSCz paid to HCz.

(21) TFS provided HSCz only with the minimum capital of PLN 50 000. In order to operate on the market without working capital, HSCz therefore shortened the payment deadline for receivables to about 15 days while lengthening the payment deadline for payables to over 50 days. This was possible as, with one exception, all key suppliers were ready to accept such credit terms in order to keep HSCz as a major client. In practice, many suppliers concluded so-called barter arrangements whereby the raw materials, in particular scrap, were paid with end products such as steel sheet destined for resale to specific end users. The companies monitored the production and accounts of HSCz closely and demanded significant profits on the operations in return for the risk incurred.

(22) Additional security was requested only for the liabilities deriving from energy supplied by the Polish electricity operator Polskie Sieci Energetyczne S.A. (hereinafter referred to as 'PSE'). TFS was asked to sign three guarantee agreements for PLN [...] million each. They comprise, on the one hand, security consisting of three notes promising payment of the amount of PLN [...] million each and, on the other hand, three declarations of consent to immediate enforcement under the Polish Code of Civil Procedures (Article 777), thus providing PSE with sureties to the tune of PLN [...] million. On 28 November 2002 two notes/guarantees were issued for PLN [...] million each and valid until 30 June 2003, while another guarantee for PLN [...] million, valid until 31 March 2005, was issued on 30 December 2002. For all the promissory notes and the guarantee HSCz paid a fixed premium of PLN [...], and for the guarantee of PLN

(*) Parts of the text have been deleted in order to protect confidential information. These parts are indicated by square brackets: […]

[...] million, an amount equivalent to approximately 0,8 %. However, the outstanding electricity bills never exceeded PLN [...] million, because the guarantee agreement contained a mechanism which obliged HSCz to repay any amounts outstanding within 5 weeks.

3. The restructuring of Huta Częstochowa

a) *The restructuring of the Polish steel sector*

(23) In June 1998 the Polish Council of Ministers adopted a First Restructuring Programme for the Polish Iron and Steel Industry. This was updated in 2001 and the Restructuring (Iron and Steel Industry) Act of 24 August 2001 ([6]) , which was the legal basis for the restructuring of the Polish steel industry, was attached to it.

(24) On 5 November 2002, the Polish Council of Ministers approved an amendment to the First Restructuring Programme, which was eventually named Restructuring and Development Programme for the Polish Iron and Steel Industry until 2006 (hereinafter referred to as the National Restructuring Programme or 'NRP'). This plan essentially allows for state aid to be awarded to the Polish steel industry for restructuring in the period from 1997 to 2006 of up to PLN 3,387 billion (EUR 713 million).

(25) The NRP indicates that 17 steel companies exist in Poland, broken down between three groups. The first group comprises eight companies which receive state aid under the NRP. The majority of aid was allotted for the consolidation of the main four steel production sites in Poland, which have been merged into Poland's biggest steel producer, Polskie Huty Stali S.A (hereinafter 'PHS'), currently named Mittal Steel Poland (hereinafter 'MSP'), following its sale to LNM ([7]) holdings, which was recently transformed into Mittal Steel ([8]). The second group covers six companies, which were not included in the restructuring programme because their main business activity was not related to steel production or because they had not received aid. The third group includes three companies which had received aid but for which bankruptcy proceedings had been commenced in the meantime.

(26) HCz was listed in the third group. In view of HCz's application for bankruptcy proceedings, the NRP concluded as regards HCz that '[f]urther restructuring of the mill will carry on through its liquidation' (section 3.1.2 and point 5.1). In fact, point 3.1.3.3 indicates HCz as one of the mills 'to which bankruptcy procedures were started' and indicates that the mill is now administered 'by the Official Receiver of Bankrupts assets.' The NRP explains in point 5.4.2 that 'in order to make restructuring of HCz, it would be necessary to grant it with state aid to an amount of PLN 1 billion. Still the results would be not as expected. In such a circumstance the company shall be restructured by means of liquidation and its production assets shall be administered by HSCz, [which] shall continue the production activity of HCz without state aid for restructuring. The assets of HCz shall not be taken over by any recipient of state aid (section 3.1.3.1.)'.

(27) The NRP was submitted to the EU. It was finalised on 25 March 2003 following intensive dialogue with the Commission. After its assessment the Commission made a proposal for a Council Decision to extend the grace period for the granting of state aid in the Polish steel sector under the Europe Agreement (which initially lasted only until 1997) until the end of 2003 subject to viability being achieved by 2006, which was approved by the Council in July 2003 ([9]).

([6]) Legal Gazette No 111, item 1196.

([7]) For more information on LNM holdings see Commission Decision PHS/LNM of 5 February 2004 in case COMP/M 3326, which clarified the acquisition of a Polish steel company under the Merger Regulation.

([8]) The other recipients are the following seven steel-producing companies: Huta Bankowa, Huta Buczek, Huta Lucchini-Warszawa, Huta Labędy, Huta Pokój, Huta Andrzej and Huta Batory. The last two have since been declared bankrupt.

([9]) In fact the Council took two decisions, one in July 2002 prolonging the grace period under the conditions of a credible restructuring programme and individual business plans pursuant to Article 8(4) of Protocol 2 of the Europe Agreement and one in June 2003 endorsing the plans submitted in April 2003, with the result that the grace period to grant state aid was prolonged until the end of 2003.

(28) The EU thus allowed Poland, in derogation from its rules, to grant restructuring aid to the steel industry [10] . The main findings of the NRP were transformed into a Protocol to the Accession Treaty, Protocol No 8 on the restructuring of the Polish iron and steel industry. Protocol No 8 endorses the granting of state aid to the eight companies indicated (not HCz) of up to PLN 3,387 billion. On the other hand, Protocol No 8 emphasises that no additional restructuring aid for the Polish steel industry is allowed.

b) *The Act of 30 October 2002*

(29) On 30 October 2002, shortly after HCZ had filed for bankruptcy, the State Aid to Enterprises of Special Significance to the Labour Market Act was passed (it was amended in November 2003 [11] and is hereinafter referred to as 'the Act of 30.10.2002') [12] . This Act allows companies to conduct a restructuring procedure in order to avoid liquidation. To this end the law introduced a new approach to restructuring as it provides for the restructuring (i.e. a partial write-off) of public debt, which until then could only be rescheduled or deferred.

(30) Pursuant to Article 7(1) of the Act of 30.10.2002, an enterprise undergoing restructuring is entitled to bankruptcy protection from the commencement of restructuring until restructuring has been completed or discontinued. Restructuring must be completed no more than 24 months after the restructuring decision was taken (Article 19(2) of the Act of 30.10.2002).

(31) The Act of 30.10.2002 provides for financial restructuring of commercial liabilities generated before July 2002 and of public liabilities generated before June 2002 (Article 3 of the Act of 30.10.2002, which extended the latter period by one year). While the private financial restructuring of commercial liabilities is based on a restructuring agreement to which at least 50 % of the creditors must agree (under Chapter 4 of the Act of 30.10.2002), public liabilities can be partially written off on the basis of a decision by the Chairman of the Polish Industrial Development Agency (Agencja Rozwoju Przemysłu S.A., hereinafter referred to as 'ARP'), the body responsible for supervising restructuring of companies under the Act of 30.10.2002 (according to Chapter 5).

(32) In addition, the amendment of 14 November 2003 introduced in Chapter 5a of the Act of 30.10.2002 the possibility of recovering some money from public claims on the basis of a special restructuring scheme whereby the recipient transfers ownership of assets which are free of sureties to a subsidiary of the ARP ('the Operator') with a value equivalent to at least 25 % of the total debt. These assets are subsequently sold to pay off the public creditors (Article 32d of the Act of 30.10.2002). However the public creditors must endorse the special restructuring scheme (Article 32h of the Act of 30 October 2002).

[10] Normally state aid to the steel sector is not allowed in the EU; see Communication from the Commission on Rescue and Restructuring aid and closure for the steel sector (OJ C 70 of 19.3.2002, p. 21). Regional investment aid is also prohibited; see point 27 of the Multisectoral framework on regional aid for large investment projects (OJ C 70 of 19.3.2002, p. 8).

[11] Law of 30 October 2002, Legal Gazette No 213 item 1800, amended by the Act of 14 November 2003, Legal Gazette No 229, item 2271.

[12] This Act is the basis for several restructuring cases in Poland. A detailed description of the Act is provided inter alia in the Commission decision of 1 June 2005, cases C(2005) 17 and 18, opening a formal investigation procedure under Article 88(2) EC on restructuring aid for Polish shipyards Gdynia and Gdansk, OJ C 220 of 8.9.2005, p. 7. If application of the law varies slightly from one case to another, this is due to the description of the Polish authorities, as it concerns a matter of national law.

(33) Chapter 5a and the special restructuring scheme also extend the temporary and material scope of restructurable claims. Claims are subject to restructuring for one more year (until 30 June 2003) and may comprise more different types of public debt pursuant to Article 32a(1) of the Act of 30.10.2002 ([13]).

c) *The restructuring process of Huta Częstochowa*

(34) On 21 January 2003 HCz applied with the ARP for restructuring under the Act of 30.10.2002. On 21 February 2003 the Chairman of the ARP accepted the application and ordered restructuring procedures to be instituted pursuant to Article 10(1) of the Act of 30.10.2002, which provided bankruptcy protection for HCz.

(35) On 18 April 2003 HCz submitted a restructuring plan to the ARP. The basic idea of the plan was to divide HCz's assets into productive and other assets and to sell the productive assets as a going concern to a private investor. On 2 July 2003 the restructuring plan was endorsed by the ARP. The plan was then submitted to the Office for Competition and Consumer Protection (hereinafter 'OCCP'), which accepted it on 25 July 2003 on condition that no state aid would be provided ([14]).

(36) On 7 August 2003 the Chairman of the ARP took the restructuring decision pursuant to Article 10(4) of the Act of 30.10.2002. In October 2003 the restructuring plan was amended to reflect the requirements laid down by the OCCP. On 1 December 2003 it was endorsed by the ARP, which modified the original restructuring decision.

(37) On 30 April 2004 the Chairman of the ARP issued a further decision amending the restructuring decision. It was based on an updated business plan dated 26 April 2004. It was necessary to amend the plan to take account of the changes in the Act of 30.10.2002; the new version also described the division of the assets in greater detail ([15]).

d) *Huta Częstochowa's creditors*

(38) The restructuring plan identified several groups of creditors on the basis of the legal nature of the liabilities:

(39) The first group contains public institutional debts (amounts as at 30 June 2003), comprising:

social insurance contributions (to Zakład Ubezpieczeń Społecznych (hereinafter referred to as 'ZUS')) of around PLN [...] million ([...] million restructurable, and [...] million non-restructurable);

— tax on property (to the municipality of Częstochowa) of PLN [...] million;

— environmental fee (to Silesia Province (regional entity) of PLN [...] million;

([13]) The following are non-restructurable: pension insurance contributions and those parts of social security contributions which are employee contributions and are connected to salary payments (contributions have two main components which normally make up 50 % each). This is because part of the contribution which should be paid by the employee is a liability of the employee (and not the employer), even if the employer has to pay it to ZUS. Hence the company remains fully liable for employees' contributions. In addition, if the amounts are overdue they result in statutory interest being charged. However, this interest, together with the above-mentioned social security contributions paid by the insured party or pension insurance contributions may be deferred for 24 months (Article 32b of the Act of 30.10.2002).

([14]) On 31 March 2004 the OCCP submitted a paper to the Commission indicating why, in its opinion, the restructuring would pass the private creditor test.

([15]) However, the decision still did not comply with all the conditions introduced by the amendments to the Act of 30.10.2002, as it neither contained a detailed description of the public liabilities subject to the special restructuring scheme nor explained why assets would be transferred to the Operator (although that information is contained in the restructuring plan). The Polish authorities have stated that this information will be provided in a new version which is scheduled for end-June 2005 and will reflect decisions taken by public institutional creditors.

— a loan from Fundusz Gwarantowanych Świadczeń Pracowniczych (Fund for Guaranteed Employee Benefits, hereinafter referred to as 'FGSP') of PLN [...] million;

— payments to Państwowy Fundusz Rehabilitacji Osób Niepełnosprawnych (State Fund for Rehabilitation of Disabled Persons, hereinafter referred to as 'PFRON') of PLN [...] million;

— liabilities vis-à-vis Częstochowa City Council of PLN [...] million; and

— VAT and other taxes (Urząd Skarbowy (hereinafter referred to as the 'Tax Office')) of PLN [...] million.

Therefore the 'public institutional creditors' are: ZUS, FGSP and PFRON, which are answerable to the Ministry of Economy and Labour, the Municipality of Częstochowa including its Tax Office and the City Council and Silesia Province. In addition, various other municipalities, such as Poraj, hold smaller claims.

(40) The second group consists of commercial claims (amounts as at 30 September 2003), which can be subdivided into claims by public and private creditors. The first subgroup (hereinafter referred to as 'public commercial creditors') consists of:

— the PSE (PLN [...] million);

— Zakład Energetyczny Częstochowa S.A (hereinafter referred to as 'Zakład Energetyczny' (PLN [...] million);

— the ARP (PLN [...] million);

— Polish State Railways (PKP Dyrekcja Generalna S.A.), hereinafter referred to as 'PKP' (PLN [...] million);

— the Polish oil and gas mining company (Polskie Górnictwo Naftowe i Gazownictwo S.A.), hereinafter referred to as 'PGNiG' (PLN [...] million);

— the coal trading company (Centrala Zbytu Węgla Węglozbyt S.A), hereinafter referred to as 'CZW Węglozbyt' (PLN [...] million); and

— the coal company (Kompania Węglowa Sp. z o.o.) (PLN [...] million).

(41) The second subgroup and the third group include the following private creditors (amounts as at 30 September 2003):

— Kredyt Bank S.A. ([...] mln PLN);

— ING Bank Śląski S.A. (hereinafter referred to as 'ING BSK') (PLN [...] million);

— BPK Logo (PLN [...] million);

— Bank Przemysłowo Handlowy S.A. (hereinafter referred to as 'BPH', [...] mln PLN);

— Citybank Handlowy S.A (PLN [...] million); and

— Bank Millenium S.A. ([...] mln PLN).

e) *Arrangements for financial restructuring*

(42) The restructuring plan provides for financial restructuring of these liabilities whereby the assets will be divided between three companies.

(1) Majątek Hutniczy Sp. z o.o. (hereinafter referred to as 'MH') will obtain the steel assets. Company shares will be issued in exchange for commercial receivables and will subsequently be sold by the creditors (possibly together with the sale of HSCz by TFS) to a strategic investor.

(2) Operator Sp. z o.o. (hereinafter 'Operator') will be provided with certain non-productive assets (i.e. non-steel assets) in order to pay off restructurable public receivables.

(3) Regionalny Fundusz Gospodarczy (Regional Economic Fund, hereinafter referred to as 'RFG') will be HCz's successor under a new name. In order to pay off the remaining debts (mainly non-restructurable receivables) it will sell most subsidiaries, together with the tube maker and the coking plant, to the strategic investor.

(1) MH — and the satisfaction of commercial claims

(43) The restructuring plan indicates that creditors with commercial claims are to be offered steel production assets in exchange for their claims. They are to swap debts for shares in a newly-established subsidiary, MH, which will own all steelmaking equipment, namely all the fittings of the steelmaking shop, the plate mill and the administration building.

(44) The value of the assets was established in accordance with Polish legislation on state-owned enterprises, which requires an asset evaluation to be made before the sale. Accordingly, in August 2003 a valuation of the blast furnace (foundry) ([16]) was carried out by ATEST, which produced a figure of PLN [...] million. In addition, the rolling mill was valued by PROFCEN in Częstochowa at PLN [...] million. However, given that these valuations were questioned by the commercial creditors who claimed that they were too optimistic in view of the method used, in December 2003 ATEST carried out a further valuation based on the discounted cash flow of the combined rolling mill and foundry, resulting in a figure of PLN [...] million. In addition, a valuation using the Swiss Method (2/3 DCF, 1/3 asset valuation) resulted in PLN [...] million. This value was more or less confirmed by LNM's bid in December 2003 which valued these assets at PLN [...] million, corrected to PLN [...] million at the end of 2003 (however, by March 2005, given the significant increase in steel prices, this value had almost doubled to PLN […(between 600 and 650)] million).

(45) On 13 October 2003, the commercial creditors signed an agreement for the restructuring of their debt predating June 2002 (hereinafter 'the restructuring agreement'), which entered into force on 9 December 2003. On the basis of the book value of MH's company assets, i.e. PLN 320 million, this agreement stipulated first that the claims of those commercial creditors as at 30 June 2002 would be settled through partial conversion into 80,44 % of the shares of MH. Of these, 72,47 % were paid in proportion to the commercial creditors' existing claims, and 7,97 % were allotted, on a proportional basis, to the creditors' existing sureties. This resulted in a debt write-off of around 60 % in 2003 and around 30 % in 2005.

(46) Second, the Creditor Agreement stipulated that RFG should use the remaining 19,56 % of shares in MH to repay — in full — the interest on liabilities existing prior to June 2002 until the date on which the agreement came into force, i.e. 9 December 2003 (thereafter it is superseded by the Creditor Agreement) and the liabilities arising after June 2002 as well as the applicable interest.

(47) The Creditor Agreement was subsequently amended several times in order to change the deadline by which the participating creditors should receive MH shares and to amend the timetable for bids from strategic investors for MH.

(48) The Creditor Agreement was initially concluded by creditors representing 54 % of the required amount of debt, comprising the following commercial public creditors: PSE, Zakład Energetyczny, the ARP, the PKP and the PGNiG and the following private creditors: BPH Bank and BPK Logo. Kredyt Bank, ING BSK, Citibank Handlowy, Bank Millenium, CZW Węglozbyt and Kompania Węglowa did not originally give their agreement. However, according to Article 23(2) of the Act of 30.10.2002 the agreement is binding on all creditors holding commercial claims.

(49) In March 2004 Bank Millenium, CZW Węglozbyt and Kompania Węglowa indicated their consent to the Creditor Agreement. Since then, Kredyt Bank, ING BSK and Citibank Handlowy have also endorsed the economic rationale of the restructuring programme.

([16]) The company ATEST 'Zakład Usług Doradczych i Technicznych' has been active on the Polish market since 1992 and specialises in valuations of companies, commercial real estate and production assets. It has carried out valuations of a number of companies for the purposes of obtaining debt bank financing, privatisatioon and mergers between companies.

(50) The Commission understands that MH will be sold together with the remaining pledges on the company's assets, as the funds from the sale will be used to pay off the remaining commercial and non-restructurable public debts; only after this will sureties be released.

(2) Operator — and the satisfaction of restructurable public institutional claims

(51) Under the restructuring plan as approved by the restructuring decision, Operator assumes liability for all public institutional claims as at 30 June 2003 which are subject to restructuring.

(52) In exchange, pursuant to Article 32d of the Act of 30.10.2002, HCz will transfer to Operator assets — free of sureties — worth at least 25 % of the claims transferred to Operator. These assets have been identified in the restructuring plan and comprise land, parts of which will form an industrial park, the energy company Elsen, and PLN 10 million in receivables. Operator will attempt to make as much cash as possible on these assets. Completion of the sale of most of the assets is not expected before December 2005.

(53) The value of the land the Operator will receive has been estimated by an independent auditor at PLN 120,6 million. Together with shares in Elsen valued at approximately PLN 25,4 million and receivables to the value of PLN 10 million, Operator's assets should amount to PLN 156 million ([17]) . This evaluation was performed on behalf of ARP by BRE Corporate Finance, the investment banking arm of Commerzbank in Poland ([18]).

(54) The transfer of the receivables to Operator results automatically in the release of the sureties for these liabilities. However, due to the existence of non-restructurable receivables, some public creditors will still retain collaterals, which will remain in place until HCz/RFG is able to clear its liabilities after the sale of MH.

(55) Consent to the special restructuring scheme has been signalled by ZUS, the municipality of Częstochowa, PFRON and Silesia Province. Poland has indicated that the Częstochowa Tax office, FGŚP and Poraj municipal authorities rejected the special restructuring scheme at the beginning of June 2005 because they took the view that bankruptcy would achieve better results. Their debts are therefore regarded as non-restructurable and must be paid by HCz/RFG. The Polish authorities have given assurances that these claims will be repaid in full.

(3) RFG — Satisfaction of non-restructurable commercial and public claims

(56) HCz is to be renamed RFG. RFG will own several of the remaining assets, in particular most of HCz' subsidiaries, such as Rurexpol and the coking plant, most of which will be sold to the strategic investor. In addition, several assets which were leased by HSCz will be transferred to another subsidiary of HCz named Majątek Hutniczy Plus (hereinafter 'MH Plus') with a view to resale to the strategic investor for the benefit of RFG.

(57) RFG's assets were first estimated at end-2003 by consultants working for the company PROFCEN in Częstochowa and were incorporated into the subsequent valuations of the subsidiary companies carried out by ATEST. The value of MH and MH Plus was substantiated further by bids from strategic investors. The second valuation basis was fixed at the beginning of 2005 after the purchase bid for shares in various subsidiaries was received (see point 62) and reflects the significant upturn in the steel market.

([17]) The restructuring plan initially stated that the assets received by Operator had a book value of about PLN 203,3 million. In fact, the exact breakdown of the assets to be transferred to Operator had been renegotiated as representatives of Operator were focusing on assets which would be easy to sell.

([18]) BRE Corporate Finance S.A. is a 100 % subsidiary of BRE Bank S.A., one of the largest banks in Poland, which is quoted on the Warsaw Stock Exchange. Management control over BRE Bank is held by Commerzbank AG of Germany, which has over 72 % of the shares. BRE Corporate Finance is involved in investment banking, M&A, restructuring and corporate finance activities. Poland confirms that the company has been involved in many large privatisation and M&A deals in Poland on behalf of private clients as well as the Treasury. These projects have usually involved valuations of these companies using various methods.

The value of the subsidiaries is given below:

Table 1

Value estimates for the subsidiaries to be sold by RFG

figures in PLN

Subsidiaries	2003	2005
19,6 % of MH.	[...]	[...]
MH Plus	[...]	[...]
Koksownia Częstochowa Sp. z o.o.	[...]	[...]
Remaining subsidiaries of Huty Częstochowa (*)	[...]	[...]
Total	[...]	[...]

(*) This figure does not include three companies which are not being sold to the strategic investor. Their value is estimated at between 0 and PLN 15 million.

(58) RFG will have to repay all non-restructurable public institutional debt (about PLN [...] million) ([19]) . It will also have to pay interest on commercial liabilities restructured in the form of conversion into MH shares for the period from 1 July 2002 to 9 December 2003 (PLN [...] million) and any new commercial liabilities with interest arising after June 2002 (estimated at PLN [...] million) ([20]) . Therefore of the PLN [...] million which RFG will receive from the sale of the subsidiaries, PLN [...] million will be used to pay all outstanding debts, while PLN [...] million will be used to cover restructuring costs and about PLN [...] million will remain in RFG.

(4) The sale of the Huta Częstochowa companies to a strategic investor

(59) Together with HCz's creditors and under the supervision of the Treasury, HCz and TFS intend to sell shares in MH, MH Plus, the coking plant, Rurexpol and some other subsidiaries along with shares in HSCz to a strategic investor. The process is to be supervised by a Negotiating Committee which will include representatives of HCz, TFS and nine of HCz's creditors (BPH, Citibank Bank Handlowy, Bank Millennium, Kredyt Bank, ING BSK, PSE, PKP, PGNiG and the ARP).

(60) After an initial tendering process, LNM holdings N.V (now merged into Mittal Steel but referred to hereinafter as 'LNM') and the Industrial Union of Donbass (hereinafter 'Donbass') have been selected by TFS and HCz as preferred bidders to enter into exclusive negotiations. A preliminary agreement was initialled on 31 March 2004 but was subsequently cancelled. In autumn 2004 the tender with the preferential bidders was relaunched.

(61) In February 2005 LNM was awarded exclusivity on the basis of the bid price. The price had risen significantly in the light of the upturn in the coke and steel market. An agreement with LNM was initialled on 15 April 2005. However, on 16 May 2005, after LNM's talks with the trade unions broke down, negotiations were started with Donbass. According to the Polish authorities, Donbass is now also ready to pay the price offered by LNM, and so an agreement was initialled on 16 June 2005, which forms the basis of a final agreement to sell the companies to Donbass.

([19]) This is an estimate taking into amount proceeds as at March 2005 of PLN [...] million (see table 3 below), plus about PLN [...] million of monthly interest until October 2005, plus payment of about PLN [...] million for the receivables of those public creditors that have rejected restructuring.

([20]) Figures are estimates for end-June 2005.

(62) A price of around PLN […] […(between 600 and 650)] million will be paid as a package for MH, MH Plus (about PLN [...] million), Koksownia (about [...] PLN million), Rurexpol and 8 other HCz subsidiaries (about PLN [...] million altogether) and HSCz (about PLN [...] million). The sellers set minimal prices, but in view of the price bid for all the components of the transaction, they were increased proportionally (because otherwise there would have been a risk of various bidders being able to submit better bids for various parts).

(63) In October 2004TFS presented an updated Individual Business Plan (hereinafter referred to as 'the IBP') for HSCz for 2004-2006 on the assumption that HSCz's operations and assets would be reunited in one company (comprising MH, MH Plus and HSCz). This IBP includes investments of PLN 252,6 million in the existing plant. Several other restructuring measures, such as cost reduction and an environmental programme, are also planned. On the basis of these measures the IBP anticipates a return on investments of more than 10 % for 2004 to 2006 and a return on capital of more than 5 %.

(64) The tender required the Investor to complete the Investment Programme within 24 months of gaining control over HSCz, MH and MH Plus. In addition, the sales agreement will oblige the investor not to increase production capacity of finished products until 31 December 2006, in particular not to make investments in new production lines of hot-rolled sheets.

f) *Overview of claims and transfers*

(65) In order to evaluate the effects of the restructuring, a detailed economic analysis was conducted by PriceWaterhouseCoopers on behalf of Poland (hereinafter referred to as 'the PWC analysis'), which compares the extent of debt settlement in two respective scenarios, namely restructuring proceedings and bankruptcy. The restructuring arrangements were taken from the Creditor Agreement of October 2003 and from the restructuring decision of August/December 2003. Arrangements in the bankruptcy scenario are based on the hypothetical application of bankruptcy law ([21]) and on the best outcome for public institutional creditors.

(66) The analysis assumes that bankruptcy and restructuring would take place in the first case on 31 December 2003 (see table 2) and in the second case on 31 March 2005 (see table 3). The amount of receivables and the value of the assets are calculated on the basis of the present value at the time (e.g. for 2003 the MH value will be PLN […(between 325 and 375)] million while for 2005 it will be PLN […(between 600 and 650)] million). The reason why the analysis was carried out over two different time periods is that the commercial creditors had already agreed to restructuring on the basis of Table 2, while the public institutional creditors did not give their final approval in 2003 but did so only later with a view to the March 2005 scenario. However, at that time the figures changed significantly as, on the one hand, creditors' receivables increased as a result of additional accrued interest and, on the other, proceeds under both the bankruptcy and restructuring scenarios improved as the value of the assets in question rose.

([21]) PWC's analysis is based on a simulation under the Bankruptcy and Restructuring Act of 28 February 2003.

Table 2

Comparison of proceeds in December 2003

in million zloty

2003 Analysis — Adjusted	Receivables as of 31.12.2003	Proceeds under bankruptcy (2003 PWC Analysis)	Proceeds under Restructuring Programme				Difference (Restructuring-Bankruptcy)	Restructuring as a % of Bankruptcy	% Recovery Bankruptcy	% Recovery Restructuring
			Total	*from Majatek Hutniczy*	from RFG	from Operator ARP				
All public creditors	**875,7**	**405,1**	**531,0**	[…]	[…]	[…]	**125,9**	**131**	**46**	**61**
Public institutional creditors, including:	**470,1**	**234,9**	**315,4**	[…]	[…]	[…]	**80,5**	**134**	**50**	**67**
Social Security (ZUS)	[…]	[…]	[…]	—	[…]	[…]	[…]	136	53	72
Gmina Częstochowa	[…]	[…]	[…]	[…]	[…]	[…]	[…]	148	39	58
Tax Office (Urząd Skarbowy)	[…]	[…]	[…]	—	[…]	[…]	[…]	67	100	67
Guaranteed Employee Benefits Fund (FGŚP)	[…]	[…]	[…]	—	[…]	[…]	[…]	53	100	53
State Fund for Rehabilitation of Handicapped Persons (PFRON)	[…]	[…]	[…]	—	[…]	[…]	[…]	178	30	53
Śląsk voivodship	[…]	[…]	[…]	—	[…]	[…]	[…]	210	25	53
Gmina Poraj and other gminas	[…]	[…]	[…]	—	[…]	[…]	[…]	165	42	69
Public Corporate Creditors, including:	**405,6**	**170,2**	**215,6**	[…]	[…]	—	**45,4**	**127**	**42**	**53**
PSE S.A. (Power Grid)	[…]	[…]	[…]	[…]	[…]	—	[…]	139	38	54
Zakład Energetyczny (Energy Distribution Company)	[…]	[…]	[…]	[…]	[…]	—	[…]	97	69	67
Agencja Rozwoju Przemysłu S.A.(Industrial Development Agency)	[…]	[…]	[…]	[…]	[…]	—	[…]	116	42	49
PKP S.A. (Polish Railway)	[…]	[…]	[…]	[…]	[…]	—	[…]	174	26	46
PGNiG S.A. (Polish Gas Company)	[…]	[…]	[…]	[…]	[…]	—	[…]	104	51	53

in million zloty

2003 Analysis — Adjusted	Receivables as of 31.12.2003	Proceeds under bankruptcy (2003 PWC Analysis)	Proceeds under Restructuring Programme				Difference (Restructuring-Bankruptcy)	Restructuring as a % of Bankruptcy	% Recovery Bankruptcy	% Recovery Restructuring
			Total	*from Majatek Hutniczy*	from RFG	from Operator ARP				
Kompania Węglowa S.A.	[…]	[…]	[…]	[…]	[…]	—	[…]	198	23	45
CZW Węglozbyt S.A.	[…]	[…]	[…]	[…]	[…]	—	[…]	169	28	47
Key Private Corporate Creditors, including:	**520,5**	**312,3**	**265,91**	[…]	[…]	—	**46,4**	**85**	**60**	**51**
Kredyt Bank	[…]	[…]	[…]	[…]	[…]	—	[…]	80	70	56
ING Bank Śląski S.A	[…]	[…]	[…]	[…]	[…]	—	[…]	91	63	57
Bank BPH S.A.	[…]	[…]	[…]	[…]	[…]	—	[…]	62	81	50
Citibank Handlowy	[…]	[…]	[…]	[…]	[…]	—	[…]	99	46	46
Millennium Big Bank Gdański S.A.	[…]	[…]	[…]	[…]	[…]	—	[…]	65	78	50
Others	[…]	[…]	[…]	[…]	[…]	—	[…]	111	41	45
TOTAL		**717,41**	**796,91**	[…]	[…]					

Table 3

Comparison of proceeds in March 2005

in million PLN

2005 analysis	Receivables as of 31.3.2005	Proceeds under bankruptcy (2005 PWC Analysis)	Proceeds under Restructuring Programme				Difference (Restructuring-Bankruptcy)	Restructuring as a % of Bankruptcy	% Recovery Bankruptcy	% Recovery Restructuring
			Total	*from Majatek Hutniczy*	from RFG	from Operator ARP				
All public creditors	950,6	659,7	664,4	[…]	[…]	[…]				
Public institutional creditors, including:	**504,72**	**342,4**	**365,6**	[…]	[…]	[…]	**23,2**	**107**	**68**	**72**
Social Security (ZUS)	[…]	[…]	[…]	—	[…]	[…]	[…]	110	**68**	74
Gmina Czestochowa	[…]	[…]	[…]	[…]	[…]	[…]	[…]	110	69	75
Tax Office (Urzad Skarbowy)	[…]	[…]	[…]	—	[…]	[…]	[…]	62	100	62
Guaranteed Employee Benefits Fund (FGSP)	[…]	[…]	[…]	—	[…]	[…]	[…]	49	100	49
State Fund for Rehabilitation of Handicapped Persons (PFRON)	[…]	[…]	[…]	—	[…]	[…]	[…]	105	55	58
Slask voivodship	[…]	[…]	[…]	—	[…]	[…]	[…]	122	47	57
Gmina Poraj and other gminas	[…]	[…]	[…]	—	[…]	[…]	[…]	53	73	39
Public Corporate Creditors, including:	**445,9**	**317,3**	306,3	[…]	[…]	—	**11,0**	**97**	**71**	**69**
PSE S.A. (Power Grid)	[…]	[…]	[…]	[…]	[…]	—	[…]	96	69	66
Zaklad Energetyczny (Energy Distribution Company)	[…]	[…]	[…]	[…]	[…]	—	[…]	90	85	76
Agencja Rozwoju Przemyslu S.A. (Industrial Development Agency)	[…]	[…]	[…]	[…]	[…]	—	[…]	74	100	74
PKP S.A. (Polish Railway)	[…]	[…]	[…]	[…]	[…]	—	[…]	142	47	67

in million PLN

2005 analysis	Receivables as of 31.3.2005	Proceeds under bankruptcy (2005 PWC Analysis)	Proceeds under Restructuring Programme				Difference (Restructuring-Bankruptcy)	Restructuring as a % of Bankruptcy	% Recovery Bankruptcy	% Recovery Restructuring
			Total	*from Majatek Hutniczy*	from RFG	from Operator ARP				
PGNiG S.A. (Polish Gas Company)	[…]	[…]	[…]	[…]	[…]	—	[…]	92	72	66
Kompania Weglowa S.A.	[…]	[…]	[…]	[…]	[…]	—	[…]	146	43	63
CZW Weglozbyt S.A.								122	51	62
Key Private Corporate Creditors, including:										
Banks:	**411,4**	**346,2**	**295,9**	[…]	[…]	—	**50,3**	**85**	**84**	**72**
Kredyt Bank	[…]	[…]	[…]	[…]	[…]	—	[…]	82	89	73
ING BSK	[…]	[…]	[…]	[…]	[…]	—	[…]	92	77	71
Bank BPH	[…]	[…]	[…]	[…]	[…]	—	[…]	84	82	69
Citibank Handlowy	[…]	[…]	[…]	[…]	[…]	—	[…]	84	83	70
Bank Millenium	[…]	[…]	[…]	[…]	[…]	—	[…]	90	90	81
Other Corporate Creditors	[…]	[…]	[…]	[…]	[…]	—	[…]	63	88	55
Small Creditors			[…]	[…]	[…]					
TOTAL	**1 529,0**	**1 152,5**	**1 070,4**	[…]	[…]					

3. **Subsidies and other measures**

a) *Subsidies in favour of Huta Częstochowa*

(67) Between 1997 and May 2002 HCz received financial support from the state amounting to PLN 25 161 072,08 (EUR 5,3 million).

(68) PLN 19 699 452 (EUR 4,15 million) was granted for operating support and employment restructuring:

— On 10 June 1997 a preferential loan of PLN 900,000 was granted by Wojewódzki Fundusz Ochrony Środowiska i Gospodarki Wodnej (Fund for the Protection of the Environment, hereinafter referred to as 'the Environmental Fund'). The difference between the preferential rate and market rates amounted to PLN 354 175,28 ([22]).

— On 24 October 1997 the Head of Popów municipality waived claims of PLN 1 019 436 and PLN 2 695 558 ([23]).

— On 25 October 1998 the Environmental Fund waived claims of PLN 50 000 ([24]).

— On 21 December 1998 Częstochowa Province waived claims of PLN 2 116 260 ([25]).

— On 22 April 1999 the FGŚP waived interest on a loan granted to HCz of PLN 13 726 271,88. The amount of interest waived is PLN 3 369 111 ([26]).

— On 22 April 1999 the tax office in Częstochowa waived claims of PLN 186 809.

— On 5 May 1999 the tax office in Częstochowa waived claims of PLN 151 187 ([27]).

— On 14 September 1999 the Minister for the Economy granted aid of PLN 3 556 808 for employment restructuring.

— On 15 November 1999 Częstochowa City Council waived outstanding claims of PLN 394 427 and PLN 305 904 ([28]).

— On 2 February 2000 the Minister for the Economy granted aid of PLN 24 400,55 for employment restructuring ([29]).

— On 22 February 2000 the Head of Popów municipality waived claims of PLN 13 494,40 and of PLN 1 339,60 ([30]).

([22]) On the basis of the Environmental Protection Act of 31 January 1980, Legal Gazette 1994/49, item 196.

([23]) By Decision No FEO/72752/E/97/TT under Articles 8(1) and 4(1) of the Employment and Rehabilitation (Disabled) Act of 9 May 1991 (Legal Gazette No 46, item 201 with amendments).

([24]) Within the meaning of the Environmental Protection Act of 31 January 1980 (Legal Gazette 1994/49, item 196).

([25]) By Decision of the Province No GKN.IV.7224/653/98 under Article 219(1) of the Real Estate Management Act of 21 August 1997 (Legal Gazette No 115, item 741).

([26]) By Decision of the Board of FGSP No 205/99 under Article 4(1) of the Protection of Employees' Claims (Bankrupt Companies) Act of 29 December 1993 (Legal Gazette 1994/1, item 1).

([27]) By Decision of the Head of the Tax Office (No DUS-PP-733/12/99) under Article 67 of the Tax Ordinance of 29 August 1997 (Legal Gazette No 137, item 926 with amendments).

([28]) On the basis of an agreement concerning the restructuring of HCz's debt resulting from non-payment of real estate tax.

([29]) Under Article 36(1) of the 1999 Budget Act of 17 February 1999 (Legal Gazette 1999/17, item 154).

([30]) By Decision No 2/2000 under Article 67 of the Tax Ordinance of 29 August 1997 (Legal Gazette No 137, item 929 with amendments).

— On 10 May 2000 the Minister for the Economy granted aid of PLN 4 217 240,57 for employment restructuring ([31]).

— On 1 February 2001 the Minister for the Economy granted aid of PLN 117 849,19 for employment restructuring ([32]).

— On 2 May 2001 the Head of Poraj municipality waived PLN 77 986,70 ([33]).

— On 2 July 2001 the Minister for the Economy granted aid of PLN 795 685,06 for employment restructuring ([34]).

— On 10 May 2002 the Minister for the Economy granted aid of PLN 251 780,73 for employment restructuring ([35]).

(69) In addition, PLN 5 461 620 (EUR 1,15 million) was granted to HCz by Komitet Badań Naukowych (Committee for Scientific Research, hereinafter 'KBN'). These subsidies were based on agreements between HCz and KBN and the Institute of Metallurgy in Gliwice designed to further research and development (hereinafter 'R&D projects'). The following grants were awarded:

— A grant dated 20 June 1997 of PLN 394 420 against total costs of PLN 2 391 420 (16,5 %) for industrial research and pre-competitive development activity concerning the review, from the engineering perspective, of the development of an ISO 14001 compliant system in accordance with Polish environmental legislation ([36]). The whole project was carried out by the Institute of the Polish Academy of Science ([37]). The Polish authorities have indicated that the purpose of the aid was to promote R&D, as HCz does not carry out this type of research and would not itself have commissioned work to develop ISO document templates that can be used by a wide range of industrial companies.

— A grant dated 6 October 1997 of PLN 2 450 000 against total costs of PLN 7 920 000 (31,9 %) for industrial research and pre-competitive development activity as part of a project for the development of modern alloyed steel production processes on a full process line for manufacturing of plates and tubes ([38]). The research was conducted by the Institute of Metallurgy. The Polish authorities have indicated that the aid had an incentive effect as it provided information on technical procedures for processing alloyed steel to a wide range of companies (in the drilling, shipbuilding, energy and construction industries amongst others) which HCz would have not commissioned on its own.

— A grant dated 26 November 1998 of PLN 104 000 against total costs of PLN 290 000 (i.e. 35,8 %) for industrial research as part of a project for developing the process of improving water quality in industrial cooling systems with cooling towers ([39]). This project was carried out by the Polish Academy of Science. The Polish authorities indicate that the aid had an incentive effect, as otherwise the project would not have been supported by HCz as it was made available to other companies using similar cooling systems and would not have been undertaken by HCz alone.

([31]) Under Article 36(1) of the 2000 Budget Act of 21.01.2000 (Legal Gazette No 7, item 85).

([32]) Under Article 36(1) of the 2000 Budget Act of 21.01.2000 (Legal Gazette No 7, item 85).

([33]) By Decision No II — 3130/4/01 under Article 67 of the Tax Ordinance of 29 August 1997 (Legal Gazette No 137, item 929 with amendments).

([34]) Under Article 36(1) of the 2001 Budget Act of 1.3.2001 (Legal Gazette No 21, item 246).

([35]) Under Article 36(1) of the 2000 Budget Act of 14 March 2002 (Legal Gazette No 30, item 275) and the Restructuring (Iron and Steel Industry) Act of 24 August 2001 (Legal Gazette No 111, item 1196).

([36]) Of these costs, PLN 606,800 was allotted to industrial research; the rest went into pre-competitive development activity. The Academy of Sciences now has commercial rights to the R&D programmes.

([37]) A State scientific institution which is the main scientific advisory body and is purely state funded.

([38]) Of these costs, PLN 3 870 000 was allotted to industrial research and PLN 4 050 000 went into pre-competitive development activity. All payments from KBN were made to the Institute of Metallurgy.

([39]) The results of the research were passed on by the Polish Academy of Science to a number of other industrial plants which face the problem of having to use cooling water from sources containing large amounts of organic substances which damage the heat exchangers.

— A grant dated 30 November 1999 of PLN 2 290 000 against total costs of PLN 5 626 000. PLN 2.000.000 was designated for industrial research of a total value of PLN 3 526 000 (56.7 %) and PLN 290 000 for pre-competitive development activity of a total value of PLN 2 100 000 (13.8 %). The research was carried out by the Institute of Metallurgy and concerned the manufacturing of plates with homogeneous internal structure ([40]). The Polish authorities have indicated that the aid had an incentive effect in view of the fact that the information was later made available to other companies involved in metal processing, as the research would not otherwise been commissioned.

— A grant dated 15 November 2000 of PLN 223 200 against total costs of PLN 496 400 (45 %) for industrial research as part of a project involving plastometric tests and parameter identification for metalworking processes. This project was carried out as part of the Fifth European Union Framework Programme, Theme Programme III GROWTH, with the acronym TESTIFY and the Polish authorities have given assurances that the company would not have participated in the project without state support.

b) *Measures in favour of Huta Stali Częstochowa*

(70) HSCz benefited from a variety of financial measures between November 2002 and January 2004.

(71) HCz deferred its debts to ZUS and FGSP which have, however, since been repaid. Late payments (made later than two weeks after the due date) amount to PLN 18 155 302 in total. For these late payments, which were generally not more than six months overdue, HCSz was charged statutory interest, i.e. PLN 560 383.

(72) The tax office in Częstochowa accepted deferral of tax payments for an amount of around PLN 7 million in exchange for payment of statutory interest, which was duly paid. However, the Office waived part of the statutory interest owed by virtue of the late payments. The difference between the interest paid and the full statutory interest is PLN 31 145.

(73) The Chairman of PFRON waived interest claims against HSCz of PLN 22 821 and accepted payment of these claims in instalments of around PLN 350 000, i.e. an aid value equivalent to PLN 8 150. When fiscal benefits of PLN 31 145 are factored in, HSCz was released from claims totalling PLN 62 116 (about EUR 13 077).

(74) Finally, on 27 November 2002 and 20 November 2003 the KBN awarded grants of PLN 1 100 000 and PLN 280 000 (PLN 1 380 000) in total against total costs of PLN 4 370 000 (30.4 %) for industrial research and pre-competitive activity for a project designed to help analyse ways of modernising the technological process in foundries by amending the breakdown of components used to make steel with a view to increasing quality and efficiency ([41]).

III. **GROUNDS FOR INITIATING THE PROCEDURE**

(75) In its decision to initiate proceedings, the Commission expressed doubts that the measures implemented by Poland involved aid, essentially for three reasons:

— The Commission had reasons to believe that the restructuring of HCz did not pass the private creditor test. It appeared that some public creditors were writing off more debts in the course of restructuring than they would have if they had faced bankruptcy, given the possession of first-class sureties, at least in the case of public institutional creditors. In these circumstances the Commission was reluctant to accept the Polish argument that overall the restructuring plan would produce a better return for the state than liquidation. Moreover, the Commission was not sure whether the public institutional creditors' consent was obtained purely on the basis of the Act of 30 October 2002 and whether the Operator really would receive valuable assets.

([40]) The purpose of the project was to develop technology for casting and rolling thick plate steel with a homogenous alloy structure across the whole depth of the plate. These types of steel were required by the shipbuilding industry and had not previously been made in Poland. The results of the research were also made available to other companies and a number of clients.

([41]) The aid was mainly paid to the Institute of Metallurgy.

— In addition, the Commission was not sure how HSCz had continued production without working capital and whether it had received other financial aid.

— Finally, the Commission had information in its file that HCz had received various financial aid measures between 1997 and 2002.

(76) The Commission also expressed concern as to whether, in the light of point 4a of Protocol No 8, LNM would be entitled to acquire shares in HCz, as LNM already owned MSP, a state aid recipient under that Protocol.

IV. COMMENTS FROM INTERESTED PARTIES

(77) By letter dated 9 September 2004, UK Steel, acting on behalf of HCz's UK competitors, argues that debt write-offs and deferrals constitute state aid until such time as they are repaid in full. It endorses the Commission's concerns that under normal market conditions HCz's steel assets would been liquidated and not leased to HSCz. UK Steel also urges the Commission to apply point 4b of Protocol No 8 which, in its view, would completely bar LNM from acquiring HCz's assets.

(78) By letter dated 10 September 2004, the Czech Republic, as the owner of another plate producing steel plant, Vítkovice Steel, declared its interest in the Commission proceedings.

(79) By letter of 10 September 2004, LNM intervenes in the Commission proceedings as one of the potential bidders. LNM states that its aim is to help demonstrate that the privatisation of the HCz steel companies and the relationship between other LNM group companies are fully compatible with the Accession Treaty and the state aid rules. It particular, it confirms that its subsidiary MSP is not acquiring the HCz companies. It reiterates its unequivocal assurance that, should it be successful in acquiring the HCz companies, it would operate them as an independent entity, entirely separate from MSP, and that it would ensure that no state aid or capacity were transferred between them and MSP. The only relationship the companies would have would be a commercial one whereby MSP would supply slabs to HCz; this relationship would be organised in a transparent fashion and at market prices which did not differ from the prices charged by the company's competitors.

(80) Donbass intervened in the Commission proceedings as one of the potential bidders by letter dated 13 September 2004. In Donbass' view the restructuring is taking place under market conditions. Given the cumbersome nature and length of bankruptcy proceedings, it doubts that it would be interested in purchasing HCz's assets if such proceedings were launched.

V. COMMENTS FROM POLAND

(81) The Polish authorities provided additional information. They attempt to explain that neither the restructuring of HCz nor the operation of HSCz involved restructuring aid. They only admit that some aid was awarded to HCz prior to end-2002. Finally, Poland explains why the Commission should agree to a change of the NRP.

1. The restructuring of Huta Częstochowa

(82) The Polish authorities first provide new arguments as to why the restructuring of HCz did not involve state aid. In that connection, they present the above-mentioned analysis of the bankruptcy scenario carried out by PWC. They wish to demonstrate that all public creditors' claims will be met to a greater extent in the event of restructuring than they would in the event of bankruptcy.

(83) The analysis is based on a proper analysis of the value of the sureties, which had not been conducted before. In fact, the PWC analysis emphasises that public creditors' claims are predominantly secured on non-productive assets, with only a small part of the security on productive assets, while civil creditors' claims are primarily secured on (the most valuable) productive assets. Moreover, even in cases where public creditors' claims are secured on HCz's productive assets, they were registered with later dates than the claims of private creditors. Under the Polish Bankruptcy Act, such claims cannot be satisfied until claims registered previously have been settled (i.e. the private creditors' claims).

(84) On the basis of this analysis, Poland claims that restructuring would meet the private creditor test. Only a few public creditors receive less in restructuring than in bankruptcy (those which have a minus in the last column of tables 2 and 3) but, in any event, this would still be more than in a realistic bankruptcy scenario.

(85) Poland argues that the PWC analysis for 2003 is a very optimistic scenario for public institutional creditors. In reality, a further reduction in proceeds from bankruptcy proceedings is primarily the result of the peculiar nature of court-supervised bankruptcy proceedings in Poland, which comprise the receiver's costs, usually amounting to 5 % of receipts from sales and, in HCz's case, probably as much as 10 %. In addition, bankruptcy proceedings take a long period of time, which can further diminish the value.

(86) The Polish authorities also argue that bankruptcy might have the effect that assets are not sold in a uniform process, as some creditors have ownership rights transferred onto individual assets and can thus sell them separately. As such, investors cannot be sure that they will obtain the full production line, which may result in the price being reduced. Poland has provided several examples of sales under bankruptcy procedure, including the case of Huta Andrzej in which the breakdown of ownership of production assets made the sale very difficult and caused the price to be reduced. Therefore a sale under bankruptcy procedure may result in a much lower price than a sale organised under the restructuring process.

(87) The Polish authorities also argue that 'loss-making' public creditors still get a better deal than private creditors who, in any event, opted for restructuring (for details see tables 2 and 3) ([42]).

(88) The Polish authorities explain that the main reason why creditors were reluctant to sign the Creditor Agreement was a lack of trust that the restructuring programme would produce positive results. The Polish authorities also suggest that private creditors are generally reticent about new proposals, in particular because banks are unwilling to swap sureties and mortgages on assets for shares, as this results in their receivables being downgraded by the auditors or Banking Inspectorate and their being obliged to indicate a loss in their books. Keeping the status quo, on the other hand, allows them to keep a higher value in their books, even if this is not realistic.

(89) However, when restructuring seems to be a realistic scenario, the time needed to achieve results is not very long and there is a good chance of cashing in receivables, there is a tendency to agree to such deals. In fact, Poland has provided letters from Kredyt Bank and ING BSK which show that even those banks which lose the most from restructuring now view restructuring programmes as a better solution than bankruptcy. In the meantime, the private commercial creditors have indicated that they are prepared for a further reduction in interest recovery in order to ensure that HCz retains sufficient funds to repay all its non-restructurable liabilities and associated costs.

(90) Poland also argues that the public commercial creditors who, on the basis of the PWC analysis, would get less from a restructuring scenario than from bankruptcy would not, in any event, have enough power to prevent a conciliatory agreement being concluded under Polish law. Therefore in practice a minority of unsatisfied creditors would not have the power to force liquidation.

(91) As regards public institutional creditors, the Polish authorities have indicated that the release of collateral held by public creditors and the transfer of claims to a new entity, the Operator, does not take place automatically. Instead such action shall require the sole, individual consent of each of the public institutional creditors which — according to the Polish authorities — is discretionary. This is best exemplified by three public institutional creditors (Częstochowa Tax office, the FGSP and Poraj municipal authorities), which rejected the special restructuring scheme on the grounds that bankruptcy would bring them a better result.

([42]) The Polish authorities have also indicated that in 2003 the percentage of public creditors' claims recovered as a result of restructuring was between 46 % and 72 % (on average 61 %) whereas the reduction in the case of private creditors was between 46 % and 58 % (on average 54 %).

2. The operation of Huta Stali Częstochowa

(92) Poland has also provided additional information on the operation of HSCz. It argues that the lease of steel production assets by HCz to HSCz is an act any private creditor would normally agree to. While the standard practice of the court receivers would have caused cessation of production activities, the solution consisting in leasing such assets prior to bankruptcy to an independent company beyond the receivers' control is a way of preserving the value of the assets as a going concern. To that end a private creditor would also have accepted a deferral of payments under the lease agreement.

(93) In addition, the Polish authorities do not accept that their activities constitute state aid as financing was provided from loans granted on a commercial basis by suppliers and prepayments from the steelwork's customers, who did not want to lose HCz/HSCz as a customer.

(94) As regards payment of energy bills to PSE, Poland argues that the guarantees did not constitute state aid as HSCz paid TFS the market rate for the sureties, amounting to 2 % of their real value. This value is calculated on the basis that the guaranteed sum was never to exceed PLN 6 million and thus the premium of PLN 120 000 should actually be equivalent to 2 %. By way of comparison, the Polish authorities quote the National Fund for Credit Guarantees, which offers 'loan guarantees' to the clients of more than 25 commercial banks at rates that currently amount to 1 % for 1 year, 1,2 % for 2 years and 1,4 % for 3 years. Therefore, in the Polish authorities' view, the cost of the guarantees and the amounts thereof reflect the market terms prevailing at the time.

3. Grants and other measures

(95) First, Poland accepts that the aid to HCz of PLN 19 699 452 (EUR 4 147 332) granted between 1997 and May 2002 constituted restructuring aid.

(96) Second, however, as regards the aid to KBN, the Polish authorities take the view that the grants in question meet the criteria set out in the Community framework for state aid for research and development (hereinafter 'R&D framework') ([43]) and should be treated as aid of that type.

(97) The Polish authorities indicate that this aid is partly covered by the Programme of 30 November 2001 issued by the Chairman of KBN on the criteria for and method of granting state financial support for science, which was included on the list of existing aid in the Accession Treaty. This is the case at least for the aid of PLN 1 380 000 to HSCz, which was granted after the Programme was adopted.

(98) Poland also takes the view that KBN's grants of PLN 5 461 620 to HCz, although not awarded under the Programme, should be regarded as compatible as they meet the similar conditions set out in the R&D aid framework. Although they were awarded before the programme came into effect, the aid was nevertheless assessed under the same criteria of the programme and is thus in line with the R&D aid framework. Poland indicates that more detailed information on this aid, which was described in part II above, is not available as the KBN has in the meantime been dissolved.

(99) Third, Poland argues that various financial measures in favour of HSCz have been repaid in the meantime. The deferred lease payments to HCz as well as the interest owed to ZUS and FGSP were paid at the statutory rate of 16 % between July 2002 and 21 January 2003, 13 % until 24 September 2003 and 12,25 % until 25 November 2004.

(100) Finally, the aid in the form of fiscal benefits from PFRON and the Tax Office of PLN 62 116 (about EUR 13 077) has not been repaid because the tax authorities did not accept repayment without a recovery decision. However, Poland claims that this is de minimis aid.

4. Approval of changes in the NRP

(101) Poland asks for the Commission's agreement under point 10 of Protocol No 8 to changes in the NRP. The Polish authorities have provided assurances that HCz will continue to operate without aid and not be liquidated. In exchange, Poland undertakes that HCz will not receive any additional state aid between

([43]) Community framework for state aid for research and development, OJ C 45 of 17 February 1996, p. 5.

1997 and 2006 and not increase the capacity described above before end-2006, the end of the restructuring period laid down in Protocol No 8.

(102) The Polish authorities have explained that restructuring HCz without state aid was not considered possible when the NRP was drafted in autumn 2002. As long as there seemed to be a possibility of full repayment of debts with the help of state aid, no creditor was willing to forego its part of the debt. Only when the NRP refused to provide aid to HCz did the company's creditors agree to reduce their receivables. Furthermore, only the entry-into-force of the Act of 30 October 2002 provided an effective instrument under Polish law enabling public claims to be written off and creditors to be paid in proceedings under their control.

5. Assurance concerning separation of the respective operations of LNM, MSP and HCz

(103) Poland has assured the Commission that the contract for the sale of MH, HSCz and other companies to a strategic investor will exclude the possibility of state aid being passed on from any of the recipients under Protocol No 8 to HCz. With that aim, specific provision will be made in the sales contract with the investor for all necessary monitoring arrangements.

VI. AID ASSESSMENT

1. Applicable law

(104) Point 1 of Protocol No 8 provides that 'notwithstanding Articles 87 and 88 of the EC Treaty, state aid granted by Poland for restructuring purposes to specified parts of the Polish steel industry shall be deemed to be compatible with the common market' if, inter alia, the conditions set out in the Protocol are met.

(105) According to point 3 of Protocol No 8, restructuring aid may be granted only to the companies listed in Annex 1. Poland has selected 8 companies to be included on that list. Neither HCz, HSCz nor any subsidiaries of HCz are listed.

(106) Point 6, third subparagraph of Protocol No 8 prohibits granting any additional aid for the purpose of restructuring the Polish steel industry. To that end, point 18 of Protocol No 8 gives the Commission the power to take 'appropriate steps requiring any company concerned to reimburse any aid granted' if monitoring of the restructuring shows non-compliance as a result of the award of 'additional incompatible state aid to the steel industry.'

(107) The grace period for granting restructuring aid to the Polish steel industry under the Europe Agreement was extended by the Council until 31 December 2006. This arrangement was recognised in Protocol No 8 as part of Poland's accession to the European Union. In order to achieve this objective, it covers a time-frame extending before and after accession. More precisely, it authorises a limited amount of restructuring aid for the years from 1997 to 2003 and forbids any further state aid for restructuring purposes to the Polish steel industry between 1997 and 2006. In that respect, it clearly differs from other provisions of the Accession Treaty such as the interim mechanism set out in Annex IV (the 'existing aid procedure'), which only concerns state aid granted before accession in so far as it is 'still applicable after' the date of accession. Protocol No 8 can therefore be regarded as lex specialis which, for the matters that it covers, supersedes any other provision of the Act of Accession ([44]).

(108) Consequently, while Articles 87 and 88 EC would normally not apply to aid granted before accession and which is not applicable after accession, the provisions of Protocol No 8 extend state aid monitoring under the EC Treaty to any aid granted for the restructuring of the Polish steel industry between 1997 and 2006.

([44]) See Decision of 14 December 2004, Restructuring aid to the Czech steel producer Třinecké Železárny a.s, OJ C 22 of 27 January 2005, p. 2, which is based on Protocol 2 to the Accession Treaty concerning the restructuring of the Czech steel industry.

(109) The decision may be taken after Poland's accession under Article 88(2) EC because, in the absence of specific provisions in Protocol No 8, the normal rules and principles should apply. Consequently Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 ([45]) (hereinafter 'the Procedural Regulation') will also apply.

2. **Existence of aid**

(110) According to Article 87(1) EC, state aid is 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, in so far as it affects trade between Member States, and is thereby incompatible with the common market. Article 86(1) EC specifies that Article 87 EC also applies to public undertakings, i.e. to companies controlled by the state.

a) *Aid for the restructuring of Huta Częstochowa and application of the private creditor test*

(111) The writing-off of debts by the authorities confers an economic advantage as it constitutes an agreement to forgo revenue and is therefore aid from state resources. However, in case-law, a state measure constitutes aid for the purposes of Article 87 EC only if the recipient acquires a competitive edge which it would not have acquired under normal market conditions. In fact, it has been established that a market economy investor may pursue a structural policy whereby he is guided by the longer-term prospect of the capital invested yielding a profit. However, according to case-law, a market economy creditor would tend to seek to obtain payment of sums owed to him by a debtor in financial difficulties within a reasonable period of time ([46]).

(112) Therefore, the Court of First Instance takes the view that, where a debtor in financial difficulties proposes rescheduling debt in order to avoid liquidation, each creditor must, as a minimum, carefully balance the advantage inherent in obtaining the offered sum under the restructuring plan and the sum they would be able to recover via the firm's liquidation (this evaluation is hereinafter referred to as 'the private creditor test') ([47]). The Court of First Instance has established that the private creditor test is influenced by a number of factors, including the creditor's status as the holder of a secured, preferential or ordinary claim, the nature and extent of any security it may hold, its assessment of the chances of the firm being restored to viability, as well as the amount it would receive in the event of liquidation.

Existence of aid as regards debt write-offs in favour of Huta Częstochowa

(113) As regards the restructuring of HCz, the Commission has assessed the documentation and information provided by Poland and concluded that the doubts it expressed when proceedings were opened have subsequently been allayed. The Commission considers that the restructuring meets the private creditor test.

(114) On the basis of the PWC analysis, the Commission no longer takes the view that, in view of the guarantees held by public institutional creditors, liquidation would yield better proceeds than restructuring. It understands from the explanations provided in the PWC analysis that public creditors

([45]) OJ L 83, 27.3.1999, p. 1.

([46]) Case C-342/96 Spain v Commission, paragraph 46; Case C-256/97 DMT, paragraph 24, Opinion of the Advocate General in Case C-256/97 DMT, paragraph 38; Case T-152/99 Hamsa, paragraph 167.

([47]) Case T-152/99 Hamsa, paragraph 168: 'When a firm faced with a substantial deterioration of its financial situation proposes an agreement or series of agreements for debt arrangement to its creditors with a view to remedying the situation and avoiding liquidation, each creditor must make a decision having regard to the amount offered to it under the proposed agreement, on the one hand, and the amount it expects to be able to recover following possible liquidation of the firm, on the other. Its choice is influenced by number of factors, including the creditor's status as the holder of a secured, preferential or ordinary claim, the nature and extent of any security it may hold, its assessment of the chances of the firm being restored to viability, as well as the amount it would receive in the event of liquidation. If it turned out, for example, that in the event the firm was liquidated, the realisation value of its assets was only sufficient to cover mortgage and preferential claims, ordinary claims would have no value. In such a scenario, acceptance by an ordinary creditor of the cancellation of a major part of its claim would not really be a sacrifice'.

had similar guarantees to private creditors on the same production assets; however, their guarantees were registered later than those of private creditors. Therefore priority will be given to satisfying private creditors, thus reducing the extent to which public institutional creditors are satisfied.

(115) In addition, the Commission can now conclude that the present restructuring proposal will allow each public creditor to benefit from the restructuring of HCz. To this end, the Commission notes that the assessment concerning commercial creditors should be made with reference to the situation prevailing in December 2003. Although the Creditor Agreement has subsequently been amended, the basic elements of the agreement have remained valid and binding since that time. However, the relevant date for institutional public creditors is June 2005 because these creditors still have to agree unconditionally to the terms of the restructuring decision.

(116) The analysis that restructuring will be more profitable for creditors than bankruptcy applies even in the best-case scenario of bankruptcy for public creditors. In the best-case bankruptcy scenario for public creditors, only three public institutional creditors in 2005 and one public commercial creditor in 2003 ([48]) could have received a smaller return in the event of restructuring than in the event of bankruptcy. However, all three public institutional creditors have voted against the restructuring and the Polish authorities have guaranteed that their claims will be repaid in full from RFG's assets. Therefore these public creditors have not provided any advantage to the debtor nor have they committed public resources, i.e. their conduct cannot entail any state aid ([49]).

(117) As to the public commercial creditor, Zakład Energetyczny, which is the energy provider in the Częstochowa region, it should first be noted that the difference in the level of satisfaction of its claims between the restructuring scenario and the bankruptcy scenario is minimal. Second, the Commission understands that a private creditor providing services to HCz would, in most cases, be against its bankruptcy because it would lose an important customer if HCz's production were interrupted for a long time or simply abandoned. This is particularly true of Zakład Energetyczny, which would have lost its main client. Therefore this creditor acted in accordance with its business interests and did not provide HCz with an undue advantage.

(118) In addition, the Commission understands that the private creditor test requires a realistic assessment of bankruptcy vis-à-vis restructuring, when considering the above-mentioned case-law ([50]) according to which 'the amount it would receive in the event of liquidation' must be compared with 'the assessment of the chances of the firm being restored to viability.'

(119) In the present case there is clearly a good likelihood of the firm being restored to viability. The commercial liabilities will be sold to a strategic investor, and there was evidence (in 2003) and still is today (in 2005) that serious offers have been made. In addition, the transfer of claims to the Operator also appears to have a sound economic basis. The value of the assets has been confirmed by a credible evaluation company.

(120) The Commission also understands that the amount receivable in the event of bankruptcy as suggested by way of an example in the PWC analysis is by no means guaranteed. Rather, the analysis was made on the basis of a best-case scenario for public creditors, and is based on similar expectations of the sale of assets as those indicated for restructuring. However, it is by no means guaranteed that assets would be sold together by the receiver in a uniform process. Instead, some creditors may take away assets on which they have pledges, and as such the sale will probably yield a lower price than the restructuring process. Poland has provided empirical evidence to confirm this hypothesis.

([48]) In fact there are four in 2005, but this is not of relevance in this case as they had already agreed to restructuring in 2003.

([49]) The Commission is also not concerned by the fact that also other creditors could have rejected the restructuring, as these other creditors had clearly benefited from restructuring and did not want to jeopardise this process.

([50]) Case T-152/99 Hamsa, paragraph 168 (author's emphasis).

(121) The behaviour of the private creditors clearly suggests that they would adopt a market-based approach. In fact, the private creditors also voted for restructuring despite the fact that, according to tables 2 and 3, bankruptcy was in their favour. For example, in 2003 the private bank BPH faced losses of its receivables of PLN 75 million equivalent to 19 % (PLN 14 million) in the event of bankruptcy while, in the event of restructuring, it was expected to lose about 49 % (PLN 37 million). As such, compared at the time with the best-case bankruptcy scenario, restructuring offered a return of only 62 %. Nevertheless, BPH voted in favour of the Creditor Agreement.

(122) If the same yardstick were to be applied to the public creditors, almost everyone should have favoured restructuring. i.e. all public commercial creditors and most public institutional creditors.

Existence of aid as regards Huta Stali Częstochowa's activities

(123) The Commission has also overcome its doubts that the outsourcing of HCz's production to HSCz involved aid. The Commission notes that the rationale of leasing the steel assets prior to bankruptcy to a separate company beyond the receivers' control was a way of preserving the value of assets as a going concern.

(124) Moreover, the Commission concludes that HSCz obtained its working capital and the guarantee from TFS on a commercial basis that meets the private creditor test. It understands that HSCz was financed by loans granted by suppliers on a commercial basis and prepayments from steelwork customers, who had a vested interest in the continuation of steel production at Huta Częstochowa.

(125) As for the guarantee granted by TFS, the Commission finds that, on the basis of the Commission's practice for assessing individual guarantees, it does not constitute state aid ([51]).

(126) First, HSCz was not in financial difficulty in the sense of the Community Guidelines on state aid for rescuing and restructuring firms in difficulty ([52]). Instead it is a new company without debt which already has a significant number of orders on its books. Second, it was able to obtain loans from the financial markets without state intervention. Third, the guarantee is linked to a fixed maximum amount and is not open-ended.

(127) As for the price of the guarantee, the Commission has no evidence that the premium paid does not correspond to the market price. That is obvious if the Polish authorities' argument is accepted that, because of the contractual arrangements, the guaranteed sum did not exceed PLN 6 million and the premium was therefore 2 %. However, even in the case of a premium of 0,8 %, examples of similar guarantees with premiums of 1 % indicate that the premium was a market rate, in particular if one bears in mind that TFS had comprehensive information about HSCz and had thus been able to set up a monitoring system which allowed the guaranteed sum to be limited. In addition, the Commission recalls that in other steel cases it took the view that the correct premium was even lower than in the present case ([53]).

b) *Grants and other measures*

Existence of aid as regards the grants to Huta Częstochowa

(128) The financial measures received by HCz between June 1997 and May 2002 amounting to PLN 25 161 072,08 (about EUR 5,3 million) were granted to the company from state resources. Because steel plate is a product which is widely traded throughout Europe, such aid granted by Poland could possibly distort competition by favouring HCz and affect trade between Member States. The measures thus constitute state aid pursuant to Article 87(1) EC.

([51]) Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (OJ C 71, 11.3.2000, p. 14).

([52]) OJ C 244, 1.10.2004, p. 2.

([53]) See Commission Decision Anon of 26 July 2004, C(2004)1813 fin, point 47, not yet published, in which the Commission accepts a premium of 0,6 %.

Existence of aid to Huta Stali Częstochowa in other forms

(129) KBN's grants of PLN 1 328 000 also conferred an economic advantage on HSCz and thus constitute state aid because, like the grants to HCz, they affect trade and threaten to distort competition.

(130) However, the Commission sees no advantage as regards the late payment by HCz of public dues. As HSCz was not in difficulty, the Commission has no reason to believe that a private creditor in the place of the public institutions would have opted for short-term enforcement of its debts ([54]).

(131) In addition, HSCz paid the statutory interest on late payments in accordance with Polish law; this interest is above the Commission's reference rate. The Commission recalls that according to Article 14 of the Procedural Regulation, the object of a procedure regarding unlawful aid is to identify the amount to be recovered in order to re-establish the situation as if no aid had been granted. However, if the recipient has repaid the aid in an amount equal to, or in excess of, compound interest calculated from the day on which the aid was granted until its repayment, in line with Commission practice the measure no longer constitutes state aid within the meaning of Article 87(1) EC.

(132) Indeed, the statutory interest rate, which ranged, between 2002 and 2004, from 16 % to 12,25 % (see point 98) is higher than the reference rate which the Commission applies for repayment of aid. Pursuant to Article 9 of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty) hereinafter 'the Implementing Regulation') this is the five-year inter-bank swap rate for the last three months of the previous year, plus 75 basis points. This reference rate was as of 1 May 2004 7,62 % for Poland ([55]) . Before 2004 no five-year inter-bank swap rate existed in Poland. In any event, other indicators too, such as the average yield on one-year treasury bonds, were clearly lower (8,24 % in 2002, 5,34 % in 2003 and 6,63 % in 2004).

(133) Only the deferrals of payments to Częstochowa tax office and PFRON, PLN 62 116,09 in total, which have not been repaid, could constitute state aid.

3. **Compatibility of aid with the common market**

Compatibility of the aid to Huta Częstochowa

(134) The aid of PLN 25 161 072,08 received by HCz between June 1997 and May 2002 was awarded in view of the fact that it would subsequently be approved as state aid under the NRP and Protocol No 8, but it was later disregarded in view of HCz's bankruptcy. However, as this aid was not authorised under Protocol No 8, it constitutes prohibited restructuring aid unless it is compatible under other state aid rules.

(135) The Commission notes that until 23 July 2002 the state aid rules for the steel sector were contained in Commission Decision No 2496/96/ECSC of 18 December 1996 establishing Community rules for state aid to the steel industry ([56]) (hereinafter 'the Steel Aid Code').

(136) Article 2 of the Steel Aid Code authorises aid which is compatible with the R&D framework. The Commission takes the view that the five measures granted by KBN to an amount of PLN 5 461 620 do not give rise to serious doubts as to their compatibility with the R&D framework pursuant to Annex IV (3)(2) of the Accession Treaty ([57]).

([54]) Advocate General Opinion in Case C-276/02 Spain v Commission, paragraph 40.

([55]) Reference and recovery rates in the field of state aid, OJ C 48, 24.2.2005, p. 2.

([56]) OJ L 338, 28.12.1996, p. 42.

([57]) Protocol No 8 applies only to restructuring aid in the steel sector, which is any aid that is not compatible under the other EC state aid rules.

(137) First, although the subsidies granted by KBN to HCz are not directly covered by the Programme of the Chairman of KBN on the Criteria of Granting Financial Support for Science dated 30 November 2001 (which has been accepted by the Commission as existing aid under Measure PL 6 of Annex IV to the Accession Treaty), it seems that Poland did not assess its aid differently before the programme was approved. In fact, in the NRP the Polish authorities had already identified the 'KBN's resources' as 'authorised state aid instruments in the form of subsidies for R&D.' ([58]) This NRP as such has been assessed by the Commission and was approved by a Council decision in July 2003 (see point 25).

(138) Second, the aid measures are compatible with the R&D framework. Clearly, the aid was awarded for the purposes of R&D. In addition, the aid remains below the ceiling for compatible aid as indicated in the R&D framework assuming an additional bonus of 10 % as the recipient was situated in an Article 87(3)(a) region ([59]). It is either aid for industrial research and remains below the ceiling of 60 % (point 0 of subparagraph 1, 2 and 4) or aid which is used for either industrial research or pre-competitive development and which remains below the ceiling for pre-competitive development of 35 % (point 0 of subparagraph 3, 4 and 5). The aid also had an incentive effect as the Polish authorities have convincingly demonstrated that HCz would not have commissioned the R&D without it.

(139) The Commission therefore takes the view that it would not have raised objections to KBN's aid measure between 1997 and 2001 under Annex IV of the Accession Treaty and thus considers this aid as compatible R&D aid and not as restructuring aid within the meaning of Protocol No 8.

(140) However, in the case of the remaining operating and employment restructuring aid of PLN 19 699 452, the Commission does not see under which provisions of the Steel Aid Code this aid could be compatible. It is obviously not aid for R&D or aid for closures (Article 4). Moreover, the aid is not permissible operating aid within the meaning of the Community guidelines on state aid for environmental protection ([60]). In any event, the Polish authorities did not invoke any derogation under either the Steel Aid Code or the EC rules.

(141) In view of the fact that these measures are not covered by any other exception under the ECSC Steel Aid Code, the Commission takes the view that they constitute restructuring aid pursuant to Article 1 of the Steel Aid Code which, under Protocol No 8, is deemed incompatible with the common market.

Compatibility of the aid to Huta Stali Częstochowa

(142) KBN granted PLN 1 380 000 to HSCz in 2002 and 2003. This aid can be considered as existing aid under Measure PL 6 of Annex IV to the Accession Treaty. Poland confirmed that the aid was granted under the scheme approved under Measure PL 6. Accordingly, these measures do not give rise to serious doubts as to their compatibility with the R&D framework pursuant to Annex IV(3)(2) of the Accession Treaty.

(143) In view of the compatibility of the aid granted to HCz by KBN, the amount of potential incompatible aid which HSCz received amounts to PLN 62 116,09 (about EUR 13 077). However, this amount fulfils the conditions of Commission Regulation 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to de minimis aid ([61]) and thus allows the Commission to conclude that the measure does not constitute state aid within the meaning of Article 87(1) EC.

([58]) Page 38.

([59]) See Commission letter to Poland dated 13.08.2004, which did not raise any objections to the notified measures, including the Polish regional aid map (C(2004)3230/5).

([60]) OJ C 72, 10.3.1994, p. 3, applied in accordance with Article 3 of the Steel Aid Code (since replaced by OJ C 37 of 3.2.2001, p. 3). In particular it is not aid for waste management or energy savings.

([61]) OJ L 10, 13.1.2001, p. 30.

4. **Conclusions**

(144) For all these reasons, the Commission concludes that the measures which Poland has implemented for the restructuring of HCz as part of the restructuring plan of 7 August 2003, as amended on 1 December 2003 and 30 April 2004, do not constitute aid within the meaning of Article 87(1) EC. The measures which Poland has implemented for the operation of HSCz do not constitute aid within the meaning of Article 87(1) EC either. Furthermore, the subsidies granted to HCz and HCSz by KBN for R&D are compatible with the common market.

(145) However, the restructuring aid received by HCz between 1997 and 2002 of PLN 19 699 452 (EUR 4,1 million) is not compatible with the common market and must be repaid pursuant to point 18 of Protocol No 8.

(146) The company which actually benefited from the aid will be asked to repay it. At the time when the aid was awarded, the economic entity that received it formed part of the legal entity HCz. Since the assets and liabilities of the original HCz will be distributed to three successor companies, RFG, MH and Operator, the economic entity which received the aid is not longer limited to the legal entity — HCz — but should also extend to the entities which received HCz's assets and liabilities. Consequently, repayment of the aid will be requested from HCz, RFG, MH and Operator, which are jointly and severally liable.

(147) The sums to be recovered shall bear interest calculated in accordance with the provisions of the Implementing Regulation. In particular, under Article 9(4) of the Implementing Regulation, when five-year inter-bank swap rates are not available, the Commission may, in close cooperation with the Member State concerned, fix a state aid recovery interest rate using a different method and on the basis of the information available to it. As five-year inter-bank swap rates were not available for Poland for the period when the incompatible aid was granted, the recovery interest rate to be applied should be based on an available interest rate deemed appropriate for that period.

VII. **APPROVAL OF CHANGES IN THE NRP UNDER POINT 10 OF PROTOCOL NO 8**

(148) Poland has announced a change in the NRP with a view to stating that HCz will not be liquidated but may be restructured without state aid. Pursuant to Point 10 of Protocol No 8, the Commission has no objections to this change.

(149) Pursuant to Point 10 of Protocol No 8 'any subsequent changes in the overall restructuring plan and the individual plans must be agreed by the Commission and, where appropriate, by the Council.' As the Commission decision concerns state aid it is appropriate to refer to the procedural provisions of Article 88 EC and to Regulation No 659/99. In this context, decisions are taken by the Commission, except when a decision to consider the aid compatible is justified by exceptional circumstances within the meaning of Article 88(2) third subparagraph.

(150) Therefore the Commission is entitled to approve the proposed change, since the main figures indicated in the Protocol concerning state aid, capacity, timing and proportionality of state aid remain unchanged ([62]). The change in the NRP will not have any effect on Protocol No 8 itself. HCz will not become a recipient under Protocol No 8 and nor will the overall capacity reduction laid down for the Polish steel industry in point 7 be altered.

(151) In addition, Poland has provided sufficient justification for the change. Indeed, restructuring of HCz seems to be a market-based option and the above evaluation has shown that HCz can, contrary to the situation in 2003, be restructured without state aid.

([62]) Decision of 3 March 2005, C(2005) 424 — Postponement of capacity reduction of VPFM.

(152) However, the Commission concludes that it cannot accept the aid granted to HCz between 1997 and 2002. Acceptance of this aid would entail including HCz in the list of recipients, and would increase the amount of state aid which could be granted to the Polish steel industry, which would disturb the balance between state aid commitments and distortion of competition. The Commission could not approve such a change without the consent of the Council.

VIII. COMPLIANCE WITH POINT 4 OF PROTOCOL NO 8

(153) The Commission does not consider the sale of the subsidiaries of HCz and HCSz to be in breach of Point 4 of Protocol No 8.

(154) Point 4 of Protocol No 8 states that: 'A benefiting company may not:

(a) in the case of a merger with a company not included in Annex 1, pass on the benefit of the aid granted to the benefiting company,

(b) take over the assets of any company not included in Annex 1 which is declared bankrupt in the period up to 31 December 2006.'

The NRP (cf. point 25) reiterated that this provision was intended to prevent a recipient under Protocol No 8 acquiring HCz assets or shares.

(155) The Commission takes the view that point 4(a) and not point 4(b) of Protocol No 8 should be considered in the present case, as it does not involve a sale of assets but a sale of shares which is considered a merger ([63]). In practice, the strategic investor will acquire only shares in companies and not individual assets. Moreover, application of point 4(b) suffices for bankruptcy of HCz, which has not been declared.

(156) The Commission does not see any infringement of point 4(a) of Protocol No 8, as the provision is clearly addressed to recipients under Protocol No 8 and neither Donbass nor LNM are recipients under that Protocol.

(157) It is true that LNM has acquired a recipient, namely MSP. However, the Commission has no evidence that LNM is acting in behalf of or as an agent of MSP. Instead, LNM and MSP are run as separate companies on a stand-alone basis. Even if the Commission were to understand the rationale of the above provision as prohibiting any cross-subsidisation between recipients (possibly MSP) and non-recipients (here HCz), the Commission has been provided with sufficient assurances that any buyer will abstain from cross-subsidising HCz from the aid received under the NRP. Indeed, not just Poland but also LNM have given undertakings (see points 78 and point 105) to underline these assurances,

HAS ADOPTED THIS DECISION:

Article 1

1. The measures which Poland has implemented for the restructuring of Huta Częstochowa S.A. on the basis of the restructuring decision of 7 August 2003 as amended on 1 December 2003 and 30 April 2004 do not constitute aid within the meaning of Article 87(1) of the Treaty.

2. The measures which Poland has implemented for the operation of Huta Stali Częstochowa Sp z o.o. do not constitute aid within the meaning of Article 87(1) of the Treaty.

Article 2

The state aid which Poland awarded for R&D amounting to PLN 5 461 620 for Huta Częstochowa S.A. and PLN 1 328 000 for Huta Stali Częstochowa Sp z o.o. is compatible with the common market.

([63]) See Article 3(1)(b) of Council Regulation 139/2004, OJ L 24, 29.1.2004, p. 1.

Article 3

1. The state aid which Poland awarded to Huta Częstochowa S.A. between 1997 and May 2002 as operating aid and aid for employment restructuring amounting to PLN 19 699 452 is incompatible with the common market.

2. Poland shall take all necessary measures to recover from Huta Częstochowa S.A., Regionalny Fundusz Gospodarczy, Majątek Hutniczy Sp. z o.o. and Operator Sp. z o.o. the aid referred to in paragraph 1 and unlawfully made available to Huta Częstochowa S.A. All these companies shall be jointly and severally liable.

Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective enforcement of the decision. The sums to be recovered shall bear interest from the date on which they were made available to Huta Częstochowa S.A. until their actual recovery. The interest shall be calculated in conformity with the provisions laid down in Chapter V of Commission Regulation (EC) No 794/2004.

3. Within two months of receiving notification of this Decision, Poland shall inform the Commission of the measures already taken and planned to comply with it. It shall provide this information using the questionnaire attached to Annex 1 of this Decision. In particular, Poland shall provide the Commission, within that deadline, with any documents which can prove that the recovery process has been initiated vis-à-vis the entities responsible for reimbursing the unlawful aid.

Article 4

The Commission approves the proposed change in the Polish National Restructuring Plan under point 10 of Protocol No 8 to the Accession Treaty in so far as it will permit the restructuring of Huta Częstochowa S.A. without state aid and without increasing capacity.

Article 5

This Decision is addressed to the Republic of Poland.

Done at Brussels, 5 July 2005.

For the Commission

Neelie KROES

Member of the Commission

ANNEX

Information regarding enforcement of Commission Decision 2006/937/EC

1. **Calculation of the amount to be recovered**

1.1. Please provide the following details on the amount of unlawful state aid made available to the recipient:

Date(s) of payment (°)	Amount of aid (*)	Currency	Identity of recipient

(°) Date(s) on which (individual instalments of) the aid (were)/was made available to the recipient (if a measure comprises several instalments and reimbursements, use separate rows)
(*) Amount of aid made available to the recipient (gross grant equivalent)

Comments:

1.2. Please explain in detail which is the interest rate your authorities intend to apply for the purposes of recovering the unlawful aid which is deemed to be an appropriate interest rate in Poland for the period from 1997 till May 2004.

1.3. Please explain in detail how the interest 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 have already been taken and what measures are planned to effect an immediate and effective recovery of the aid. Please also explain what alternative measures are available under national law to effect recovery. Please also indicate, where relevant, the legal basis for the measures taken/planned.

2.2. By what date will recovery of the aid be completed?

3. **Recovery already effected**

3.1. Please provide the following details on the amounts of aid recovered from the recipient:

Date(s) (°)	Amount of aid repaid	Currency	Identity of recipient

(°) Date(s) on which the aid was repaid

3.2. Please attach information documenting the repayment of the aid amounts specified in the table under point 3.1 above.

COMMISSION DECISION

of 4 July 2006

on State aid C 40/2005 (ex N 331/2005) which Belgium is planning to give to Ford Genk

(notified under document number C(2006) 2931)

(Only the French and Dutch texts are authentic)

(Text with EEA relevance)

(2006/938/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 invited the parties concerned to submit their comments in accordance with the articles referred to above ([1]),

Whereas:

PROCEDURE

(1) Belgium notified the Commission of the planned aid to Ford in Genk by letter dated 22 June 2005, registered on 27 June 2005. The Commission requested further information by letter of 27 July 2005, to which the Belgian authorities replied by letter dated and registered on 15 September 2005.

(2) By letter of 9 November 2005, the Commission informed Belgium that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid. A meeting with the Belgian authorities followed on 25 November 2005.

(3) The Belgian authorities submitted their observations by letter dated and registered on 13 January 2006.

(4) The Commission decision to initiate the procedure was published in the Official Journal of the European Union on 25 February 2006 ([2]). The Commission invited interested parties to submit their comments on the measure. However, no comments were received.

DESCRIPTION OF THE AID

The recipient

(5) The recipient of the aid is Ford-Werke GmbH, Fabrieken te Genk, Belgium (hereinafter referred to as 'Ford Genk'), which is part of the Ford Motor Company. The plant opened in 1964. At the end of 2003, as part of a general restructuring of Ford Europe, there was a significant reduction in staff involving about 3 000 employees. At the same time, the company announced an investment programme of some EUR 700 million., primarily devoted to a new flexible manufacturing system. Under this programme production of the next generation Galaxy and a third model would be added to the current Mondeo production line. The plant currently employs about 5 000 people. In 2004 it produced 207 163 vehicles. In Belgium the Ford group also has a Volvo plant in Ghent.

The training project

(6) According to the information provided by Belgium, the training programme's eligible costs total EUR 33,84 million. This figure includes EUR 25,34 million for specific training and EUR 8,5 million for general training.

(7) The eligible costs considered in the programme, and their respective amounts, are:

— Consultancy costs: they cover the provision of training services by external suppliers.

— On-the job-training: cost of the operators when trained on the production line (versatility). The workers have to be able to operate at three different positions in the team. According to Ford's training objectives, this accounts for 1,35 training days per year on average.

— Lean organisation: cost of the personnel in the team providing training in lean, flexible, and efficient production methods, in line with the new Ford Production System (FPS).

([1]) OJ C 47 of 25.2.2006, p. 14.
([2]) See footnote 1.

— Off-line personnel costs: cost of the workforce during classroom training. According to Ford's training objectives, this accounts for 1,95 training days per year on average.

— Training enablers: large, glass-enclosed rooms with areas for reading and socialising, containing notice boards for posting up production and quality information. Belgium proposes that the depreciation of these areas be an eligible cost for the period in question as long as they are used for training purposes.

— Personnel costs of the training department: salaries of the employees in the company's training department who are working for this training programme.

— 'Cascading': the director of the plant calls a meeting of all the workforce three times a year in order to brief them on the implementation of Ford's 'lean organisation' system ('FPS'). Cost of the workforce during this meeting.

— Six Sigma: expenditure arising from the personnel costs of the team providing training using the 'DMAIC' method (define-measure-analyse-improve-control).

— Restructuring: In recent years Ford Europe has tried to adapt its production capacity to a stagnating level of demand. To this end, over the period December 2003 to April 2004, Ford Genk reorganised its production and 2 770 employees were laid off or (for those having worked enough years) offered early retirement. In order to guarantee continuity in production and quality, 279 experienced employees were asked to stay for some additional weeks or months to train their successors.

— Launch costs: personnel cost of the 'product coaches', i.e., the first workers involved in launching new models. They learn about the new products (construction, use of the new plant, process), and then transfer this knowledge to other workers.

Type of activity	Specific training (EUR million)	General training (EUR million)
Consultancy costs	0,88	2,05
On-the job-training	5,44	
Lean organisation	1,65	
Off-line personnel costs	2,35	5,5
'Training enablers'	1,48	
Personnel costs of the training department		0,92
'Cascading'	1,6	
Six Sigma		0,026
Restructuring	4,47	
Launch costs	7,44	

(8) Total eligible costs broken down by type of expenditure are:

Type of expenditure	(EUR m)
Trainers' personnel costs	16,54
Depreciation of tools and equipment	1,48
Cost of guidance and counselling services	0,92
Trainers' personnel costs	14,9
Total eligible costs	**33,84**

The aid

(9) The proposed aid consists in a direct grant to Ford Genk of EUR 12 279 423 for the period 2004-2006. Of this sum, EUR 4 677 408 (38 %) is aid for general training, and EUR 7 602 015 (61 %) is for specific training. The aid is to be granted as ad hoc aid by the Flemish Community (*Vlaamse Gemeenschap*). Belgium has given assurances that this training aid will not be supplemented by other aid for the same costs.

(10) The amount of this aid gives an aid intensity of 55 % for general training and 30 % for specific training.

DECISION TO INITIATE PROCEEDINGS UNDER ARTICLE 88(2) OF THE TREATY

(11) In its decision to initiate a formal investigation, the Commission expressed doubts concerning (1) the way the Belgian authorities interpret the scope of eligible costs and (2) the proposed classification of some cost items under the headings of general or specific training.

(12) On the issue of eligible costs, the Commission queried whether some of the expenditure proposed by Belgium was compatible with Article 4(7) of Regulation (EC) No 68/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to training aid [3], notably:

— Training enablers: the Commission queried whether buildings or other types of infrastructure fell within the scope of Article 4(7)(d) of Regulation (EC) No 68/2001.

— Personnel costs of the training department: the Commission doubted whether these costs could be assimilated to 'cost of guidance and counselling services with regard to the training project' (Article 4(7)(e) of Regulation (EC) No 68/2001).

— 'Cascading': the Commission wondered whether cascading included any training content and whether it was anything more than a mere management practice. It also expressed doubts about the company's needing any state aid to undertake these activities, as they seemed to be part of Ford Genks' routine management operations.

— Restructuring costs and launch costs: the Commission queried whether aid linked to restructuring and launch costs provided any real incentive for the companys' training operations. Furthermore, the Commission also had reservations as to whether the restructuring costs were eligible under Article 4(7) of Regulation (EC) No 68/2001 as they appeared to result exclusively from the recent restructuring of the plant.

— Expenditure in 2004: part of the eligible costs was expenditure that had already been made in 2004. Given that this aid is intended to subsidise past expenditure, the Commission queried whether it could have any incentive effect on the firms' training activities for that period.

(13) On the question of the breakdown between 'general' and 'specific' training, the Commission feared that the Belgian authorities had applied an excessively wide definition of general training to some project expenditure. The Commission's misgivings focused on the training headings 'Consultancy costs' and 'Off-line personnel costs'. According to the Belgian authorities, the training department of Ford Genk estimated that about 70 % of this expenditure concerned training of a general nature. However, no evidence has been provided in support of this claim.

COMMENTS FROM BELGIUM

(14) In their reply to the opening of the formal investigation, the Belgian authorities made the following comments:

— Training enablers: the Belgian authorities argue that these equipped spaces enclosed by glass walls are used for training activities for most of the time and must therefore be considered an eligible cost.

— Personnel costs of the training department: Belgium claims that they are covered by Article 4(7)(e) of Regulation (EC) No 68/2001 ('cost of guidance and counselling services with regard to the training project'), that the employees in question have been seconded to the programme for three years, that this results in extra staffing costs over that period, and that for the purpose of classification these costs have to be accounted for as general training.

— 'Cascading': the Belgian authorities accept the Commission's view that cascading should be considered a management rather than a training instrument.

— Restructuring costs: according to the Belgian authorities, the lay-off of 2 770 Ford Genk employees in the period 2003-2004 cannot be regarded as normal restructuring in response to a change in market circumstances. On the contrary, the workforce reduction, which was implemented in full compliance with social legislation and after consultation with staff representatives, has resulted in a drastic change in the organisation of the plant. However, it led to the sudden departure of the most experienced workers, i.e. those able to train their younger colleagues. Under these circumstances, and in order to avoid having to use external coaches, the company decided to ask a number of these workers to continue in service just to provide training.

— Launch costs: the Belgian authorities claim that this case is the not same as normal training that takes place following a total or partial renewal of an existing model. In particular, the entire Genk factory has been converted to produce three models on a single platform; three completely new models are being introduced over a period of 18 months.

(3) OJ L 10 of 13.01.2001, p. 20. Regulation modified by the regulation (EC) nº 363/2004 (OJ L 63 of 28.2.2004, p. 20).

— Expenditure in 2004: the Belgian authorities have provided assurances that the training programme for 2004-2006 was developed after the promise of support from the Flemish government in November 2003, and that the first course in the programme took place after Ford Genk formally requested the aid from the Flemish administration.

— As regards the distinction between 'general' and 'specific' training, Belgium has submitted a detailed classification of the courses, including the name of external consultants providing the training. In addition, the Belgian authorities have also undertaken to correct, *ex post*, any deviation from the proportion of general training retained for budgetary purposes (70 %) on the basis of the company's past experience.

ASSESSMENT OF THE AID

Existence of state aid

(15) The measure notified by Belgium in favour of Ford Genk constitutes state aid within the meaning of Article 87(1) of the Treaty. It takes the form of a grant that will be financed by the state or through state resources. The measure is selective as it is limited to Ford Genk. Furthermore, it is liable to distort competition in the Community by providing Ford Genk with an advantage over competitors not receiving the aid. Finally, the automobile market is characterised by extensive trade between Member States, and the aid is therefore likely to affect trade between Member States.

Legal basis for the assessment

(16) Belgium asks for approval of the aid on the basis of Regulation (EC) No 68/2001, the aid being linked to a training programme.

(17) According to Article 5 of Regulation (EC) No 68/2001, if the amount of aid granted to one enterprise for a single training project exceeds EUR 1 million, the aid is not exempted from the notification requirement of Article 88 (3) of the Treaty. The Commission notes that the proposed aid in this case amounts to EUR 12 279 423, that it is to be paid to one enterprise, and that the training scheme is a single project. The Commission therefore considers that the notification requirement applies to the proposed aid, and that Belgium has complied with it.

(18) Recital 16 of Regulation (EC) No 68/2001 explains why such aid cannot be exempted from notification: 'It is appropriate that large amounts of aid remain subject to an individual assessment by the Commission before they are put into effect.'

(19) When the Commission assesses an individual training aid which, because of its size, does not qualify for the exemption laid down in Regulation (EC) No 68/2001 and whose compatibility has therefore to be assessed on the basis of Article 87(3)(c) of the Treaty, it employs the same guiding principles as those of the Regulation. Having regard to recital 4 of Regulation (EC) No 68/2001, which states that notifications will be assessed by the Commission in particular in the light of the criteria set out in the Regulation, the Commission goes on to assess whether or not all eligible costs can be approved, once again exercising its wide margin of discretion on the basis of Article 87(3)(c) of the Treaty. Such measures must be assessed with a view to ensuring coherent decision-making practice and equality of treatment [4].

Compatibility with the common market

(20) The Commission's assessment of the measure's compatibility with the common market must therefore entail verification that the points about which it had doubts at the opening of the formal investigation are in conformity with the common market under Regulation (EC) No 68/2001 and Article 87(3)(c) of the Treaty. In particular:

I) *Eligible costs*

(21) The Commission notes that Article 4(7) of Regulation (EC) No 68/2001 lays down that the following costs are eligible for a training aid project:

a) trainers' personnel costs,

b) trainers' and trainees' travel expenses,

c) other recurrent expenditure such as materials and supplies,

d) depreciation of tools and equipment as long as they are used exclusively for the training project,

e) cost of guidance and counselling services for the training project,

f) staff costs of trainees taking part in the project up to the total of the other eligible costs referred to in (a) to (e).

[4] See, for example, the judgment dated 24 March 1993 in Case C-313/90 [1993] ECR p. I-1125, paragraph 44 and Article 4(2) of Council Regulation (EC) No 994/98 (OJ L 142, 14.5.1998, p. 1).

(22) Belgium has provided a training cost overview to enable the Commission to identify the proposed eligible costs. According to the information provided by Belgium, the personnel costs of participation in the training do not exceed the total of the other eligible costs.

i) 'Training enablers' (EUR 1,5 million)

(23) Article 4(7)(d) of Regulation (EC) No 68/2001 provides that the depreciation of tools and equipment are potentially eligible costs as long as they are used exclusively for the training project. Buildings are not mentioned as potential eligible costs. In this case, the 'training enablers' consist of different facilities set up in rooms enclosed by glass panels. These rooms are used for training activities. As they are located within the plant, they do not constitute buildings and can be considered as falling within the category of 'tools and equipment' laid down in Regulation (EC) No 68/2001.

(24) In view of this, the Commission considers that they constitute eligible costs.

ii) Personnel costs of training department (EUR 1 million)

(25) The Commission notes that large companies are more likely to have their own training department and therefore less prone to require the assistance of external counselling services. Furthermore, in order to be compatible with Article 87(3)(c) of the Treaty, the aid measure must be proportionate to the objective, and must not distort competition to an extent contrary to the common interest. In view of this, the Commission considers that excluding the costs arising from internal training departments from the scope of Article 4(7)(e) of Regulation (EC) No 68/2001 would discriminate against the category of large enterprises. The Commission therefore accepts them as eligible expenditure.

(26) The Commission will apply the same criteria used in this decision to any similar case notified to it.

(27) However, the Commission has to reject the Belgian authorities' argument that all the costs in question can be regarded as general training. The Commission considers that guidance and counselling services are of the same nature (general/specific) as the training activities they refer to. Consequently, in order to avoid overcompensation of such guidance and counselling costs, the expenditure of the training department on training classified as 'specific' or 'general' must be subject to the same maximum aid intensity as the corresponding training activity. The costs of the training department will therefore be classified as 'general' or 'specific' in the same proportion as the 'general' and 'specific' training elements of the overall training project. In this case, taking the training activities for which the Commission authorises aid, this will result in 57,8 % for general training and 42,2 % for specific training.

(28) Higher aid intensities would cause a disproportionate distortion of competition. In particular, the Commission takes the view that requiring an enterprise to finance a reasonable proportion of the cost contributes to the efficiency and feasibility of the measure. It thus concludes that a higher aid intensity would adversely affect trading conditions to an extent contrary to the common interest. This part of the measure may not, therefore, be regarded as compatible with the common market under Article 87(3)(c) of the Treaty.

iii) Restructuring costs (EUR 4,4 million)

(29) When deciding to undertake restructuring, a company compares the present value of the expected reduction in costs in future periods with the costs of the restructuring. The expenditure for training employees who will occupy a new function following the restructuring are a normal and indispensable part of the restructuring costs. Indeed, once the company has decided to lay off a significant part of its staff, temporary training for the employees referred to above is indispensable for ensuring the continuity of production and quality. The company has no choice but to incur such training expenditure for the remaining workforce in order to replace the expertise that will be laid off. Consequently, the aid in question would simply subsidise the companys' normal and indispensable restructuring costs, which would been incurred anyway, even without aid. So this aid does not seem necessary and, in any event, it will not result in additional training.

(30) Recital 10 of Regulation (EC) No 68/2001 describes the rationale for state aid in support of training, considering that training usually has positive external effects for society as a whole, since it increases the pool of skilled workers from which other firms may draw and improves the competitiveness of Community industry. In this case, however, the restructuring in question will lead to a reduction in the pool of skilled workers available and therefore seems contrary to the explicit objective of Regulation (EC) No 68/2001.

(31) Furthermore, in order to be compatible with Article 87(3)(c) of the Treaty, the aid measure must be proportionate to the objective and must not distort competition to an extent contrary to the common interest. Since Ford Europe is one of the major players in the Community market for car manufacturing, it appears that market forces alone should suffice to undertake the training entailed by the restructuring in question. Any state aid in support of this training would therefore, with reference to recital 11 of Regulation (EC) No 68/2001, be in excess of the minimum necessary

to obtain the Community objective which market forces alone would not make possible, and would therefore result in an undue distortion of competition. In this respect, the Commission observes in particular that, despite the doubts it voiced in the opening decision, Belgium has not explained why the company would not have undertaken the training activities in question without aid.

(32) The Commission therefore considers that these restructuring costs are not eligible for training aid.

iv) Launch costs (EUR 7,5 m)

(33) Over the last year the Commission has amassed evidence that some car manufacturers are putting their production plants in different Member States in competition with each other for the production of new models. Car makers compare several plants with a view to production of a new product, then decide where to locate the production on the basis of total operating costs, which means all types of costs, including government support of any kind, training aid as well. In view of this economic reality, and in view of the resulting risk that certain training aid measures do not contribute to the objective of common interest laid down in recital 10 of Regulation (EC) No 68/2001 but simply constitute distortive operating aid, the Commission has to scrutinise more carefully the need for aid 'in order to ensure that State aid is limited to the minimum necessary to obtain the Community objective which market forces alone would not make possible' (recital 11 of the Regulation) ([5]). Such assessment is even more justified in view of the current market situation in the motor vehicle sector, characterised by significant over-capacity.

(34) In earlier cases, the Commission did not analyse in detail the need for specific training aid for launch costs ([6]). This, however, does not stop it from doing so once it notices that the economic conditions on the markets concerned have evolved. In paragraph 52 of its judgment of 30 September 2003 in joined cases C-57/00 P and C-61/00 P ([7]), the Court of Justice ruled 'whatever the interpretation given by the Commission to Article 92(2)(c) [now 87(2)(c)] of the Treaty in the past, that cannot affect the correctness of the Commission's interpretation of that provision in the contested decision and hence its validity.' Similarly, in paragraph 177 of its judgment of 15 June 2005 in case T-171/02 ([8]), the Court of First Instance indicated that 'the legality of a Commission decision declaring that new aid does not fulfil the conditions under which the exemption in Article 87(3)(c) EC applies must be assessed solely in the context of that article, and not in the light of the Commissions' earlier decision-making practice, assuming that is established.'

(35) The Commission observes that in the car industry the production of a new model is necessary to maintain competitiveness. The launch of a new model is therefore a normal and regular feature of the car industry. In order to produce new models, car manufacturers need to train their workforce in the new techniques that will be adopted. The related training costs necessary for launching the new model are therefore normally incurred by car makers on the sole basis of market incentive. Consequently, the training activities in question would have been undertaken by the company in any event, even without aid. Training aid is not necessary in these circumstances. It does not motivate the company to undertake 'additional' training activities beyond those already carried out just on the basis of market forces. The aid would cover an operational cost normally borne by the company, and would therefore constitute distortive operating aid.

(36) In addition, the introduction of a single platform in the Genk plant is likely to lead to more efficient production of the new models. The company will therefore benefit directly from the single platform. Market forces alone are thus sufficient to push the company to undertake this restructuring of production and to bear the cost of the correlated training activities. In view of this, the aid is not necessary, as it would cover normal reorganisation costs of the company.

([5]) This is consistent with the approach taken in the cases *General Motors Antwerp* (Case No. N 624/2005, formal investigation opened on 26.4.2006, not yet published in the OJ), *Auto Europa* (Case No. N 3/2006, formal investigation opened on 16.5.2006, not yet published in the OJ) and WEBASTO Portugal (Case No. N 653/2005, approved on 16.5.2006, not yet published in the OJ). In the latter case the Commission found that the aid is necessary and that the positive effects on the common interest outweigh possible distortions of trading conditions, on the basis of the combination of several elements: Notably, the training programme exceeds the basic work needs of the beneficiary, as reflected by the fact that the large majority of training courses concern transferable skills (predominance of general training). The Commission also observed that the training seeks preparation of employees that are newly recruited, in an assisted region where the qualification of the workforce is weak, for the beginning of activities in a brand new plant, using a technology not yet available in the Member State concerned.

([6]) See, for example, cases C77/2002, Volvo Cars NV, Commission decision 2003/665/CE of 13 May 2003 (OJ L 235 of 23.9.2003, p. 24) and C78/2002, Commission decision 2003/592/CE of 13 May 2003, Opel Belgium NV (OJ L 201 of 8.8.2003, p. 21).

([7]) Court judgment of 30 September 2003 in cases C-57/00P and C-61/00P, Freistaat Sachsen, Volkswagen AG and Volkswagen Sachsen GmbH, ECR p. I-9975.

([8]) Court of First Instance judgment of 15 June 2005 in case T-171/02, Regione autonoma della Sardegna, 15.6.2005, not yet published in ECR.

(37) Furthermore, the arguments set out in recital 31 concerning the proportionality of the aid and the avoidance of undue distortion of competition as conditions for compatibility under Article 87(3)(c) of the Treaty also apply to the training associated with the launching of new models. Any state aid in support of this training would go beyond the minimum necessary to obtain the Community objective which market forces alone would not make possible, and would therefore result in a distortion of competition to an extent contrary to the common interest. In this respect, the Commission observes in particular that, despite the doubts it voiced in the opening decision, Belgium has not explained why the company would not have undertaken the training activities in question without aid.

(38) The launch costs may not therefore benefit from training aid.

v) 2004 expenditure

(39) In their reply to the decision to open a formal investigation, the Belgian authorities provided firm and detailed assurances that the formal request for aid preceded the start of the training programme. The Commission believes that these assurances are sufficient to dispel the doubts it voiced in its decision.

Adjustments in the amount of eligible costs

(40) In view of the above arguments, the eligible costs of the project have to be adjusted downwards to EUR 20,31 million. Of this sum, the personnel costs of trainees account for EUR 13,29 million, 65 % of the total.

(41) The Commission notes that Article 4(7)(f) of Regulation (EC) No 68/2001 provides that such costs are eligible up to the amount of the total of the other eligible costs. In view of this, a further adjustment is required in this case to bring trainees' personnel costs down to a level equivalent to the sum of other costs ([9]). Such an adjustment results in total eligible costs of EUR 14,04 million.

II) *Nature of the training*

(42) Article 4 of Regulation (EC) No 68/2001 makes a distinction between specific training and general training.

(43) Specific training is defined in Article 2(d) of Regulation (EC) N° 68/2001 as training involving tuition directly and principally applicable to the employees' present or future position in the assisted firm, and providing qualifications which are not, or only to a limited extent, transferable to other firms or fields of work.

(44) General training is defined in Article 2(e) of Regulation (EC) N° 68/2001 as training involving tuition which is not applicable only or principally to the employees' present or future position in the assisted firm, but which provides qualifications that are largely transferable to other firms or fields of work, and thereby substantially improve the employability of the employee. Training is regarded as general if, for example, it is jointly organised by different independent enterprises, or if employees of different enterprises may avail themselves of the training.

(45) In order to be compatible with the common market, training aid must not exceed the maximum allowable aid intensities in relation to eligible costs laid down in Article 4 (2) and (3) of the Regulation (EC) N° 68/2001. These maximum thresholds depend, *inter alia*, on the size of the recipient company, the region in which it operates, and the category of workers involved. The Commission notes that Ford Genk is a large enterprise, that the project is located in an area (the province of Limburg), which qualifies for assistance under Article 87(3)(c) of the Treaty, and that the participants in the training do not include any of the categories of disadvantaged workers mentioned in Article 2 (g) of Regulation (EC) No 68/2001. The maximum aid intensities authorised under these circumstances are 30 % for specific training, and 55 % for general training.

(46) The Commission considers that in its reply to the opening of the formal investigation Belgium has submitted sufficient information and assurances regarding the nature of the training. In particular, it has communicated the names of the external enterprises in charge of the general training. It has also undertaken to correct, *ex post*, any deviation in the proportion of general training proposed. Any such correction will follow the conclusions of the audit carried out by the economic services of the Flemish region (on the basis of which the exact percentage of general training will finally be determined).

([9]) When reducing the amount of eligible trainees' personnel costs, the Commission has reduced the trainees' personnel costs which constituted *specific* training.

Closing remarks

(47) The Commission notes that, in the case of the aid measure under scrutiny, the exemptions provided for in Article 87(2) of the Treaty do not apply since the aid measure does not target any of the objectives listed there, nor has Belgium argued that they do. The notified aid is not designed to promote the execution of an important project in the common European interest nor to remedy a serious disturbance in the economy of a Member State, nor is it intended to promote culture or heritage conservation. The Commission therefore considers that the aid for covering costs stipulated in recital 7 cannot be exempted under Article 87(3)(b) or (d) of the Treaty as regards the basic incompatibility of state aid with the common market. The exemption provided for in Article 87(3)(a) is not applicable either, because the aim of the measures is the promotion of training in an area which is not assisted under that article of the Treaty. Finally Article 87(3)c of the Treaty is relevant to the extent it concerns promotion of training and regional development, which has already been taken into account in the assessment above.

Conclusion

(48) The Commission finds that some of the measures notified by Belgium, as set out in recitals 21 to 41, concern expenditure that is not eligible, or aid that is not necessary for undertaking the training activities in question. This aid is not compatible with the common market under any exemption provided for in the Treaty, and must be prohibited. According to the Belgian authorities the aid has not been granted, and therefore there is no need to recover it.

(49) The other measures in the proposal, accounting for eligible costs of EUR 14,04 million, which correspond to aid of EUR 6 240 555, comply with the criteria for compatibility with the common market under Article 87(3)(c) of the Treaty,

HAS ADOPTED THIS DECISION:

Article 1

EUR 6 038 868 of the state aid which Belgium is planning to accord a training project at Ford-Werke GmbH, Fabrieken te Genk is incompatible with the common market.

Therefore that part of the aid may not be implemented.

The remaining EUR 6 240 555 million in notified aid is compatible with the common market.

Article 2

Within six months of the date on which this Decision is notified, Belgium shall inform the Commission of the measures taken to comply with it.

Article 3

This decision is addressed to the Kingdom of Belgium.

Done at Brussels, 4 July 2006.

For the Commission

Neelie KROES

Member of the Commission

COMMISSION DECISION

of 19 July 2006

on the aid measure notified by the Netherlands for KG Holding NV

(notified under document number C(2006) 2954)

(Only the Dutch version is authentic)

(Text with EEA relevance)

(2006/939/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 called on interested parties to submit their comments pursuant to the provisions cited above [1] and having regard to their comments,

Whereas:

1. PROCEDURE

(1) By letter dated 26 January 2004, registered as received on 11 February 2004, the Dutch authorities notified the Commission that they intended to grant restructuring aid under the Community guidelines on state aid for rescuing and restructuring firms in difficulty (hereinafter 'the guidelines') [2] to KG Holding NV (hereinafter 'Kliq Holding' or 'KH'). Following this notification, the Commission asked the Netherlands to provide further information in April, August and November 2004. In December 2004, the Dutch authorities requested an extension of the deadline for providing a reply, explaining that the firm was still not performing well and that another firm was possibly interested in a takeover.

(2) By letter dated 5 August 2005, the Commission informed the Netherlands that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the notified measure.

(3) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* [3]. The Commission invited interested parties to submit their comments on the measure.

(4) By letter dated 7 September 2005, the Dutch authorities requested an extension of the deadline for submitting their comments on the Commission's decision to initiate proceedings, which the Commission granted by letter dated 15 September 2005.

(5) The Netherlands submitted its comments and provided additional information by letters dated 29 September 2005, registered as received on 30 September 2005; 13 January 2006, registered as received on 18 January 2006; and 17 February 2006, registered as received on 23 February 2006.

(6) The Commission received no comments from interested parties.

2. DETAILED DESCRIPTION OF THE AID

2.1. Background

(7) In 2002, KH was created through the transformation of the reintegration services of the Dutch Ministry of Employment and Social Affairs into a private limited liability company [4]. By late 2003, KH had significantly reduced its headcount because of mounting losses due *inter alia* to adverse market conditions and poor management.

(8) In November 2003, the Netherlands notified its plan to grant the company a EUR 45 million loan as rescue aid under the guidelines to enable the company to stay afloat whilst preparing a wide-ranging restructuring plan. In December 2003, the Commission authorised the rescue aid for KH [5] pending the notification of a detailed restructuring plan within six months.

[1] OJ C 280, 12.11.2005, p. 2.

[2] OJ C 288, 9.10.1999, p. 2. Given that the aid was notified before 10 October 2004, these guidelines remain applicable by virtue of point 103 of the new Community guidelines on state aid for rescuing and restructuring firms in difficulty (OJ C 244, 1.10.2004, p. 2).

[3] See footnote 1.

[4] Upon incorporation the company's name was N.V. Kliq, and in the second half of 2003 it was changed to KG Holding NV.

[5] OJ C 33, 6.2.2004, p. 8.

2.2. The relevant undertaking

(9) KH is a holding company whose main activity is to provide labour reintegration services on the Dutch market. After having been a part of the Dutch government, with some 3 000 employees, it was incorporated on 1 January 2002. The Dutch State is the sole shareholder. KH currently employs about 700 people.

(10) Besides the reintegration activity of the holding company, which was performed by the subsidiary Kliq Reïntegratie (hereinafter 'Old Kliq' or 'OK') with 1 450 employees, there was one other main subsidiary called Kliq Employability (hereinafter 'KE') with 200 employees. In addition, KH owned equity stakes in six very small subsidiaries and joint ventures which together with KE are collectively referred below as 'OS' (other subsidiaries), ranging in size from 4 to 20 employees, namely: Kliq Experts, Brug and Instroomprojecten, Flexpay BV, Simnet BV, Kliq Match BV and Kliq Business School.

(11) The core activities of the two largest subsidiaries were reintegration and employability services. These are services provided to people who are facing difficulties finding a job, including disabled people, but also to companies who are facing difficulties in finding the right people for certain jobs.

2.3. The relevant markets

(12) The main relevant market concerned is the market for labour integration services. Both public as well as private operators tender out contracts to undertakings offering labour integration services. However, for KH the public sector is the most important market. Local authorities and the UWV (an organisation responsible for the implementation of social regulations) offer contracts to undertakings like KH. KH had a market share of 16 % on the UWV market; Alexander Calder (12 %), Argonaut (10 %) and Randstad (9 %) are the other major players. The second most important market for KH is the market for contracts tendered by municipalities; there the market share of KH is about 38 %. Other important players on that market are Alexander Calder (25 %) and TMP (25 %).

2.4. The restructuring plan

(13) Under the restructuring plan, KH would wind up its largest and loss-making subsidiary OK, sell or liquidate all the companies forming part of OS, and set up a new specially created subsidiary called Kliq BV (hereinafter 'New Kliq' or 'NK'), which would focus on continuing KH's core reintegration business [6]. Under the restructuring plan, NK is the vehicle entrusted with the restoration of KH's long-term viability.

(14) The key features of the base-case scenario of the restructuring programme are:

— *Key measures:*

  — NK would focus on the core reintegration business of KH, and KH would dispose of all its subsidiaries, except for OK — the largest and loss-making subsidiary — which would be shut down before the end of 2004;

  — the operational reorganisation of the company (staff reductions, reduction of the number of operation sites, improvement of the company's internal organisation, business procurement and execution, as well as the financial operations, etc).

— *The targets:*

  — NK was to be profitable from 2004 onwards, and would pay out its profits to KH,

  — KH was to be viable from 2005 onwards, and would use NK's paid-out profit over time to reimburse the outstanding state loans of EUR 41 million by 2016.

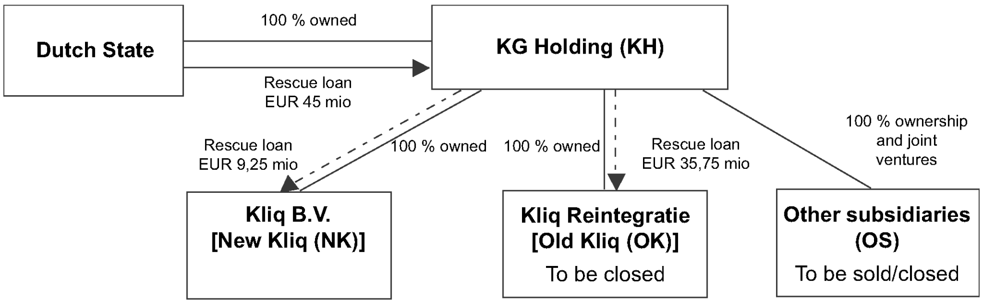
— *The restructuring aid:*

  — Extension by KH of the EUR 45 million state-granted rescue loan partly to NK (EUR 9,25 million) and partly to OK (EUR 35,75 million);

  — the transformation of the total rescue loan to KH, amounting to EUR 45 million, plus the interest due thereon provisionally estimated to some EUR 1,2 million, into restructuring aid by means of conversion into equity capital, possibly supplemented by additional state measures in the worst-case scenario (an overview of the measures is set out in Annex I to the Commission's decision to initiate the Article 88(2) procedure).

(6) In order to perform this task, under the restructuring plan NK took over the assets, liabilities and part of the staff of OK whilst acquiring the outstanding reintegration contracts.

(15) The chart below provides an overview of KH's structure and ownership under the restructuring plan.



3. STATE OF PLAY OF THE RESTRUCTURING PLAN PRIOR TO THE INITIATION OF THE PROCEDURE

(16) Because of the persistence of severe difficulties, KH and OK filed for suspension of payments, which was granted to them on 20 January 2005 by the Rotterdam court and by the Utrecht court. On 7 February 2005, the receivers of KH and OK asked the above courts to change the suspension of payments into bankruptcy. On 8 February 2005, KH and OK were eventually declared bankrupt by the above Dutch courts.

(17) NK accumulated losses of some EUR 12 million between the end of 2003 and the end of 2004 against equity capital of EUR 5,75 million provided by KH when it was set up. Moreover, NK's future was highly uncertain as the company had failed to meet the targets set under the restructuring plan and faced more unfavourable market conditions as the market had shrunk in size in the wake of regulatory change, with municipalities no longer being required to earmark part of their budget for reintegration services.

4. GROUNDS FOR INITIATING THE PROCEDURE

(18) In its decision of August 2005 to initiate the procedure, the Commission concluded that the restructuring aid which the Netherlands intended to grant to KH, by means of transforming the EUR 45 million rescue loan and interest due thereon into equity capital, did not appear to fulfil the requirements of the Community guidelines on state aid for rescuing and restructuring firms in difficulty. Furthermore, the Commission doubted whether the aid was actually limited to the minimum required and in particular whether the beneficiary would make a significant contribution from its own resources. Consequently, the Commission expressed doubts as to whether the restructuring aid could be considered compatible with the common market pursuant to Article 87(3)(c) of the Treaty.

5. COMMENTS FROM THE DUTCH AUTHORITIES

(19) By letter dated September 2005 the Dutch authorities responded to the Commission's decision to initiate the procedure, providing further information concerning (i) the development of the bankruptcy proceedings of KH and OK; (ii) the financial and operating performance of NK; and (iii) the development of the legal proceedings opposing NK and the Dutch state. The latter concerns specifically the legal application filed by NK to the competent Dutch court, in the wake of the bankruptcy of KH and OK, asking the court to order the state to convert into equity the EUR 9,25 million rescue loan facility extended by KH to NK following the authorisation of the rescue aid by the Commission. Notwithstanding the fact that, pursuant to the guidelines, such aid must be liquidity support and temporary in nature and may only be considered permanent after the Commission's approval of the restructuring aid, in the summer of 2005 the Dutch authorities informed the Commission that the competent Dutch court had ordered them to convert the above loan into equity.

(20) Further, by letter dated January 2006, the Netherlands informed the Commission of the bankruptcy of NK as of 14 December 2005 and the ensuing proceedings. Finally, by letter dated February 2006, the Netherlands provided updated information concerning the bankruptcy proceedings of KH and OK.

6. ASSESSMENT

6.1. Existence of aid

(21) 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'.

(22) Firstly, the restructuring aid is granted by means of transformation into equity capital of the state-granted rescue loan to KH plus interest due on the loan by the latter, and thus clearly constitutes state resources. The rescue loan granted to KH and its transformation into restructuring aid confer on it an advantage that an undertaking in such difficulties, close to bankruptcy, would not have obtained on the financial market.

(23) Although KH is operating only on the Dutch market, it is not excluded that granting an advantage to KH distorts or threatens to distort competition and has a potential effect on trade between Member States. In addition, as indicated by the Dutch authorities, there are smaller international players on the Dutch market such as TMP and Creyff's (subsidiary of Solvus, Belgium). Consequently, the advantage appears to favour a company over its competitors, thus distorting or threatening to distort competition and affect trade between Member States.

(24) Consequently, the notified measure for KH must be considered to constitute state aid within the meaning of Article 87(1) of the EC Treaty and has to be assessed accordingly.

6.2. Compatibility of the aid with the common market

(25) The aid falls to be assessed by the Commission as *ad hoc* aid. Article 87(2) and (3) of the EC Treaty provides for exemptions from the general incompatibility of aid stated in Article 87(1) of the EC Treaty.

(26) The aid measure in question clearly fails to qualify for the exemptions provided for in Article 87(2) of the EC Treaty. The notified aid measure does not have a social character, nor is it granted to individual consumers, nor does it make good the damage caused by natural disasters or exceptional occurrences, nor is the aid granted to the economy of certain areas of the Federal Republic of Germany affected by its division.

(27) Further exemptions are set out in Article 87(3)(a) to (d) of the EC Treaty. As the primary objective of the aid is not regional but concerns the restructuring of an undertaking in difficulty, only the exemption provided for in Article 87 (3)(c) appears relevant in that it provides for the authorisation of state aid granted to promote the development of certain economic sectors, where such aid does not adversely affect trading conditions to an extent contrary to the common interest.

(28) For its assessment of rescue and restructuring aid the Commission has issued the above mentioned guidelines. The Netherlands has requested the Commission to scrutinise the measure under those guidelines.

(29) Section 3.2. (points 28 to 63) of the guidelines, and in particular points 30 to 47, describe the conditions which must be met in order for the Commission to authorise restructuring aid. The assessment is outlined in the paragraphs (30) to (55) below.

6.2.1. *Eligibility of the company*

(30) Pursuant to point 30 of the guidelines, the company must qualify as a firm in difficulty within the meaning of section 2.1 (points 4 to 8). According to point 6 of the guidelines the usual signs of a firm being in difficulty are increasing losses, diminishing turnover, growing stock inventories, excess capacity, declining cash flow, mounting debt, rising interest charges and falling or nil net asset value.

(31) Point 5(a) of the guidelines specifically defines a company as being in difficulty where more than half of its registered capital has disappeared and more than one quarter of that capital has been lost over the preceding 12 months.

(32) According to the notification this is the case with KH. From the audited accounts of 31 December 2002 it can be concluded that the registered capital of the holding company (consolidated) amounted to approximately EUR 73 million on 1 January 2002. At the end of that year it amounted to only EUR 22 million. This equates to a reduction of approximately 70 %. In addition, there was a further significant decrease in the nine months to September 2003.

(33) The Dutch authorities plan to grant the restructuring aid to KH. KH will in turn extend this aid to its two subsidiaries, NK and OK, in order to complete the restructuring.

(34) The Commission considers that KH qualifies as a company in difficulties pursuant to the concept defined in points 4 to 8 of the guidelines and is consequently eligible for restructuring aid.

6.2.2. *Restoration of viability*

(35) The grant of aid is conditional on implementation of a restructuring plan which must be endorsed by the Commission in the case of individual measures such as the one under review. In particular, pursuant to points 31 to 34, the guidelines require *inter alia* that:

— 'the restructuring plan, the duration of which must be as short as possible, must restore the long-term viability of the firm within a reasonable timescale and on the basis of realistic assumptions as to future operating conditions. Restructuring aid must therefore be linked to a viable restructuring plan to which the Member State concerned commits itself….'.

— 'The plan should normally provide for a turnaround that will enable the company, after completing its restructuring, to cover all its costs including depreciation and financial charges. The expected return on capital should be enough to enable the restructured firm to compete in the marketplace on its own merits'.

(36) It should first of all be noted that the notified restructuring plan was incomplete: the Dutch authorities did not, for example, submit up-to-date liquidity planning. The restructuring plan did not provide the Commission with the information it needed in order to be able to carry out a full assessment under the guidelines. The Commission had to ask for KH's liquidity costs and for a sensitivity analysis in respect of the various business scenarios. Because of the way KH's business was going, the Dutch authorities did not appear able at any point in time to provide all the required information.

(37) The Commission doubted from the outset whether the restructuring plan could bring about the required turnaround because of the insufficient internal rate of return compared with the expected return on capital, because of NK's underperformance compared with the benchmarks of the restructuring plan, because of the persistence of the serious structural problems that had caused KH's difficulties, and finally because of the failure of the Dutch authorities to give a proper account of the beneficiaries' significant contribution to the restructuring from their own resources. The presence of these substantial problems impeded the fulfilment of the guidelines' requirements for the authorisation of the restructuring aid.

(38) Furthermore, as stated in paragraph (16), the Commission notes that KH was declared bankrupt in February 2005. Since KH failed to achieve the required turnaround according to plan, it must therefore be noted that its long-term viability can no longer be restored by the present or any modified restructuring plan. Moreover, as pointed out by the Dutch authorities following the initiation of the formal investigation procedure, it should be noted that even NK, the specially created vehicle that was to have brought about KH's turnaround, has been declared bankrupt, thus confirming NK's serious difficulties highlighted in the decision to initiate the procedure and the inappropriateness of the restructuring plan.

(39) Since the core conditions for the granting of restructuring aid pursuant to the guidelines are not met, the Commission cannot approve the restructuring plan, and the restructuring aid cannot therefore be authorised. Nor, by the same token, can the notified measure be considered to be compatible with the common market under Article 87(3)(c) of the EC Treaty.

(40) In light of the foregoing, the Commission considers that it is not necessary to examine in detail the other conditions required for authorisation of the restructuring aid under the guidelines, including the requirement in point 40 of the guidelines that the aid amount and intensity be limited to the minimum necessary and that the beneficiary make a significant contribution from its own resources.

6.2.3. *Further considerations*

(41) In line with the requirements set out in point 24 of the guidelines, the rescue aid for KH was initially granted for no more than six months. It is also noted that within six months of the authorisation of the rescue aid for KH, the Dutch authorities notified the restructuring plan for KH.

(42) According to the terms of the restructuring plan notified by the Dutch authorities, KH transferred EUR 35,75 million from the rescue loan to OK and EUR 9,25 million to NK.

6.2.3.1. Conversion into equity of the EUR 9,25 million rescue loan transferred to NK

(43) The Dutch authorities informed the Commission that the competent Dutch court had ordered them to convert the EUR 9,25 million loan into equity on the basis of Articles 53 and 69 of the Dutch Bankruptcy Law. The conversion took place on 22 August 2005. The conversion can therefore be regarded as partial implementation of the notified measure.

(44) The Commission would remind the Dutch authorities that, in accordance with the principle that Community law takes precedence over national law, the implementation of the decision of the national court referred to in paragraph (43) is in breach of the ban on implementing any state aid measure before the Commission has approved it under Article 88(3) of the EC Treaty. The conversion of the rescue loan into equity for the purposes of restructuring ranks as unlawful restructuring aid. Since, moreover, the notified aid does not meet the requirements of the guidelines, a measure which constitutes partial implementation thereof is also incompatible. The fact that the measure was implemented by order of a national court is irrelevant in this context, since national courts, like other state bodies, are required to comply with the provisions of the Treaty.

(45) Consequently, the conversion of the EUR 9,25 million rescue loan transferred to NK pursuant to the judgment of the national court is deemed to amount to the granting of unlawful and incompatible restructuring aid to NK. Since this restructuring aid cannot be approved, it is incompatible with the common market.

(46) Pursuant to Article 14 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 [7], where negative decisions are taken in cases of unlawful aid, the Commission must decide that the Member State concerned has to take all necessary measures to recover the aid from

[7] OJ L 83, 27.3.1999, p. 1. Regulation amended by the Act of Accession of 2003.

the beneficiary. However, the Commission may not require recovery of the aid if this would be contrary to a general principle of Community law. In the case being examined here, no such principle can be invoked. Consequently, the aid granted in the form of conversion into equity of the rescue loan amounting to EUR 9,25 million must be recovered in full.

6.2.3.2. Concerning the EUR 35,75 million rescue loan transferred to OK

(47) Pursuant to the notified restructuring plan, in order to restore KH's long-term viability, KH transferred EUR 35,75 million from the total EUR 45 million state rescue loan to OK for the latter's closure. Contrary to the EUR 9,25 million rescue loan transferred to NK, this loan was not converted into equity. Therefore, the measure continues to rank as rescue aid.

(48) According to point 23(d) of the guidelines, the Member State concerned has to communicate to the Commission, not later than six months after the rescue aid measure has been authorised, a restructuring plan or a liquidation plan or proof that the loan has been reimbursed in full.

(49) In this case, the companies concerned went into bankruptcy soon after the communication of the restructuring plan. The Commission was, therefore, not in a position to authorise such plan.

(50) However, the Dutch authorities informed the Commission that the formal bankruptcy and liquidation proceedings had commenced. This is in line with point 25(d) of the guidelines, which, as an alternative to the full reimbursement of the loan or the presentation of a restructuring plan, requires the communication of a liquidation plan. The Commission authorises such liquidation plan provided that the following two conditions are met:

— the Netherlands registers its EUR 35,75 million claim on KH and/or OK as a creditor in the bankruptcy proceedings with the curator; and

— the Netherlands ensures that the company is liquidated in a manner that would put an end to the distortion of competition, i.e. the activities of the undertakings concerned should end and their assets should be sold on market terms as soon as possible. It is generally speaking the case that the sale of an undertaking as a whole involves the risk of the aid that has been granted being transferred to whoever acquires the undertaking. That risk is reduced if only the undertaking's assets are sold.

6.2.3.3. Concerning the old loans granted to KH upon incorporation

(51) Despite the fact that the old state loans granted to KH are outside the scope of the restructuring aid package and of the present procedure ([8]), the Commission wishes to make its position clear in order to help prevent any further conflicts arising in the present case between the Community rules on state aid and the application of national law by the competent courts, as happened with regard to the measure outlined in paragraphs (43) to (46) above. Its position is being made clear more specifically in relation to the legal proceedings brought before the Dutch court outlined in paragraphs (52) to (55) below.

(52) Under the notified restructuring plan, by 2016 KH was to repay in full old loans amounting to EUR 41 million, including a conditional EUR 17 million current account credit facility (hereinafter 'credit facility'), which had been granted on market terms by the state in 2002 in the wake of KH's incorporation and is outside the scope of the restructuring aid package.

(53) By letter of February 2006, the Netherlands informed the Commission that, in the context of KH and OK's bankruptcy proceedings, the curators had asked the competent national courts to order the state to pay in full the credit facility, which had been frozen by the state in the wake of the suspension of payments pending the bankruptcy of KH and OK in February 2005.

(54) The Commission notes that the above matter is under the jurisdiction of the competent national court, which will have to establish whether the state's decision was in line with the terms and conditions set forth in the credit facility termination agreement.

(55) The Commission takes the position that if the state's decision was in line with the agreement, then the competent court must uphold the state's decision and dismiss the curators' claim. If, however, the court should decide that, despite the fact that the state complied with its contractual rights and obligations, the state still must pay the full amount of the credit facility to the curators, in the framework of the said bankruptcy proceedings, such a decision could be deemed to be tantamount to granting new state aid to KH's creditors, and it would have to be notified to the Commission in accordance with Article 88 (3) of the Treaty.

7. CONCLUSIONS

(56) In the light of the foregoing, the Commission has found that the measure under review constitutes state aid within the meaning of Article 87(1) of the Treaty. The information submitted by the Dutch authorities, whether or not during the formal investigation, has confirmed that the restructuring aid which the Netherlands intends to grant to KH, by

([8]) All the old loans were granted on market terms.

means of transforming the EUR 45 million rescue loan and interest due thereon into equity capital, does not fulfil the requirements of the Community guidelines and is therefore not in accordance with Article 87(3)(c) of the Treaty.

(57) In so far as the aid measure has already been implemented through conversion of the EUR 9,25 million loan transferred to NK into equity capital, this must be recovered,

HAS ADOPTED THIS DECISION:

Article 1

The state aid measure in the form of restructuring aid for KG Holding NV amounting to EUR 45 million does not fulfil the requirements of the Community guidelines on state aid for rescuing and restructuring firms in difficulty and is therefore incompatible with the common market.

Article 2

1. The Netherlands shall take all necessary measures to recover from KG Holding NV and Kliq BV that part of the aid referred to in Article 1 that was transferred as a EUR 9,25 million rescue loan by KG Holding NV to its subsidiary Kliq BV, plus any interest.

2. Recovery shall be effected without delay and in accordance with the procedures of national law, provided that they allow the immediate and effective implementation of this Decision.

3. The amount to be recovered shall bear interest from the date on which the individual parts thereof were first put at the disposal of the beneficiaries until the date of their actual recovery.

4. The interest to be recovered pursuant to paragraph 3 shall be calculated in accordance with the methods set out in Articles 9 and 11 of Commission Regulation (EC) No 794/2004 ([9]).

Article 3

The Netherlands shall register its claim of EUR 35,75 million on the KG Holding NV and/or Kliq Reïntegratie as a creditor in the bankruptcy proceedings with the curator. The Netherlands shall ensure that the undertakings are liquidated in a manner that will put an end to the distortion of competition, with the activities of the undertakings concerned being terminated and their assets sold on market terms as soon as possible.

Article 4

The Netherlands shall inform the Commission, within two months of notification of this Decision, of the measures planned and already taken to comply with it.

Article 5

This Decision is addressed to the Netherlands.

Done at Brussels, 19 July 2006.

For the Commission

Neelie KROES

Member of the Commission

([9]) OJ L 140, 30.4.2004, p. 1.

COMMISSION DECISION

of 19 July 2006

on aid scheme C 3/2006 implemented by Luxembourg for '1929' holding companies and 'billionaire' holding companies

(notified under document number C(2006) 2956)

(Only the French text is authentic)

(Text with EEA relevance)

(2006/940/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 invited interested parties to submit their comments in accordance with the above-mentioned provisions ([1]),

Whereas:

(1) In 1997 the Council adopted a Code of Conduct for Business Taxation with a view to tackling harmful tax competition ([2]). In accordance with the commitments made under the Code, in 1998 the Commission published a notice on the application of state aid rules to measures relating to direct business taxation ([3]) emphasising its determination to apply those rules rigorously and to respect the principle of equal treatment. The present proceeding is to be seen in the context of that notice.

I. PROCEDURE

(2) By letter of 12 February 1999 (D/50716), the Commission requested Luxembourg to furnish it with preliminary information on companies exempted from taxes under a 1929 Law. By letter of 26 March 1999 (A/32604), the Luxembourg authorities provided a description of the 1929 scheme of exemption for holding companies (hereinafter called 'exempt 1929 holding companies'), as amended by the Law of 29 December 1971 and the Law of 30 November 1978.

(3) By letter of 5 July 2000 (D/53671), the Commission requested Luxembourg to provide further information on exempt 1929 holding companies, including information on the Law of 17 December 1938 on the arrangements applicable to so-called billionaire holding companies (hereinafter called 'exempt billionaire holding companies'). By letter of 20 July 2000 (A/36150), the Luxembourg authorities provided the further information requested.

(4) By letter of 26 March 2001 (D/51279), the Commission requested additional information, including the texts of the laws establishing the tax schemes in favour of exempt 1929 holding companies and exempt billionaire holding companies. By letter of 11 May 2001 (A/33928), the Luxembourg authorities provided the information requested.

(5) By letter of 11 February 2002 (D/50571), the Commission informed the Luxembourg authorities of its preliminary views about the possible aid nature of Luxembourg's tax provisions, and invited them to submit their comments in accordance with the cooperation procedure with respect to existing aid schemes introduced by Article 17(2) of Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 [now Article 88] of the EC Treaty ([4]). Following a meeting with the Commission on 19 April 2002, the Luxembourg authorities provided the requested comments by letter of 2 May 2002 (A/33288). A second meeting took place between the Luxembourg authorities and the Commission on 17 October 2002.

(6) With a view to finalising the preliminary examination of the scheme in question pursuant to the procedure laid down in Article 17(2) of Regulation (EC) No 659/1999, the Commission requested Luxembourg by letter of 9 March 2004 (A/51743) to update the information concerning the scheme by submitting all new proposed or approved provisions relating to the tax treatment of exempt 1929 holding companies. By letter of 6 May 2004, Luxembourg submitted the requested information to the Commission.

(7) On 15 September 2004, a third meeting took place between the Luxembourg authorities and the Commission during which the Commission was informed of certain aspects of draft law No 5231 proposing certain amendments to the Law of 31 July 1929 on the exempt 1929 holding companies tax scheme.

([1]) OJ C 78, 31.3.2006, p. 2.

([2]) OJ C 2, 6.1.1998, p. 1.

([3]) OJ C 384, 10.12.1998, p. 3.

([4]) OJ L 83, 27.3.1999, p. 1. Regulation amended by 2003 Act of Accession.

(8) By letter of 4 May 2005 (D/53536), the Commission asked to be provided with any information on the approval, on 19 April 2005, of draft law No 5231 so that it could complete the preliminary assessment of the scheme in question. By letters of 1 June 2005 (A/34536) and 23 June 2005 (A/35047), the Luxembourg authorities submitted the requested information to the Commission.

(9) By letter of 11 July 2005 (D/55311), the Commission informed Luxembourg that it had come to the conclusion as part of its preliminary assessment that the scheme in question (as amended following the approval by the Luxembourg Parliament on 19 April 2005 of draft law No 5231, which had become the Law of 21 June 2005 amending Article 1 of the Law of 31 July 1929 on the holding companies tax scheme) constituted aid incompatible with the common market.

(10) On 25 July 2005, a fourth meeting took place between the Luxembourg authorities and the Commission during which the matter was examined in the light *inter alia* of the amendments made to the scheme in question by the Law of 21 June 2005.

(11) By letter of 28 July 2005 (D/55780), the Commission informed Luxembourg of its preliminary assessment that the Law of 31 July 1929, as amended by the Law of 21 June 2005, was in the nature of aid incompatible with the common market and invited Luxembourg to submit its comments pursuant to Article 17(2) of Regulation (EC) No 659/1999.

(12) By letters of 5 September 2005 (D/56729) and 19 September 2005 (D/57172), the Commission urged the Luxembourg authorities to send the requested comments.

(13) Since no reply was received within the period prescribed, the Commission, by letter of 25 November 2005 ([5]), proposed to Luxembourg the following appropriate measures pursuant to Article 88(1) of the Treaty:

(a) that the Luxembourg authorities close the exempt 1929 holding companies scheme to any new applicants within 30 days from the date of acceptance of these appropriate measures;

(b) that the Luxembourg authorities take any legislative, administrative or other measures necessary to repeal the exempt 1929 holding companies scheme or to eliminate from it any aid elements within the meaning of Article 87(1) of the EC Treaty;

(c) that the Luxembourg authorities notify to the Commission any proposed amendments to the exempt 1929 holding companies scheme, within the scope of the preceding point (a), in accordance with Article 2 of Regulation (EC) No 659/1999;

(d) that the Luxembourg authorities issue, within 30 days from the date of acceptance of these appropriate measures, a public statement on the introduction of the necessary amendments in the tax legislation.

(14) In the same letter, the Commission also asked the Luxembourg authorities to inform it in writing, within one month of receipt of the proposal, whether Luxembourg accepted, pursuant to Article 19(1) of Regulation (EC) No 659/1999, unconditionally and unequivocally the appropriate measures in their entirety, and to indicate by what date at the latest the scheme would be abolished. The Commission indicated that it might otherwise initiate, in accordance with Article 19(2) of the said Regulation, proceedings pursuant to Article 4(4).

(15) By letter of 9 December 2005 (A/40451), Luxembourg informed the Commission that it did not accept the appropriate measures proposed. In the light of Luxembourg's rejection and the Luxembourg authorities' comments in the aforementioned letter, the Commission decided to initiate the procedure laid down in Article 88 (2) of the Treaty.

(16) By letters of 9 February 2006 (SG D/200621) and 28 March 2006 (SG D/201345), the Commission notified Luxembourg of the decision to initiate the procedure laid down in Article 88(2) of the Treaty together with a corrigendum to that decision.

(17) The Commission's decision (as corrected) was published in the *Official Journal of the European Union* ([6]). In its decision, the Commission called on interested parties to submit their comments. In this context, the Commission received no comments from interested third parties.

(18) Luxembourg submitted its comments by letter of 13 April 2006 (A/32917).

(19) On 6 July 2006, a further meeting took place between the Luxembourg authorities and the Commission during which the former provided additional information on the financing activities of 1929 holding companies and on those companies' possible legitimate expectation in continuing to enjoy exemption during a transitional period.

([5]) SG(2005) D/205866.

([6]) See footnote 1.

II. DESCRIPTION OF THE MEASURE

(20) The Organic Law of 31 July 1929 on the exempt holding companies introduced a tax vehicle to encourage distribution of profits accumulated by operating companies in a multinational group, while avoiding the multiple taxation of the profits received by the beneficiary holding companies and further distributed to their shareholders. In 1937, following amendments to the Law of 31 July 1929, Luxembourg introduced an ancillary exempt status for billionaire holding companies formed by an initial contribution of paid-up share capital of at least one billion Luxembourg francs (LUF). Luxembourg further introduced a participation exemption scheme whereby dividends, royalties, capital gains and liquidation proceeds from the sale of shares in participated companies are not taxable, subject to certain conditions. Luxembourg accordingly nowadays possesses, in addition to a general participation exemption scheme governed by ordinary law (e.g. Article 166 of the Income Tax Act), transposing the Parent-Subsidiary and Interest-Royalty Payments Directives ([7]), a specific exemption scheme for exempt 1929 holding companies and exempt billionaire holding companies.

(21) Under the Law of 31 July 1929, exempt 1929 holding companies are not subject to any direct taxes in Luxembourg, such as, for example, corporate income tax (*impôt sur le revenu des collectivités*), municipal business tax (*impôt commercial communal*) ([8]) and net worth tax (*taxe sur la valeur nette*) ([9]). They are, however, liable to taxes on capital, such as real estate tax (*impôt foncier*) ([10]) and the annual subscription tax (*taxe d'abonnement*) ([11]). Accordingly, dividends, interest, royalties and capital gains earned by an exempt 1929 holding company are not taxable in Luxembourg. Payments of dividends, royalties ([12]) and interest made by an exempt 1929 holding company are not subject to any withholding taxes ([13]). Lastly, there is no withholding tax on interest paid abroad by exempt 1929 holding companies as by any other Luxembourg company, while the interest received by non-exempt resident companiess is always regarded as taxable income.

(22) Interest payments made by exempt 1929 holding companies (as by any other Luxembourg company) to individuals — beneficial owners within the meaning of Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments ([14]) — who are resident in another Member State are subject to the withholding tax provided for by the said Directive, in Luxembourg. There is a similar 10 % final withholding tax on interest paid to resident individuals, introduced in Luxembourg as from 1 January 2006, to which interest payments by an exempt 1929 holding are subject.

(23) Exempt 1929 holding companies are normally excluded from the bilateral double taxation and tax fraud prevention conventions concluded by Luxembourg.

(24) As regards capital taxation, exempt 1929 holding companies are subject to a 1 % capital duty (*droit d'apport*) on cash or asset contributions ([15]). In addition, they are subject to an annual subscription tax (*taxe d'abonnement*) of 0,2 % of the paid-up share capital and share premiums' value as set on the date of closing of the preceding financial year ([16]). Exempt 1929 holding companies may borrow funds from their shareholders or from banks or other credit institutions and they may issue bonds. With a view to avoiding non-payment of subscription tax, thin capitalisation rules are applied if the funding by means of debt as opposed to

([7]) 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 (OJ L 225, 20.8.1990, p. 6), as amended by Directive 2003/123/EC of 22 December 2003; and Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (OJ L 157, 26. 6.2003, p. 49).

([8]) Luxembourg resident companies and permanent establishments of foreign companies are subject to corporate income tax levied at the maximum rate of 22 % and to municipal business tax levied at a variable rate depending on the municipality, but with an average of 7,5 %, on the taxable income corresponding to the gross income less expenses excluding non-deductible expenses such as direct taxes, hidden payments of dividends and directors' fees.

([9]) Luxembourg imposes a net worth tax on resident companies and on permanent establishments of foreign companies at a rate of 0,5 % applied as at 1 January of each year to the net assets, these being the difference between the assets estimated at their fair market value and liabilities vis-à-vis third parties.

([10]) A municipal tax levied on the value of real estate owned by undertakings.

([11]) Equal to 0,2 % of the paid-up share capital and share premiums value.

([12]) Luxembourg has abolished the tax on royalties as from 1 January 2004 (except in the case of payments abroad).

([13]) Dividends distributed by a non-exempt company are subject to withholding tax at the rate of 20 % on the gross amount paid (25 % if the withholding cost is borne by the payer), unless Directive 90/435/EEC applies or qualifying participations within the meaning of Article 147 of the Income Tax Act are involved. This withholding tax may be reduced pursuant to treaty provisions. Interest is generally not subject to any withholding taxes, unless qualified as hidden dividends. Most types of royalties paid to non-resident beneficiaries are subject to withholding tax levied at the rate of 10 % (11,11 % if the withholding cost is borne by the payer). Luxembourg recently adopted in its tax legislation the exemption provided for by Directive 2003/49/EC. This withholding tax maybe reduced or waived pursuant to treaty provisions.

([14]) OJ L 157, 26.6.2003, p. 1. Directive as last amended by Directive 2004/66/EC (OJ L 168, 1.5.2004, p. 35).

([15]) Any contribution in cash or in kind to a Luxembourg company is subject to a 1 % capital duty.

([16]) Where dividends are distributed by an exempt 1929 holding company in excess of 10 % of the paid-up capital existing on the date of closing of the financial year during which the distribution was made, the subscription tax due the following year is levied on a deemed basis of 10 times the said dividends.

equity exceeds certain financial ratios. Finally, the fees (*tantièmes*) paid to resident or non-resident members of an exempt 1929 holding company's board of directors, managers or statutory auditors are subject to a 20 % withholding tax.

Conditions

(25) Exempt 1929 holding company status is available only to companies ([17]) registered in Luxembourg, and not to one-person businesses, contractual joint ventures not in the form of a company, or permanent establishments, branches or local offices of foreign companies. The amount of subscribed capital of an exempt 1929 holding company depends on the legal form adopted. A grand-ducal decree of 29 July 1977 requires an exempt 1929 holding company to have a fully paid-up share capital of at least EUR 24 000.

(26) Companies established in Luxembourg can be registered as exempt 1929 holding companies provided they engage only in acquiring, holding and maximising the value of any forms of participation in other Luxembourg or foreign companies, including by providing loans, holding patents and licensing copyright or know-how to the participated companies. An exempt 1929 holding company is not allowed to carry on any industrial activities on its own account or to maintain a commercial establishment open to the public. An exempt 1929 holding company extending its activities beyond the above scope loses its status and is treated as a fully taxable commercial company.

(27) The authorised activities of an exempt 1929 holding company include, in particular:

(a) acquiring, holding, managing and selling equity interests in any Luxembourg or foreign company with limited liability;

(b) acquiring, holding, managing and selling Luxembourg or foreign bonds, deposit certificates and debentures;

(c) acquiring, holding, managing and selling Luxembourg or foreign companies' stocks;

(d) granting loans, advances or guarantees in any form to companies in which it has a direct equity interest. In order to safeguard such loans, a minimum 25 % equity stake in such companies is required;

(e) holding gold or commercial paper linked to the value of gold;

(f) issuing bonds or deposit certificates (whether publicly traded or privately issued);

(g) acquiring and holding patents, exploiting them by granting licences to its subsidiaries and receiving royalties in consideration (licences may also be offered to third parties, but there may be no trading therein);

(h) holding trademarks and licences that are complementary to the holding of a patent and exploiting them by receiving royalties from its subsidiaries is also allowed, but only by way of ancillary activity;

(i) holding equity interests in simple partnerships, provided the exempt 1929 holding company's share of the paid-up capital comes to at least EUR 1 240 000 and its financial liability is limited to the capital contributed.

(28) The prohibited activities include:

(a) carrying on any industrial or commercial activity or providing any kind of service;

(b) running a commercial establishment open to the public;

(c) owning land or buildings other than that used for its own premises;

(d) carrying on the activities of agent, banker, or manager on behalf of any company for consideration, unless the other company is a subsidiary;

(e) issuing short- or medium-term commercial paper;

(f) granting loans, advances or guarantees in any form to any entities other than its subsidiaries;

(g) acquiring non-patentable intellectual property rights;

(h) direct involvement in the affairs of its subsidiaries.

(29) Exempt 1929 holding companies are subject to supervision by the Luxembourg Land Registration and Estates Department (*Administration de l'Enregistrement et des Domaines*), which is entitled to inspect their books, but only as far as is necessary to confirm whether the holding companies' activities are within the limits laid down by the 1929 legislation.

([17]) These are the public limited company (*société anonyme*), the private limited company (*société à responsabilité limitée*), the limited partnership with a share capital (*société en commandite par actions*), and the cooperative company (*société coopérative*).

Exempt billionaire holding companies

(30) There is among exempt 1929 holding companies a specific form of holding company, namely the exempt billionaire holding company. This may be formed either by contributing shares in foreign companies or by increasing the paid-up share capital and reserves to at least EUR 24 million (LUF 1 billion). Exempt billionaire holding companies may opt for a tax regime whereby the subscription tax is replaced by a so-called income tax. Pursuant to the grand-ducal decree of 1937 on exempt billionaire holding companies, this income tax is levied on interest paid to bond and security holders, dividends paid to shareholders, and fees paid to directors, auditors and liquidators of such a company.

(31) Where the aggregate amount of interest paid to bond or security holders for the financial year concerned is more than EUR 2,4 million, the tax is calculated according to a specific schedule including 3 % of the interest paid, 1,8 % of the dividends, fees and remunerations up to an aggregate distribution amount of EUR 1,2 million, and 0,1 % of any dividends, fees and remunerations in excess thereof. Where the aggregate amount of interest paid to bond or security holders for the financial year is less than EUR 2,4 million, the tax is calculated according to a different schedule including 3 % of the interest paid, 3 % of the dividends, fees and remunerations up to an amount equal to the difference between EUR 2,4 million and the aggregate amount of interest paid, 1,8 % of the surplus dividends up to EUR 1,2 million, and 0,1 % of any dividends, fees and remunerations in excess thereof. As a result, exempt billionaire holding companies are not subject to the ordinary thin capitalisation rules applicable for subscription tax purposes, and no withholding tax is applied on fees and remunerations paid.

(32) The authorised activities of an exempt billionaire holding company include:

(a) providing financial assistance to any company over which it exercises, either directly or indirectly, effective control;

(b) providing financial assistance to any company in which companies it controls hold a participation of at least 25 % and with which continuous economic relations are maintained;

(c) providing financial assistance to subsidiaries effectively controlled by companies in which it holds a 25 % participation.

Exempt financial holding companies

(33) The tax exempt status described above has been extended under certain conditions to so-called exempt financial holding companies — a subcategory of exempt 1929 holding companies. These are responsible for financing the activities of the subsidiaries or affiliates of a group of companies. In this connection, companies are considered to be members of a group if they use a common denomination which constitutes the symbol of reciprocal dependence or if the companies of the same group hold a substantial participation (of at least 25 %) in their share capital and maintain continuous economic relations between them.

(34) Similarly to exempt billionaire holding companies, exempt financial holding companies may carry on a greater range of activities than exempt 1929 holding companies with respect to intra-group financing. Whereas exempt 1929 holding companies may only finance companies in which they hold a direct participation, exempt financial holding companies may grant loans to any member companies within their group. More particularly, the authorised activities of exempt financial holding companies include:

(a) financing other group members by granting loans to companies in which no direct participation is held in addition to directly participated companies;

(b) issuing bonds the proceeds of which are used to finance the activities of any other group members;

(c) performing invoice discounting activities as factor within the group;

(d) receiving cash deposits from companies within the group in order to provide advances to other companies.

Amendments to the exempt 1929 holding companies scheme

(35) On 6 November 2003, the Luxembourg Government presented to Parliament draft law No 5231 amending the Law of 31 July 1929 on the exempt 1929 holding companies scheme. At its sitting of 19 April 2003, the Luxembourg Parliament approved the above-mentioned draft subject to certain amendments. The new law was promulgated on 21 June 2005 and published in the Official Journal of the Grand Duchy of Luxembourg on 22 June 2005. The Law of 21 June 2005 entered into force on 1 July 2005.

(36) Under the Law, holding companies receiving 5 % or more of the total dividends distributed in the year by non-resident companies which are not subject to an income tax comparable to Luxembourg's income tax lose their exempt 1929 holding company status and become ordinarily taxable companies. The parliamentary documents accompanying the draft law explain that, for an income tax to be

considered comparable to Luxembourg income tax, it needs to be levied at a rate of at least 11 % (corresponding to 50 % of Luxembourg corporation tax) and that the basis of calculation of this foreign income tax has to be similar to the one applicable in Luxembourg.

(37) It is apparent from the commentaries to the Law that these amendments were adopted in order to reconcile the 1929 holding companies tax scheme with the recommendations presented to the Luxembourg authorities on 3 June 2003 by the Council as part of the review under the Code of Conduct for business taxation. In this respect, the new Law introduced a transitional regime safeguarding the existing advantages for companies enjoying exempt 1929 holding company or billionaire holding company status, from the date of its entry into force until 1 January 2011.

III. REASONS FOR THE INITIATION OF THE FORMAL INVESTIGATION PROCEDURE

(38) In its decision of 9 February 2006, the Commission found in substance that the exempt 1929 holding companies scheme constituted aid within the meaning of Article 87(1) of the Treaty. In the Commission's opinion, the scheme conferred exclusively on the holding companies in question several economic advantages consisting in exceptional exemptions from corporation, withholding, net worth and real estate taxes. The above advantages translated into reduced tax liabilities towards the Luxembourg Treasury in favour of the holding companies and the economic groups to which they belonged.

(39) These advantages appeared to the Commission to involve the use of state resources in the form of foregone tax revenue for the Luxembourg Treasury. The scheme seemed to be selective in that it was reserved for holding companies carrying on only certain types of business activity, including financial, managerial, licensing and treasury functions. The scheme was also deemed to be restricted to intra-group activities as the beneficiaries had to operate within a group in order to benefit from it. It was thus not open to all undertakings but only to those operating within a group structure, with the creation of a holding company in Luxembourg exclusively devoted to carrying on certain activities such as financing, managing holdings, coordinating and granting licences and patents.

(40) In its decision to initiate the formal investigation procedure, the Commission took the view that this advantage distorted competition and affected trade between Member States in that the financial and management activities typically carried on by exempt 1929 holding companies generally took place in international markets where competition was intense. In this respect, competition seemed to be distorted because the exempt 1929 holding companies were treated more favourably than independent service providers and financial intermediaries, including traditional banks and consultancy firms. Trade seemed to be affected because the advantages conferred by the exempt 1929 holding companies scheme benefited only holding companies exercising certain essentially cross-border financial functions.

(41) None of the derogations provided for in Article 87(2) and (3) of the Treaty seemed to be applicable, as the measure in question constituted an operating aid not linked to the execution of specific projects and it seemed merely to reduce the beneficiaries' current expenditure without contributing to the achievement of any Community objectives.

(42) The Commission also concluded that what was involved here was an existing aid measure within the meaning of Article 1(b)(i) of Regulation (EC) No 659/1999. The amendments introduced by the 2005 law amending the exempt 1929 holding companies scheme did not appear to alter the existing nature of the aid in question as they left the advantages conferred by the scheme unchanged, while temporarily limiting the circle of beneficiaries to those not receiving certain dividends subject to reduced taxation outside Luxembourg.

(43) In initiating the formal investigation procedure, the Commission called on the Luxembourg authorities to furnish any information that might be relevant for purposes of assessing the effects of the scheme in question, notably in the financial services sector. It also invited Luxembourg and interested third parties to submit their comments on the possible existence of a legitimate expectation on the part of beneficiaries such as might justify the adoption of transitional measures should it ask that the scheme in question be abolished.

IV. COMMENTS FROM THE LUXEMBOURG AUTHORITIES AND THIRD PARTIES

(44) No interested third party formally submitted comments following publication of the Commission's decision of 9 February 2006 in the *Official Journal of the European Union* ([18]). Several representatives of exempt 1929 holding companies contacted the Commission informally, however, asking to be informed *inter alia* of the legal consequences for individuals of the formal investigation procedure initiated by the Commission under Article 88(2) of the Treaty and of the legality of the tax exemptions they had received.

(45) The Luxembourg authorities sent their comments by letter dated 13 April 2006. They disagreed with the finding that the 1929 holding companies exemption scheme constituted aid within the meaning of Article 87(1) of the Treaty and

([18]) See footnote 1.

did not comment on the scheme's compatibility with the common market.

(46) In its letter of 13 April 2006 Luxembourg also refused to furnish any relevant information for purposes of assessing the measure in question and its effects on competition and trade in, among others, the areas of financial services, intra-group activities and the management of intellectual property rights. No information was forthcoming on investments managed by exempt 1929 holding companies, nor was a list provided of exempt holding companies. The Luxembourg authorities claimed it was impossible to draw up such a list because exempt 1929 holding companies were not subject to administrative authorisation.

(47) Lastly, on the issue of the existence of a legitimate expectation on the part of beneficiaries of the exemption scheme justifying the adoption of transitional measures in the event of a negative final decision, the Luxembourg authorities observed that the abolition of the exempt 1929 holding companies scheme would have such an impact on Luxembourg's tax system that the expectations of operators acting under the scheme would have to be protected. The latter could not expect a legal status to be done away with overnight.

(48) In substance, in their letter of 13 April 2006 the Luxembourg authorities dispute the finding that the tax scheme in question constitutes aid.

(49) First of all, they state that the exempt 1929 holding companies scheme confers no advantages compared with the standard taxation regime applicable to holding companies, being designed merely to avoid a multiplication of the tax burden linked to the profits distributed by operating companies. Without the exemption scheme in question, exempt 1929 holding companies would in effect be penalised from a tax point of view, the profits of an operating company being taxed once as profits of that company, a second time when they were distributed as participation income of the holding company and, lastly — in the event of a subsequent distribution — as dividends of the holding company's shareholders.

(50) Secondly, according to the Luxembourg authorities, the exempt 1929 holding companies scheme is not selective and therefore does not distort competition or affect trade between Member States. All companies in a comparable factual and legal situation, involving *inter alia* the acquisition of equity interests and the management, financing and value maximisation of shareholdings in controlled companies, can potentially benefit from the scheme.

(51) Lastly, the exempt 1929 holding companies scheme is not, so the Luxembourg authorities say, capable of distorting competition and trade within the Community because the beneficiary holding companies are exclusively passive recipients of income and are not in situations comparable to those of other operators acting as independent service providers. At all events, the Commission has not, it is claimed, shown that the scheme in question has the effect of strengthening the position of exempt 1929 holding companies compared with that of other types of holding company.

V. ASSESSMENT OF THE SCHEME

(52) Article 87(1) of the Treaty provides that 'any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.'

Aid nature of the scheme

(53) The Commission has carefully examined the exempt 1929 holding companies scheme in the light of the comments submitted by the Luxembourg authorities. The numerous objections raised are not such as to cause the Commission to alter its preliminary assessment that the tax advantages granted by the scheme to such companies constitute aid within the meaning of Article 87(1) of the Treaty.

(54) The classification of a national measure as state aid presupposes that the following cumulative conditions are met: (1) the measure confers an advantage; (2) that advantage is conferred through state resources; (3) the advantage is selective; and (4) the measure distorts or threatens to distort competition and is capable of affecting trade between Member States ([19]).

(55) In the present case, the Commission considers in substance that the 1929 Law grants tax advantages which are not confined to elimination of the double taxation of the income received by other holding companies in Luxembourg, i.e. those which are in principle taxable but which receive allowances related to taxes already paid either in Luxembourg or abroad.

(56) The Commission considers, in this context, that the scheme affords several extraordinary tax advantages and that these advantages favour certain undertakings carrying on a limited number of activities in Luxembourg generally falling within the financial sphere. Consequently, the scheme is selective in character. In view of the seriousness of the objections raised by Luxembourg, the Commission considers it necessary to give the precise reasons for finding that the scheme in question, as described above, meets all the conditions mentioned in paragraph 53.

([19]) See, for example, judgment of the Court of Justice of the European Communities in Case C-222/04 *Ministero dell'Economia e delle Finanze* v *Cassa di Risparmio di Firenze*, not yet reported, paragraph 129.

Existence of an advantage

(57) In its comments of 13 April 2006, Luxembourg stated that the exempt 1929 holding companies taxation scheme constituted a general tax scheme applicable to companies exclusively earning passive income already taxed at the time of generation, irrespective of their size, area of activity or legal form. It also stated that the scheme was justified by the overall structure of the Luxembourg tax system, which was aimed at avoiding double taxation, and that fully taxable companies could avail themselves of other, comparable forms of relief against double taxation. In particular, in Luxembourg's view, the scheme afforded no advantages for two main reasons.

(58) Firstly, the Luxembourg company taxation system provided for a number of schemes alternatively applicable to comparable situations and accessible to all operators without discrimination. As the Court of Justice had acknowledged in *Banks*, such a system could not therefore involve any advantages within the meaning of Article 87(1) of the Treaty ([20]). In that judgment, the Court had held that there was no aid where different taxation formulas, involving potential advantages in the light of the choices actually made by economic operators, were accessible to all operators without discrimination.

(59) Secondly, according to the Luxembourg authorities, the evaluation of the tax burden to which exempt 1929 holding companies were subject should take into account all the factors, both advantageous and disadvantageous, of the scheme. In their view, however, the Commission had manifestly not followed that approach. In this connection, the Luxembourg authorities claim to have provided, in their letter of 13 April 2006, three examples of holding companies that had been placed at a disadvantage by the application of the scheme in question compared with taxed holding companies.

(60) The Commission cannot share the Luxembourg authorities' conclusions. Contrary to what those authorities maintain, the scheme in question is characterised by several tax exemptions, notably from income tax, municipal business tax and net worth tax. These exemptions derogate from the rule of the taxation of the companies concerned. Moreover, they are intended not just to avoid the multiple taxation of income but to relieve from the payment of some taxes certain economic activities coming under the Law of 31 July 1929 carried on by exempt holding companies.

(61) While it is true that the 1929 exemption scheme from which exempt holding companies benefit does not cover all the taxes to which Luxembourg companies are normally subject ([21]), the present proceeding is nevertheless limited to the tax exemptions established and concerns several personal taxes from which exemption is granted ([22]). As regards direct taxes, in particular income tax, municipal business tax and net worth tax (wealth tax), the exemption enjoyed by 1929 holding companies is total.

(62) In view of the above, the Commission acknowledges that, as far as real estate tax is concerned, exempt 1929 holding companies are subject thereto in accordance with the Law of 1 December 1936 and that, contrary to what it stated in its decision of 9 February 2006, the said holding companies do not enjoy any advantages in this respect.

(63) As regards the exemption from income tax and municipal business tax, the scope of the exemption granted to 1929 holding companies in respect of the income from shareholdings (dividends and capital gains) goes far beyond the exemption of shareholdings granted in respect of dividends and capital gains earned by non-exempt holding companies with a view to preventing their double taxation. In particular, exempt 1929 holding companies are exempted therefrom, irrespective of whether or not they satisfy the conditions for benefiting from the common exemption arrangements aimed at avoiding double taxation ([23]). Unlike taxable companies, they therefore benefit automatically from these exemptions. In these circumstances, the Commission considers that the exemption in question gives exempt 1929 holding companies an advantage by mitigating the charges which are normally included in their budgets ([24]).

(64) Still on the subject of income tax and municipal business tax, the Commission would add that interest and royalties received by exempt 1929 holding companies are totally exempted therefrom, in contrast to the ordinary taxation applicable to other Luxembourg holding companies. Such exemption cannot be justified by the wish to prevent the double taxation of the income in question inasmuch as the related charges are deducted upstream by those bearing them. The exemption of this income under the Law of 31 July 1929 is therefore in the nature of an exception and contradicts the principle that interest and royalty payments are subject, at least once, to income tax. In view of the exceptional nature of this exemption, the Commission accordingly considers that exempt 1929 holding companies also benefit in this case from a mitigation of the charges which are normally included in their budgets.

(65) As regards withholding taxes on distributed income, dividends and royalties made by exempt 1929 holding companies, the Commission notes that the said holding companies are not subject to the withholding tax normally applied by Luxembourg to payments made to non-resident

([20]) Judgment in Case C-390/98 *H.J. Banks & Co. Ltd* v *The Coal Authority and Secretary of State for Trade and Industry* [2001] ECR I-6117, paragraphs 49 and 50.

([21]) Exempt 1929 holding companies are thus not exempted from payment of indirect taxes such as capital duty, registration duty and VAT.

([22]) For the purposes of this proceeding, for example, impersonal taxes, based on the nature of the transactions carried out, are not relevant.

([23]) Paragraphs 46-54 of the Commission's decision of 9 February 2006.

([24]) See, for example, the judgment of the Court of Justice in Case C-387/92 *Banco Exterior de España* [1994] ECR I-887, paragraph 14.

recipients, including — in the case of billionaire holding companies — the withholding tax imposed on directors' fees. It accordingly considers that exempt 1929 holding companies also benefit in this case from a mitigation of the charges which are normally included in their budgets.

(66) Even supposing that this withholding tax exemption benefits directly the income recipients, and only indirectly exempt 1929 holding companies, the Commission considers that it nonetheless has the effect of relieving the latter of charges normally borne by distributing companies taxable in Luxembourg. This assessment is borne out by the fact that, where a withholding is applied, the rate of tax is higher if its cost is borne by the distributor and that the latter is under no legal obligation, in such a case, to pass on the tax to the recipient of the income. Furthermore, exempt 1929 holding companies receive an indirect advantage in terms of easier access to risk/debt capital due to the higher return to investors resulting from the exemption.

(67) Finally, exempt 1929 holding companies are not subject to the net worth tax applicable to companies taxable in Luxembourg. Even supposing that this exemption has an economically limited scope, it nonetheless relieves exempt 1929 holding companies of a charge normally borne by companies in Luxembourg.

(68) It follows from all the foregoing that, in the Commission's view, the advantages in question constitute exceptional measures which are capable of favouring certain undertakings compared with other undertakings which are, in the light of the objective pursued by the said scheme — namely the prevention of multiple taxation — in a comparable factual and legal situation. The Commission considers in this context that the reference made by the Luxembourg authorities to the judgment in *Banks* is irrelevant. In that case, of the various possible formulas for applying certain taxes, none appeared *a priori* more advantageous. In the present case, however, an exemption is, in principle, more advantageous than the taxation of income. The Commission concludes from this that exempt 1929 holding companies benefit actually and not potentially from a mitigation of the charges which are normally included in their budgets.

(69) The three examples given by the Luxembourg authorities in their letter of 13 April 2006 are not of such a character as to call into question the conclusion that the scheme at issue confers advantages derogating from ordinary tax law which are not justified by the nature of the Luxembourg tax system. First of all, they concern situations which are not representative of the actual use made of the exempt 1929 holding companies scheme. Secondly, they concern only situations in which the ordinary scheme already grants total exemption from income taxes. On the other hand, Luxembourg ignores situations in which exemption is not ordinarily granted, despite the fact that, as previously observed, it is only in such situations that the scheme enables beneficiaries under it to retain a specific advantage compared with the ordinary scheme.

(70) The Commission considers, therefore, that it is not necessary to take into account all applicable direct and indirect taxes in order to determine whether there exists an actual tax advantage granted to exempt 1929 holding companies, the existence of that advantage being already sufficiently proven. The Commission would point out, moreover, that such an analysis would be impossible to carry out in view of the indeterminate number of possible situations.

(71) In conclusion, the Commission considers that the scheme in question constitutes an advantage conferred on exempt 1929 holding companies.

Selectivity

(72) The specific nature of a state measure, namely its selective application, constitutes one of the necessary elements of the concept of state aid within the meaning of Article 87(1) of the Treaty. In that regard, it is necessary to determine whether or not the tax scheme in question entails advantages accruing exclusively to certain undertakings or certain sectors of activity ([25]). In the present case, according to the Luxembourg authorities, the exempt 1929 holding companies scheme is not selective because all undertakings in comparable situations, i.e. those carrying on exclusively the activities of managing and maximising the value of participations held in controlled companies and of receiving income derived from those activities, can benefit from it.

(73) The Commission shares the view of the Luxembourg authorities that the selectivity of a measure such as the tax exemption for holding activities must be assessed in the light of comparable situations ([26]). It considers, however, that what should be taken into consideration for comparison purposes here are companies receiving income comparable to that of exempt 1929 holding companies. It would observe though that, among Luxembourg companies, only the exempt 1929 holding companies are completely exempted from tax on all the income they receive, irrespective of any tax already borne upstream on their income by companies in which they hold a participation.

(74) In these circumstances, the Commission can only conclude that such an exemption scheme is selective since it favours certain undertakings carrying on exclusively certain

([25]) See the judgment of the Court of Justice in Case C-241/94 *France* v *Commission* [1996] ECR I-4551, paragraph 24, and in Case C-200/97 *Ecotrade* [1998] ECR I-7907, paragraphs 40 and 41. See also the judgment of the Court of First Instance in Case T-55/99 *CETM* v *Commission* [2000] ECR II-3207, paragraph 39.

([26]) See in this connection the judgment of the Court of Justice in Case C-143/99 *Adria-Wien Pipeline* v *Finanzlandesdirektion für Kärnten* [2001] ECR I-8365, paragraph 41.

activities among the various undertakings and activities which are subject to the risk of multiple taxation.

(75) This assessment is borne out, moreover, by the fact that, according to the Luxembourg authorities, the Law of 31 July 1929 is designed to prevent an excessive extension of this favourable regime to companies other than exempt 1929 holding companies so as to prevent it from placing an undue burden on the state budget. The Commission would point out in this connection that a justification based on the nature or overall structure of the tax system must reflect the consistency of a specific tax measure with the internal logic of the tax system in general ([27]). Such cannot be the case here, however, inasmuch as Luxembourg has not justified, by reference to the nature or overall structure of the national tax scheme, the exceptional arrangement from which exempt 1929 holding companies alone benefit.

(76) The Commission would point out, moreover, that the benefit of the exemption under the Law of 31 July 1929 is subject to fulfilment of several conditions linked essentially to the existence of a registration system monitored by the authorities and to compliance with certain legal requirements relating to minimum net worth and to the actual, exclusive pursuit of certain strictly defined activities. In the Commission's view, the existence of these stringent criteria enhances the selective nature of the scheme in question.

(77) The Commission would note in this respect that exempt 1929 holding companies must limit their activities to the acquisition of participations, in whatever form, in other undertakings and to the management and value maximisation of those participations. The summary definition of the value maximisation of participations given in the Law of 31 July 1929 has been clarified by the Land Registration and Estates Department, which has interpreted it broadly as including several economic activities, directly or indirectly linked to the value maximisation of participations, taking the form notably of financing activities. Holding companies are thus authorised to grant long- or short-term advances and loans to companies in which they directly hold a participation ([28]).

(78) Under the Law of 31 July 1929, collateralisation in favour of creditors of companies in which exempt 1929 holding companies hold a participation and collateralisation of their capital increases also come under the concept of the value maximisation of participations. Moreover, in addition to equity participations, exempt 1929 holding companies may hold public or private bonds, whether or not quoted on the regulated markets, and whether or not issued by the public sector. Exempt 1929 holding companies may also hold only bonds, independently of or in conjunction with participation management activities. It is thus possible for financial holding companies to broaden the circle of potential financing beneficiaries and in so doing to grant loans to all companies forming part of the group and hence to all companies sharing a common name which are at least 25 %-held by a common parent company.

(79) Furthermore, certain activities are presumed to be equivalent to the acquisition of a participation, even if no shares are held by the exempt 1929 holding company in question. A holding company may thus hold patents and, although it may not exploit or negotiate them, it may grant exploitation licences to other companies either outside or within the group to which it belongs and hence collect a royalty without losing the benefit of exemption.

(80) The activities which exempt 1929 holding companies are authorised to carry on also include the provision of advice on management and investment by investment funds. The purpose of this activity is to provide advice to collective investment undertakings on the management of the portfolio entrusted to them. It is normally carried on by consultancy firms which are in principle taxable under ordinary tax law. However, where certain specific conditions are met, it is possible for a consultancy firm to opt for 1929 holding company status ([29]).

(81) It follows from the above that the activities which a 1929 holding company may carry on are strictly limited by the Law of 31 July 1929, the pursuit of other activities being sanctioned by the withdrawal of tax-exempt status. The Commission considers that these restrictions confirm the selective nature of the exemption scheme for exempt 1929 holding companies. Moreover, as the Commission mentioned in its decision of 9 February 2006, it suffices to point out that several economic sectors cannot benefit from the advantages offered by the scheme. Thus, undertakings carrying on activities other than those authorised concerning participation value maximisation and activities falling

([27]) See the judgment of the Court of Justice in Case C-409/00 *Spain* v *Commission* [2003] ECR I-1487, paragraph 52, the judgment of the Court of First Instance in Joined Cases T-92/00 and T-103/00 *Diputación Foral de Álava and Others* v *Commission* [2002] ECR II-1385, paragraph 60 and the case law cited.

([28]) The granting of loans comes under the concept of the value maximisation of participations and is compatible with pure holding company status, but it must be an activity ancillary to the holding of a participation. The ancillary nature of the activity is not assessed by reference to the amount of the loan or to the purchase price or value of a participation. The authorities require, rather, that the exempt 1929 holding company should hold a substantial participation in the company being financed. A participation is deemed to be substantial where it amounts to 25 % of the capital of the company being financed. In the case of quoted companies, however, a lower level of shareholding does not rule out the granting of credit if a substantial part of the securities are available (floating) on the market. It should be noted that any financing must be terminated before or at the same time as the participation is disposed of.

([29]) To qualify for 1929 holding company status, a consultancy firm must satisfy a series of requirements laid down by the tax authorities in Treasury Ministry Decision No 12.061 of 17 October 1968. In particular, it must have as its object the supervision and advising of a single open-ended or closed-ended investment company and it must invest at least 5 % of its capital in the company receiving its advice, with a minimum of EUR 50 000, the remainder being investable in other transferable securities of outside companies. The consultancy firm must have a company capital of at least EUR 76 000.

within several sectors, such as manufacturing, agriculture and commerce, are excluded from the benefit of the scheme.

(82) The Commission considers that no objective explanation can justify such a tax treatment specifically reserved for exempt 1929 holding companies, seeking as it does, by thus limiting its application to certain undertakings, to place them at an advantage compared with their competitors.

(83) The fact that the scheme in question is accessible only to Luxembourg undertakings carrying on a limited number of activities strengthens this assessment. In order to benefit from the exemption scheme in question, any undertaking wishing to maximise the value of its investments must set up a separate entity in Luxembourg for the purpose of carrying on exclusively the activities authorised by the 1929 legislation. The establishment of such a structure therefore entails investments on top of the normal costs of an investment activity. Only undertakings with a group structure and significant financial resources ([30]) of sufficient amount to establish in Luxembourg a structure devoted to the activities of managing and financing participations are able to benefit from the scheme. Such undertakings include, for example, exempt billionaire holding companies.

State resources

(84) With regard to the state origin of the advantages resulting from the application of the scheme in question, it should be pointed out that the concept of aid is more general than that of subsidy because it embraces not only positive benefits, such as subsidies themselves, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, therefore, without being subsidies in the strict sense of the word, are similar in character and have the same effect ([31]). It follows that a scheme, such as the one at issue here, by which the public authorities grant to certain undertakings exemption from the tax normally due, which, although not involving a transfer of state resources, places beneficiaries in a more favourable financial situation than other taxpayers constitutes state aid within the meaning of Article 87(1) of the Treaty ([32]). In the present case, therefore, although the exemptions resulting from the application of the exempt 1929 holding companies scheme do not constitute transfers of state resources, it cannot be denied that they lead to a loss of tax revenue and hence constitute state financing.

Distortion of competition and effect on trade between Member States

(85) According to Luxembourg, the exempt 1929 holding companies scheme is not capable of distorting competition and trade within the Community because the beneficiary holding companies are exclusively passive recipients of income and are not in situations comparable to those of other operators acting as independent service providers. Nor, according to Luxembourg, has the Commission proved that the scheme has the effect of strengthening the position of exempt 1929 holding companies compared with that of other holding companies.

(86) The Commission would point out that, under the settled case law of the Court of Justice of the European Communities, for a measure to distort competition it is sufficient that the recipient of the aid competes with other undertakings on markets open to competition ([33]) and that a measure affects intra-Community trade when state financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade ([34]).

(87) The Commission considers that exempt 1929 holding companies are active in the financial sector, where they perform specific activities such as providing loans to other group members, issuing bonds, performing invoice discounting and managing cash deposits on behalf of both directly and indirectly controlled companies and other companies in a group to which an exempt 1929 holding company belongs, or providing advice on the management of investment funds. As indicated above, exempt financial holding companies and exempt billionaire holding companies enjoy increased operational flexibility under the 1929 legislation in the pursuit of such financing activities. Exempt 1929 holding companies are also active in purchasing, managing and licensing patents on behalf of directly and indirectly owned subsidiaries, or for other companies in the group.

(88) In accordance with the process of deregulation which has characterised the Community market in financial services, competition in this sector is based primarily on the elimination of any institutional restrictions to the pursuit of financing activities in the common market and on transparency and equality of conditions in the pursuit of such activities where they are comparable. Competition is distorted, however, by the scheme in question inasmuch as exempt 1929 holding companies enjoy complete exemption from the direct taxes normally applicable in Luxembourg to the income from such activities, despite

([30]) See the judgment of the Court of First Instance in Joined Cases T-92/00 and T-103/00, cited above in footnote 27, paragraphs 38-40.

([31]) See *inter alia* the judgments of the Court of Justice in Cases C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2001] ECR I-8365, paragraph 38; C-501/00 *Spain* v *Commission* [2004] ECR I-6717, paragraph 90 and the case law cited; Case C-66/02 *Italy* v *Commission*, not yet reported, paragraph 77; and Case C-222/04, referred to above in footnote 19, paragraph 131, and the case law cited.

([32]) See, for example, the judgment of the Court of Justice in Case C-387/92 *Banco Exterior de España* [1994] ECR I-887, paragraph 14.

([33]) Judgment of the Court of First Instance in Case T-214/95 *Het Vlaamse Gewest* v *Commission* [1998] ECR II-717.

([34]) Judgment in Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671, paragraph 11.

the fact that those activities are taxable where they are carried on by independent service providers or service providers who do not take the specific form of an exempt 1929 holding company.

(89) Moreover, in view of the fact that the legal form of exempt 1929 holding company is frequently chosen by groups having an international dimension or whose activities cover various sectors, including the trading sector, trade between Member States is affected because of the tax advantages awarded to trading multinationals availing themselves of the services of exempt 1929 holding companies. Furthermore, exempt 1929 holding companies provide intra-group services and can, within certain limits, take part in the industrial and commercial activities of participated companies — which, as the Court of Justice confirmed in its recent judgment in *Fondazione Cassa di Risparmio di Firenze* [35], constitutes a fully fledged economic activity. For all these reasons, and because of the commercial activities carried on by the groups to which exempt 1929 holding companies belong, the effect on trade and the distortion of competition are also present at the level of those groups.

(90) These conclusions are strengthened by the finding of the considerable impact which the tax exemptions in question have on the choice of Luxembourg as a preferred financial centre. In this connection, the Commission considers it appropriate to refer to articles that have appeared in the press [36], according to which the Luxembourg financial system is founded on the holding companies tax exemption scheme. This is evidence that financial multinationals use the structure of holding companies, including exempt 1929 holding companies, in Luxembourg to minimise their tax burden. According to these press articles, there are getting on for 15 000 exempt 1929 holding companies registered in Luxembourg.

(91) Despite the lack of data from the Luxembourg authorities making it possible to establish the aggregate turnover achieved by exempt 1929 holding companies, the Commission considers there can be no denying how important the scheme is to the financial sector in Luxembourg or how substantial are the resulting distortions of competition and trade.

Compatibility

(92) The Commission considers that the state aid granted to exempt 1929 holding companies cannot be considered compatible with the common market. The Luxembourg authorities have advanced no arguments to show that any of the exceptions provided for in Article 87(2) and (3) of the Treaty are applicable in this case.

(93) The exceptions provided for in Article 87 (2) of the Treaty, which concern aid of a social character granted to individual consumers, aid to make good the damage caused by natural disasters or exceptional occurrences and aid granted to certain areas of the Federal Republic of Germany, clearly do not apply in this case.

(94) The same goes for the exception provided in Article 87(3)(a) of the Treaty, which provides for the authorisation of aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment. Likewise, the scheme cannot be considered a project of common European interest or a remedy to a serious disturbance in the economy of Luxembourg, as provided for by Article 87(3)(b) of the Treaty. Nor does it have as its object the promotion of culture and heritage conservation as provided for by Article 87(3)(d) of the Treaty.

(95) As regards lastly Article 87(3)(c) of the Treaty, which permits aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest, the Commission would point out that the tax advantages granted to exempt 1929 holding companies are not linked to investment, job creation or specific projects. They simply consist in a mitigation of the charges which should normally be borne by the companies concerned in the course of their business and must therefore be considered to be operating aid. In line with established Commission practice, such aid cannot be considered compatible with the common market if it does not facilitate the development of certain activities or of certain economic areas and if it is not limited in time, degressive or proportionate to what is necessary to remedy specific economic handicaps.

(96) The Commission would observe that the mere fact that the tax advantages in question are exclusively reserved for companies registered in Luxembourg as exempt 1929 holding companies seems to contravene the freedom of establishment of business entities established in Luxembourg as well as being formed in other Member States [37].

(97) The Commission would point out in this connection that only companies established in company form in Luxembourg can benefit from the advantages afforded by the Luxembourg tax scheme to exempt 1929 holding companies and that this cannot be justified by the nature of the scheme. It would appear that a foreign undertaking carrying on activities comparable to those of an exempt 1929 holding company, including through a permanent establishment, an agency or a branch of a foreign company

[35] Case C-222/04, cited above in footnote 19, not yet reported, paragraph 112.

[36] See the interview with Carlo Thelen, a member of the Luxembourg Chamber of Commerce, published in the *International Herald Tribune* on 9 February 2006.

[37] Judgment of the Court of Justice in Case C-307/97 *Saint-Gobain* [1999] ECR I-6161.

within the meaning of Article 43 of the Treaty, cannot benefit from the advantages afforded by the exempt 1929 holding companies scheme. Against this background, the Commission cannot accept the Luxembourg authorities' commitment not to oppose the extension of exemption status under the Law of 31 July 1929 to include permanent establishments in Luxembourg of foreign companies which satisfy the conditions laid down in that Law. Article 87(1) of the Treaty makes no distinction according to the causes or aims of state aid, but defines it in terms of its effects ([38]). The Commission therefore confirms its preliminary assessment that the scheme in question places, first and foremost, foreign undertakings operating in Luxembourg which do not take the form of a Luxembourg company at a disadvantage compared with holding companies which do take the form of a Luxembourg company. This discrimination may therefore constitute a barrier to the freedom of establishment of foreign companies in Luxembourg contrary to the Treaty and hence incompatible with the common market.

(98) The Commission would also point out in this connection that the procedure provided for in Article 88 of the Treaty must never produce a result which is contrary to other specific provisions of the Treaty. State aid, certain conditions of which contravene other provisions of the Treaty, cannot therefore be declared by the Commission to be compatible with the common market ([39]). In the present case, as already indicated, it would appear that the scheme in question would not benefit a foreign company operating in Luxembourg through a secondary establishment taking the form of a permanent establishment, an agency or a branch, within the meaning of Article 43 of the Treaty, taxable in Luxembourg. If a Member State grants, even indirectly, a tax advantage to undertakings having their registered office in its territory, while refusing to allow undertakings having their registered office in another Member State to benefit from that advantage, then the difference in treatment between these two categories of beneficiary is in principle prohibited by the Treaty, provided that there is no objective difference in situation between them.

(99) In the light of all the above considerations, the Commission considers that the scheme in question cannot be considered compatible with the common market.

VI. CONCLUSIONS

(100) The Commission finds that the tax scheme applicable to exempt 1929 holding companies constitutes state aid within the meaning of Article 87(1) of the Treaty and that none of the exceptions provided for in Article 87(2) or (3) of the Treaty applies. It also finds that, in spite of the amendments to the exempt 1929 holding companies scheme introduced by the Law of 21 June 2005, the scheme still affords all the tax advantages in question, and this despite the fact that the circle of beneficiaries under the scheme is restricted to holding companies receiving less than 5 % of their dividends from foreign companies subject to less than 11 % corporation tax and to holding companies receiving dividends from foreign companies subject to at least 11 % corporation tax or from Luxembourg companies. The Commission concludes from this that the exempt 1929 holding companies scheme, as amended by the Law of 21 June 2005, constitutes state aid within the meaning of Article 87(1) of the Treaty and that none of the exceptions provided for in Article 87(2) or (3) of the Treaty applies.

(101) The Commission notes that the exemption granted by the 1929 legislation has not been fundamentally modified since the Treaty entered into force. It considers, therefore, that the scheme in question constitutes existing aid within the meaning of point (b)(i) of Article 1 of Regulation (EC) No 659/1999. The amendments to the exempt 1929 holding companies scheme provided for by the Law of 21 June 2005 do not, in its view, introduce any new aid elements and do not increase the number of beneficiaries; the measure accordingly retains its nature as existing aid.

(102) The Luxembourg authorities have argued that the Commission approved the amendments introduced by the Law of 21 June 2005 within the Council's Code of Conduct Group devoted to scrutinising harmful tax measures in the light of the Code of Conduct for Business Taxation ([40]) and that, as a result, the exempt 1929 holding companies scheme is in conformity with the Treaty. In response to this, the Commission would point out firstly that Article 87 does not exclude from its scope tax measures of any description. Secondly, neither the Law of 31 July 1929 nor any of its amendments, including those introduced by the Law of 21 June 2005, were notified to the Commission in accordance with Article 88(3) of the Treaty. Consequently, the Commission has not had occasion to decide on the compatibility of the scheme in question with the state aid rules.

(103) No conclusions can therefore be drawn from the fact that the Commission took part in the proceedings of the Code of Conduct Group, the aim of which was to examine the harmful character of the tax measures in question. Suffice it to say that the procedure for examining tax schemes from a state aid point of view is legally independent of the work of the Code of Conduct Group. Moreover, the scope of the examination of the exempt 1929 holding companies scheme by the Code of Conduct Group was narrower than that of the present examination inasmuch as the Group focused solely on the exemption of dividends received by such companies.

([38]) Judgment of the Court of Justice in Case C-159/01 *Netherlands* v *Commission*, not yet reported, paragraph 51 and the case law cited.

([39]) Judgment of the Court of Justice in Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857.

([40]) See footnote 2.

(104) It follows from this that the Group's examination cannot prevent the Commission from carrying out the present assessment or call into question the Commission's finding that the exempt 1929 holding companies scheme governed by the Law of 31 July 1929, as amended by the Law of 21 June 2005, constitutes state aid incompatible with the common market within the meaning of Article 87(1) of the Treaty.

(105) The Commission considers that it is necessary to put an end to the granting of the various advantages conferred by the tax exemption scheme applicable to exempt 1929 holding companies either by abolishing them or by modifying them so as to make them compatible with the common market. As from the date of notification of this Decision, the advantages conferred by the scheme or its constituent parts may no longer be granted to new beneficiary companies registered in the form of exempt 1929 holding companies. To that end, the Luxembourg authorities will amend their legislation by 31 December 2006 at the latest.

(106) With regard to existing exempt 1929 holding companies which currently enjoy tax exemption under the scheme described in this Decision, the Commission acknowledges that the existing aid nature of the scheme prevents any aid granted before the date of this Decision from being recovered.

(107) The Commission takes note of the fact that interested third parties did not submit any comments or other information relevant to determining whether there is, on the part of beneficiaries of the scheme in question, a legitimate expectation such as might justify the adoption of individual transitional measures before the aid scheme is abolished. It has examined the information submitted by the Luxembourg authorities on 1929 holding companies' financing activities and the other arguments presented by those authorities concerning the legitimate expectations of current beneficiaries. The thrust of these is that the said beneficiaries should be allowed to continue enjoying the scheme's effects during a transitional period before it is abolished altogether.

(108) In this respect the Commission would point out firstly that, in the light of the judgment of the Court of Justice of 22 June 2006 ([41]), neither Luxembourg nor the beneficiaries under the scheme can claim a legitimate expectation in the maintenance of the exempt 1929 holding companies scheme during the transitional period laid down by the Council (in the context of the work of the Code of Conduct Group) for dismantling those parts of the scheme that are deemed to be harmful. The state aid regime based on Articles 87-89 of the Treaty which is the subject matter of this proceeding is distinct from the Council's activities as part of the above-mentioned work.

(109) The Commission would point out secondly that, although the exempt 1929 holding companies scheme is a permanent scheme, beneficiaries cannot in principle claim a legitimate expectation in its continued existence beyond the tax year to which the exemption applies. In particular, the scheme is not conditional on the carrying out of specific investments by beneficiaries, but is instead limited to exempting the income received by exempt 1929 holding companies during the tax period concerned.

(110) Admittedly, however, the exempt 1929 holding companies scheme is still governed by the Law of 31 July 1929, which has not been significantly modified since it was promulgated. Although such longevity (76 years) is no guarantee of the scheme's permanence or of its compliance with the state aid rules, it may have given beneficiaries the impression that a tax scheme closely bound up with their activities would not be terminated all of a sudden and that they could reasonably expect those activities to continue. The business of 1929 holding companies consists, moreover, in the provision of medium- and long-term financing. This business is distinct from that of short-term financial trading and cannot be carried on outside of a lasting stable environment.

(111) It is true that existing 1929 financial holding companies have invested heavily in the multinational groups to which they belong. This investment is aimed among other things at setting up and developing those multinational groups' infrastructure so as to coordinate and promote the growth of their business activities. Any questioning of their status would therefore lead to difficult and complex reorganisation operations which would take some time to complete.

(112) Similarly, medium- and long-term commitments have been entered into towards staff and outside service providers so as to enable holding companies to perform the activities related to the international groups to which they belong. According to the Luxembourg authorities, there are almost 13 000 exempt 1929 holding companies currently active in Luxembourg; these contribute to the country's attractiveness as an international financial centre, the active population of which consists in any case of no more than 110 000 workers. The Commission must therefore be mindful of the relatively serious consequences that a decision to immediately abolish the exempt 1929 holding companies scheme might have for employment and economic growth in Luxembourg.

(113) In view of the above, the Commission considers it reasonable to grant a transitional period to exempt holding companies existing on the date of this Decision. This transitional period will end on 31 December 2010. However, those companies which continue to benefit from the exemption scheme until 31 December 2010 will not be able to form the subject matter of any total or partial transfer for consideration of their capital throughout the duration of this transitional arrangement, the reason being

([41]) Joined Cases C-182/03 and C-217/03 *Kingdom of Belgium and Forum 187 asbl* v *Commission*, not yet reported, paragraphs 150-154.

that, in view of their nature as holding companies, when their parts are disposed of they can no longer have any legitimate expectation of continuation of the tax exemption scheme. In the case of income exemption on and after 1 January 2011, application of the exempt 1929 holding companies scheme will therefore be unlawful and may give rise to recovery of any advantage granted.

HAS ADOPTED THIS DECISION:

Article 1

The tax scheme currently in force in Luxembourg in favour of holding companies exempted on the basis of the Law of 31 July 1929 (hereinafter called 'exempt 1929 holding companies') is a state aid scheme incompatible with the common market.

Article 2

Luxembourg shall abolish the aid scheme referred to in Article 1 or amend it to make it compatible with the common market by 31 December 2006 at the latest.

As from the date of notification of this Decision, the advantages of the scheme or of its component parts may no longer be conferred on new beneficiaries.

In the case of exempt 1929 holding companies benefiting under the scheme referred to in Article 1 on the date of this Decision, the scheme's effects may be prolonged until 31 December 2010 at the latest. However, those companies which continue to benefit under the scheme referred to in Article 1 until 31 December 2010 may not form the subject matter of any total or partial transfer for consideration of their capital throughout the duration of this transitional exemption arrangement.

Article 3

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

Article 4

This Decision is addressed to the Grand Duchy of Luxembourg.

Done at Brussels, 19 July 2006.

For the Commission

Neelie KROES

Member of the Commission

COMMISSION DECISION

of 8 November 2006

on State aid C 11/06 (ex N 127/05) which Italy is planning to implement for AEM Torino

(notified under document number C(2006) 5276)

(Only the Italian version is authentic)

(Text with EEA relevance)

(2006/941/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 called on interested parties to submit their comments pursuant to the provision(s) cited above ([1]),

Whereas:

PROCEDURE

(1) By letter dated 21 March 2005, Italy notified the Commission of the aid it intended to grant to AEM Torino for the stranded costs in the energy sector. The Commission asked supplementary information with letters dated 4 May 2005, 19 July 2005, and 14 November 2005. Italy provided the Commission with further information by letters dated 27 June 2005, 5 July 2005, 3 October 2005, 1st February 2006.

(2) By letter dated 4 April 2006, the Commission informed Italy that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid. Italy did not reply to the letter of the Commission and provided no observations in the procedure.

(3) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* ([2]). The Commission called on interested parties to submit their comments.

(4) The Commission received no comments from AEM Torino. No other interested parties submitted observation either.

DESCRIPTION OF THE MEASURE

(5) The measure under assessment concerns the reimbursement that Italy intends to grant to AEM Torino for the stranded costs in the energy sector. AEM Torino is one of the so-called '*aziende municipalizzate*' and is active, in particular, in the energy sector. The measure is based on a similar measure approved by the Commission on 1 December 2004 ([3]).

(6) The amount of the aid is EUR 16,338 million, to be given in the form of grants.

(7) Italy indicated its intention to submit an annual report on the implementation of the measure.

(8) Italy indicated that the measure under assessment cannot be cumulated with any other aid.

CUMULATION AND THE DEGGENDORF JURISPRUDENCE

(9) On 5 June 2002, the Commission has taken a negative decision on State aid granted by Italy to public utilities owned by local public administrative bodies (hereinafter, '*municipalizzate*') in the form of tax exemptions and subsidised loans to public utilities with a majority public capital holding ([4]) (State aid C 27/99, ex NN 69/98).

(10) The Commission decision declared such non-notified schemes unlawful and incompatible and imposed to the Italian State to recover any possible amount disbursed under those schemes ([5]).

(11) The recovery process has been very slow. Italy has adopted Law 18 April 2005, n. 62 whose article 27 provides for the recovery of the aid granted to the *municipalizzate* in application of the Commission decision. However, beneficiaries can be allowed to repay the aid in instalments, over a period of 24 months. Such provision has been enforced by a decision taken by the *Agenzia delle Entrate* on 1 June 2005.

(12) According to its own submissions in the pending Case T-297/02 *ACEA v Commission*, AEM Torino has benefited from the aid schemes assessed in the Commission Decision 2003/193/EC, both by benefiting from the tax exemptions in 1997, 1998 and 1999 and by receiving subsidised loans from the Cassa Depositi e Prestiti.

([1]) OJ C 116, 17.5.2006, p. 2.

([2]) Cf. footnote 1.

([3]) Commission decision of 1 December 2004, on case N 490/00, in particular the part on the 'stranded impianti'.

([4]) OJ L 77, 24.3.2003, p. 21.

([5]) Article 3 of the Commission decision stipulates that all necessary measures must be taken by Italy in order to recover from the beneficiaries the unlawful aid thus granted.

(13) Further, according to information provided by Italy, AEM Torino has submitted information, in the ordinary procedures of tax assessment and collection, pursuant to the decision of the *Agenzia delle Entrate*. AEM Torino should pay the ascertained amount of illegal aid within 60 days as from the communication of the result of the assessment that, according to the information sent by Italian authorities, should have been notified by the *Agenzia delle Entrate* not later than 11 January 2006. No information has been provided by Italy on the effective payment by AEM Torino in the deadlines indicated.

(14) According to the information sent by the Italian authorities in the present case, AEM Torino would not have benefited from loans granted by the *Cassa Depositi e Prestiti*.

(15) Since the Commission cannot control cumulation between the old illegal aid received in application of the Italian scheme for the *municipalizzate* and the new aid under examination, it has asked Italy to ensure that such effect was avoided by taking the commitment to pay the aid for the stranded costs only after the previous illegal aid had been paid back. Italy declined to do so.

REASONS FOR OPENING THE PROCEDURE

(16) The Commission has found that the measure under assessment should be considered State aid.

(17) The Commission has then analysed the compatibility of the measure with State aid rules, in particular in light of the Commission Communication relating to the methodology for analysing State aid linked to stranded costs ([6]). It found that the methodology used for the calculation of the amount and the calculation itself did satisfy all the elements indicated in the Communication.

(18) However, in its judgement of 15 May 1997 ([7]), the Court of Justice has stated that 'when the Commission examines the compatibility of a State aid with the common market it must take all the relevant factors into account, including, where appropriate, the circumstances already considered in a prior decision and the obligations which that decision may have imposed on a Member State'. According to the Court of Justice, a new aid may not be assessed as compatible with the common market as long as the old unlawful aid has not been repaid, since the cumulative effect of the aids may distort competition in the common market to a significant extent.

(19) Therefore, pursuant to the above case-law, the Commission assesses a new aid measure taking into account if the beneficiary of the new aid has fully repaid any previous aid that has to be recovered pursuant to a negative decision taken by the Commission.

(20) By applying the principle stated in the above judgement to the present case, the Commission realizes that: a) AEM Torino has benefited from a previous aid, notably the aid granted to the municipalizzate (see paragraphs 9 to 15 above), that has to be recovered pursuant to the Decision 2003/193/EC; and b) the Italian authorities have not complied yet with the recovery obligation contained in the Decision 2003/193/EC. It is true that this decision concerns a scheme, but it also orders recovery of illegal and incompatible aid paid out under that scheme. Moreover, AEM Torino has expressly admitted that it had benefited from that scheme and there are no reasons to believe that, in its particular case, the measures at stake do not constitute aid, or constitute existing aid, or have been declared compatible with the common market.

(21) After four years from the adoption of the Decision 2003/193/EC the Italian authorities still have to recover the illegal aids. They have informed the Commission that they are still in the process of fulfilling their recovery obligation by adopting and implementing the appropriate administrative measures.

(22) In particular Italy has indicated that AEM Torino has submitted a declaration to the *Agenzia delle Entrate* committing to pay the sums that the *Agenzia* will indicate. However, they have not been able to indicate:

— The amount that AEM Torino has to pay back in the recovery process;

— The conditions for the payment: Italy indicates that the company should pay back as of 11 March 2006, but failed to provide any assurance that the payment would be complete (including interests) and immediate (not using the 24 months delay foreseen in the Law 18 April 2005, n. 62).

(23) Further, it is unclear if AEM Torino has benefited from the subsidised loans granted by the Cassa Depositi e Prestiti which were declared illegal by the previous decision, and, in case it did, if it has reimbursed them.

(24) In conclusion, Italy has not clarified whether the previous aid that in all likelihood has been received by AEM Torino has been recovered yet. Based on the above mentioned information, it should be inferred that AEM Torino may have received and not yet reimbursed certain aid amounts granted under the scheme declared incompatible by the Decision 2003/193/EC.

([6]) Adopted by the Commission on 26.7.2001. Available on the Commission's Competition Directorate General's web site at the following address: http://europa.eu.int/comm/competition/state_aid/legislation/stranded_costs/pt.pdf. Communicated to Member States by letter ref. SG(2001) D/290869 of 6.8.2001.

([7]) Court of Justice, 15.05.1997, *TWD/Commission,*C-355/93, *Rec.*, I-2549, par. 25-26 (the 'Deggendorf' judgement).

(25) The Commission is unable to determine the amount of aid which AEM Torino had already received prior to the new aid under examination and which still has to be reimbursed and cannot assess the cumulative effect of both the 'old' and 'new' aid accruing to AEM Torino and its likely distortionary impact on the common market.

(26) The Commission, pursuant to the Deggendorf judgement, must take into account the circumstances already considered in a prior decision and the obligations which that decision may have imposed on a Member State and cannot decide upon the compatibility with the common market of a new aid as long as the old unlawful aid has not been repaid.

(27) Further, aid to reimbourse stranded costs cannot be cumulated with any other aid.

(28) Only a commitment to ensure that the payment of the new aid would follow after the full reimbursement of the previous aid would have avoided any risk of cumulative effect of the two aid measures and any distortion of competition, under the principle established by the Court in the Deggendorf judgement.

(29) Italy has been asked repeatedly to take such commitment but has refused to do so.

(30) Thus, the cumulative effect of the two aids was present but could not be fully assessed by the Commission. Therefore, at that stage, the notified aid could not be declared compatible with the common market.

OBSERVATION BY THE ITALY AND AEM TORINO

(31) Neither Italy nor the beneficiary dispelled the doubts in the decision to open the procedure. Italy did not reply to the letter opening this procedure. AEM Torino neither submitted any information.

ASSESSMENT OF THE MEASURE

(32) The grounds on which the Commission opened the procedure have not been disputed. The measure constitutes an aid that can be declared compatible on the basis of the methodology for the stranded costs. However, because of the potential cumulation with a previous aid that the beneficiary has not reimbursed, the Commission cannot control the combined effect of the two aids.

(33) Italy has not provided any information that would allow the Commission to assess the potential cumulation. Furthermore, the recovery process has been particularly slow and difficult. Therefore, the Commission decided on 19 January 2005 to refer the matter to the Court of Justice under art. 88(2) of the EC Treaty, in order to ensure an immediate and effective execution of the Decision 2003/193/EC.

(34) On 1st June 2006, the Court ruled [8] that, by failing to take within the prescribed period all the measures necessary for repayment of the aid found to be unlawful and incompatible with the common market, Italy has failed to fulfil its obligations under that article.

(35) The Commission has to ensure that the granting of the new aid takes place only at a time when this risk of cumulation can be excluded, that is only after AEM Torino has fully reimbursed the illegal and incompatible aid received.

(36) As a consequence, the Commission has to follow closely that the condition mentioned above is fully respected.

(37) Consequently, Italy should be allowed to grant the new aid only after having submitted evidence to the Commission about the full recovery from AEM Torino.

CONCLUSIONS

(38) In light of the foregoing, the Commission confirms its assessment that the notified measure concerning aid for stranded costs that Italy intends to grant to AEM Torino is to be considered an aid which is compatible with the EC Treaty.

(39) However, the investigation has confirmed that the Commission is unable to control that the combined effect of the new aid and the previous illegal and incompatible aid brings about undue distortion of competition which could be contrary to the EC Treaty.

(40) Henceforth, acting on the basis of article 7 (4) of Regulation (EC) n. 659/1999 [9], the Commission concludes that the notified aid shall not be granted to the beneficiary before it will have reimbursed the previous illegal and incompatible aid.

(41) Finally, before granting the aid under assessment, Italy has to submit to the Commission evidence that the previous aid has been fully reimbursed by AEM Torino,

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(8) ECJ, 1.6.2006, C-207/05, Commission v. Italy, (nyr).

(9) OJ L 83, 27.3.1999, p. 1.

HAS ADOPTED THIS DECISION:

Article 1

The aid which Italy is planning to implement for AEM Torino amounting to EUR 16,338 million for the stranded costs is compatible with the common market, subject to the conditions set out in Article 2.

Article 2

The aid referred to in article 1 may not be granted before Italy has submitted evidence to the Commission that AEM Torino either has not benefited from previous aid granted under the 'municipalizzate' scheme declared illegal and incompatible by the Decision 2003/193/EC or that it has reimbursed with interests the previous aid received under the above-mentioned scheme.

Article 3

Italy shall inform the Commission, within two months of notification of this Decision, of the measures taken to comply with it.

Article 4

This Decision is addressed to Italy.

Done at Brussels, 8 November 2006.

For the Commission

Neelie KROES

Member of the Commission

EUROPEAN ECONOMIC AREA

THE EEA JOINT COMMITTEE

DECISION OF THE EEA JOINT COMMITTEE

No 129/2006

of 27 October 2006

amending Annex II (Technical regulations, standards, testing and certification) to the EEA Agreement

THE EEA JOINT COMMITTEE,

Having regard to the Agreement on the European Economic Area, as amended by the Protocol adjusting the Agreement on the European Economic Area, hereinafter referred to as 'the Agreement', and in particular Article 98 thereof,

Whereas:

(1) Annex II to the Agreement was amended by Decision of the EEA Joint Committee No 82/2006 of 7 July 2006 ([1]).

(2) Commission Decision 2006/257/EC of 9 February 2006 amending Decision 96/335/EC establishing an inventory and a common nomenclature of ingredients employed in cosmetic products ([2]) is to be incorporated into the Agreement,

HAS DECIDED AS FOLLOWS:

Article 1

The following shall be added in point 10 (Commission Decision 96/335/EC) of Chapter XVI of Annex II to the Agreement:

', as amended by:

— **32006 D 0257**: Commission Decision 2006/257/EC of 9 February 2006 (OJ L 97, 5.4.2006, p. 1).'

Article 2

The texts of Decision 2006/257/EC in the Icelandic and Norwegian languages, to be published in the EEA Supplement to the *Official Journal of the European Union*, shall be authentic.

Article 3

This Decision shall enter into force on 28 October 2006, provided that all the notifications under Article 103 (1) of the Agreement have been made to the EEA Joint Committee (*).

([1]) OJ L 289, 19.10.2006, p. 14.
([2]) OJ L 97, 5.4.2006, p. 1.
(*) No constitutional requirements indicated.

Article 4

This Decision shall be published in the EEA Section of, and in the EEA Supplement to, the *Official Journal of the European Union*.

Done at Brussels, 27 October 2006.

For the EEA Joint Committee

The President

Oda Helen SLETNES

DECISION OF THE EEA JOINT COMMITTEE

No 130/2006

of 27 October 2006

amending Annex IX (Financial services) to the EEA Agreement

THE EEA JOINT COMMITTEE,

Having regard to the Agreement on the European Economic Area, as amended by the Protocol adjusting the Agreement on the European Economic Area, hereinafter referred to as 'the Agreement', and in particular Article 98 thereof,

Whereas:

(1) Annex IX to the Agreement was amended by Decision of the EEA Joint Committee No 119/2006 of 22 September 2006 [1].

(2) Commission Directive 2006/29/EC of 8 March 2006 amending Directive 2000/12/EC of the European Parliament and of the Council as regards the exclusion or inclusion of certain institutions from the scope of application [2] is to be incorporated into the Agreement,

HAS DECIDED AS FOLLOWS:

Article 1

The following indent shall be added in point 14 (Directive 2000/12/EC of the European Parliament and of the Council) of Annex IX to the Agreement:

'— **32006 L 0029**: Commission Directive 2006/29/EC of 8 March 2006 (OJ L 70, 9.3.2006, p. 50).'

Article 2

The texts of Directive 2006/29/EC in the Icelandic and Norwegian languages, to be published in the EEA Supplement to the *Official Journal of the European Union*, shall be authentic.

Article 3

This Decision shall enter into force on 28 October 2006, provided that all the notifications under Article 103 (1) of the Agreement have been made to the EEA Joint Committee (*).

Article 4

This Decision shall be published in the EEA Section of, and in the EEA Supplement to, the *Official Journal of the European Union*.

Done at Brussels, 27 October 2006.

For the EEA Joint Committee

The President

Oda Helen SLETNES

(1) OJ L 333, 30.11.2006, p. 44.

(2) OJ L 70, 9.3.2006, p. 50.

(*) No constitutional requirements indicated.

DECISION OF THE EEA JOINT COMMITTEE

No 131/2006

of 27 October 2006

amending Annex XIII (Transport) to the EEA Agreement

THE EEA JOINT COMMITTEE,

Having regard to the Agreement on the European Economic Area, as amended by the Protocol adjusting the Agreement on the European Economic Area, hereinafter referred to as 'the Agreement', and in particular Article 98 thereof,

Whereas:

(1) Annex XIII to the Agreement was amended by Decision of the EEA Joint Committee No 123/2006 of 22 September 2006 ([1]).

(2) Regulation (EC) No 336/2006 of the European Parliament and of the Council of 15 February 2006 on the implementation of the International Safety Management Code within the Community and repealing Council Regulation (EC) No 3051/95 ([2]) is to be incorporated into the Agreement,

HAS DECIDED AS FOLLOWS:

Article 1

Annex XIII to the Agreement shall be amended as follows:

1. The following point shall be inserted after point 56t (Directive 2005/65/EC of the European Parliament and of the Council):

'56u. **32006 R 0336**: Regulation (EC) No 336/2006 of the European Parliament and of the Council of 15 February 2006 on the implementation of the International Safety Management Code within the Community and repealing Council Regulation (EC) No 3051/95 (OJ L 64, 4.3.2006, p. 1).

The provisions of the Regulation shall, for the purposes of this Agreement, be read with the following adaptation:

With regard to Norway, Article 3(2)(e) shall read as follows:

"passenger ships other than:

(i) ro-ro passenger ferries, and

(ii) passenger ships with more than 100 passengers flying the flag of Norway,

in sea areas of Class C and D as defined in Article 4 of Directive 98/18/EC."'

2. The text of point 56c (Council Regulation (EC) No 3051/95) shall be deleted.

([1]) OJ L 333, 30.11.2006, p. 52.
([2]) OJ L 64, 4.3.2006, p. 1.

Article 2

The texts of Regulation (EC) No 336/2006 in the Icelandic and Norwegian languages, to be published in the EEA Supplement to the *Official Journal of the European Union*, shall be authentic.

Article 3

This Decision shall enter into force on 28 October 2006, provided that all the notifications under Article 103 (1) of the Agreement have been made to the EEA Joint Committee (*).

Article 4

This Decision shall be published in the EEA Section of, and in the EEA Supplement to, the *Official Journal of the European Union*.

Done at Brussels, 27 October 2006.

For the EEA Joint Committee

The President

Oda Helen SLETNES

(*) Constitutional requirements indicated.

DECISION OF THE EEA JOINT COMMITTEE

No 132/2006

of 27 October 2006

amending Annex XIII (Transport) to the EEA Agreement

THE EEA JOINT COMMITTEE,

Having regard to the Agreement on the European Economic Area, as amended by the Protocol adjusting the Agreement on the European Economic Area, hereinafter referred to as 'the Agreement', and in particular Article 98 thereof,

Whereas:

(1) Annex XIII to the Agreement was amended by Decision of the EEA Joint Committee No 123/2006 of 22 September 2006 ([1]).

(2) Commission Regulation (EC) No 706/2006 of 8 May 2006 amending Regulation (EC) No 1702/2003 as regards the period during which Member States may issue approvals of a limited duration ([2]) is to be incorporated into the Agreement.

(3) Commission Regulation (EC) No 707/2006 of 8 May 2006 amending Regulation (EC) No 2042/2003 as regards approvals of a limited duration and Annexes I and III ([3]) is to be incorporated into the Agreement,

HAS DECIDED AS FOLLOWS:

Article 1

Annex XIII to the Agreement shall be amended as follows:

1. The following indent shall be added in point 66p (Commission Regulation (EC) No 1702/2003):

'— **32006 R 0706**: Commission Regulation (EC) No 706/2006 of 8 May 2006 (OJ L 122, 9.5.2006, p. 16).'

2. The following shall be added in point 66q (Commission Regulation (EC) No 2042/2003):

', as amended by:

— **32006 R 0707**: Commission Regulation (EC) No 707/2006 of 8 May 2006 (OJ L 122, 9.5.2006, p. 17).'

([1]) OJ L 333, 30.11.2006, p. 52.
([2]) OJ L 122, 9.5.2006, p. 16.
([3]) OJ L 122, 9.5.2006, p. 17.

Article 2

The texts of Regulations (EC) No 706/2006 and (EC) No 707/2006 in the Icelandic and Norwegian languages, to be published in the EEA Supplement to the *Official Journal of the European Union*, shall be authentic.

Article 3

This Decision shall enter into force on 28 October 2006, provided that all the notifications under Article 103 (1) of the Agreement have been made to the EEA Joint Committee (*).

Article 4

This Decision shall be published in the EEA Section of, and in the EEA Supplement to, the *Official Journal of the European Union*.

Done at Brussels, 27 October 2006.

For the EEA Joint Committee

The President

Oda Helen SLETNES

(*) No constitutional requirements indicated.

DECISION OF THE EEA JOINT COMMITTEE

No 133/2006

of 27 October 2006

amending Annex XIII (Transport) to the EEA Agreement

THE EEA JOINT COMMITTEE,

Having regard to the Agreement on the European Economic Area, as amended by the Protocol adjusting the Agreement on the European Economic Area, hereinafter referred to as 'the Agreement', and in particular Article 98 thereof,

Whereas:

(1) Annex XIII to the Agreement was amended by Decision of the EEA Joint Committee No 123/2006 of 22 September 2006 ([1]).

(2) Regulation (EC) No 549/2004 of the European Parliament and of the Council of 10 March 2004 laying down the framework for the creation of the single European sky ([2]), Regulation (EC) No 550/2004 of the European Parliament and of the Council of 10 March 2004 on the provision of air navigation services in the single European sky ([3]), Regulation (EC) No 551/2004 of the European Parliament and of the Council of 10 March 2004 on the organisation and use of the airspace in the single European sky ([4]), and Regulation (EC) No 552/2004 of the European Parliament and of the Council of 10 March 2004 on the interoperability of the European Air Traffic Management network ([5]) were incorporated into the Agreement by Decision of the EEA Joint Committee No 67/2006 ([6]) of 2 June 2006, with country specific adaptations.

(3) Commission Regulation (EC) No 730/2006 of 11 May 2006 on airspace classification and access of flights operated under visual flight rules above flight level 195 ([7]) is to be incorporated into the Agreement,

HAS DECIDED AS FOLLOWS:

Article 1

The following point shall be inserted after point 66w (Regulation (EC) No 552/2004 of the European Parliament and of the Council) of Annex XIII to the Agreement:

'66wa. **32006 R 0730**: Commission Regulation (EC) No 730/2006 of 11 May 2006 on airspace classification and access of flights operated under visual flight rules above flight level 195 (OJ L 128, 16.5.2006, p. 3).'

([1]) OJ L 333, 30.11.2006, p. 52.
([2]) OJ L 96, 31.3.2004, p. 1.
([3]) OJ L 96, 31.3.2004, p. 10.
([4]) OJ L 96, 31.3.2004, p. 20.
([5]) OJ L 96, 31.3.2004, p. 26.
([6]) OJ L 245, 7.9.2006, p. 18.
([7]) OJ L 128, 16.5.2006, p. 3.

Article 2

The texts of Regulation (EC) No 730/2006 in the Icelandic and Norwegian languages, to be published in the EEA Supplement to the *Official Journal of the European Union*, shall be authentic.

Article 3

This Decision shall enter into force on 28 October 2006, provided that all the notifications under Article 103 (1) of the Agreement have been made to the EEA Joint Committee (*), or on the day of entry into force of Decision of the EEA Joint Committee No 67/2006 of 2 June 2006, whichever is the later.

Article 4

This Decision shall be published in the EEA Section of, and in the EEA Supplement to, the *Official Journal of the European Union*.

Done at Brussels, 27 October 2006.

For the EEA Joint Committee

The President

Oda Helen SLETNES

(*) No constitutional requirements indicated.

DECISION OF THE EEA JOINT COMMITTEE

No 134/2006

of 27 October 2006

amending Annex XIII (Transport) to the EEA Agreement

THE EEA JOINT COMMITTEE,

Having regard to the Agreement on the European Economic Area, as amended by the Protocol adjusting the Agreement on the European Economic Area, hereinafter referred to as 'the Agreement', and in particular Article 98 thereof,

Whereas:

(1) Annex XIII to the Agreement was amended by Decision of the EEA Joint Committee No 123/2006 of 22 September 2006 ([1]).

(2) Regulation (EC) No 549/2004 of the European Parliament and of the Council of 10 March 2004 laying down the framework for the creation of the single European sky ([2]), Regulation (EC) No 551/2004 of the European Parliament and of the Council of 10 March 2004 on the organisation and use of the airspace in the single European sky ([3]), and Regulation (EC) No 552/2004 of the European Parliament and of the Council of 10 March 2004 on the interoperability of the European Air Traffic Management network ([4]) were incorporated into the Agreement by Decision of the EEA Joint Committee No 67/2006 ([5]) of 2 June 2006, with country specific adaptations.

(3) Commission Regulation EC (No) 1032/2006 of 6 July 2006 laying down requirements for automatic systems for the exchange of flight data for the purpose of notification, coordination and transfer of flights between air traffic control units ([6]) is to be incorporated into the Agreement.

(4) Commission Regulation (EC) No 1033/2006 of 4 July 2006 laying down the requirements on procedures for flight plans in the pre-flight phase for the single European sky ([7]) is to be incorporated into the Agreement,

HAS DECIDED AS FOLLOWS:

Article 1

The following points shall be inserted after point 66wa (Commission Regulation (EC) No 730/2006) of Annex XIII to the Agreement:

'66wb. **32006 R 1032**: Commission Regulation EC (No) 1032/2006 of 6 July 2006 laying down requirements for automatic systems for the exchange of flight data for the purpose of notification, coordination and transfer of flights between air traffic control units (OJ L 186, 7.7.2006, p. 27).

66wc. **32006 R 1033**: Commission Regulation (EC) No 1033/2006 of 4 July 2006 laying down the requirements on procedures for flight plans in the pre-flight phase for the single European sky (OJ L 186, 7.7.2006, p. 46).'

([1]) OJ L 333, 30.11.2006, p. 52.
([2]) OJ L 96, 31.3.2004, p. 1.
([3]) OJ L 96, 31.3.2004, p. 20.
([4]) OJ L 96, 31.3.2004, p. 26.
([5]) OJ L 245, 7.9.2006, p. 18.
([6]) OJ L 186, 7.7.2006, p. 27.
([7]) OJ L 186, 7.7.2006, p. 46.

Article 2

The texts of Regulations (EC) Nos 1032/2006 and 1033/2006 in the Icelandic and Norwegian languages, to be published in the EEA Supplement to the *Official Journal of the European Union*, shall be authentic.

Article 3

This Decision shall enter into force on 28 October 2006, provided that all the notifications under Article 103 (1) of the Agreement have been made to the EEA Joint Committee (*), or on the day of entry into force of Decision of the EEA Joint Committee No 67/2006 of 2 June 2006, whichever is the later.

Article 4

This Decision shall be published in the EEA Section of, and in the EEA Supplement to, the *Official Journal of the European Union*.

Done at Brussels, 27 October 2006.

For the EEA Joint Committee

The President

Oda Helen SLETNES

(*) No constitutional requirements indicated.

DECISION OF THE EEA JOINT COMMITTEE

No 135/2006

of 27 October 2006

amending Annex XXI (Statistics) to the EEA Agreement

THE EEA JOINT COMMITTEE,

Having regard to the Agreement on the European Economic Area, as amended by the Protocol adjusting the Agreement on the European Economic Area, hereinafter referred to as 'the Agreement', and in particular Article 98 thereof,

Whereas:

(1) Annex XXI to the Agreement was amended by Decision of the EEA Joint Committee No 126/2006 of 22 September 2006 ([1]).

(2) Commission Regulation (EC) No 601/2006 of 18 April 2006 implementing Regulation (EC) No 184/2005 of the European Parliament and of the Council as regards the format and the procedure for the transmission of data ([2]) is to be incorporated into the Agreement.

(3) Commission Regulation (EC) No 602/2006 of 18 April 2006 adapting Regulation (EC) No 184/2005 of the European Parliament and of the Council through the updating of data requirements ([3]) is to be incorporated into the Agreement,

HAS DECIDED AS FOLLOWS:

Article 1

Annex XXI to the Agreement shall be amended as follows:

1. The following shall be added in point 19s (Regulation (EC) No 184/2005 of the European Parliament and of the Council):

   ', as amended by:

   — **32006 R 0602**: Commission Regulation (EC) No 602/2006 of 18 April 2006 (OJ L 106, 19.4.2006, p. 10).'

2. The following point shall be inserted after point 19s (Regulation (EC) No 184/2005 of the European Parliament and of the Council):

   '19sa. **32006 R 0601**: Commission Regulation (EC) No 601/2006 of 18 April 2006 implementing Regulation (EC) No 184/2005 of the European Parliament and of the Council as regards the format and the procedure for the transmission of data (OJ L 106, 19.4.2006, p. 7).'

([1]) OJ L 333, 30.11.2006, p. 57.
([2]) OJ L 106, 19.4.2006, p. 7.
([3]) OJ L 106, 19.4.2006, p. 10.

Article 2

The texts of Regulations (EC) Nos 601/2006 and 602/2006 in the Icelandic and Norwegian languages, to be published in the EEA Supplement to the *Official Journal of the European Union*, shall be authentic.

Article 3

This Decision shall enter into force on 28 October 2006, provided that all the notifications under Article 103 (1) of the Agreement have been made to the EEA Joint Committee (*).

Article 4

This Decision shall be published in the EEA Section of, and in the EEA Supplement to, the *Official Journal of the European Union*.

Done at Brussels, 27 October 2006.

For the EEA Joint Committee

The President

Oda Helen SLETNES

(*) No constitutional requirements indicated.

DECISION OF THE EEA JOINT COMMITTEE

No 136/2006

of 27 October 2006

amending Annex XXI (Statistics) to the EEA Agreement

THE EEA JOINT COMMITTEE,

Having regard to the Agreement on the European Economic Area, as amended by the Protocol adjusting the Agreement on the European Economic Area, hereinafter referred to as 'the Agreement', and in particular Article 98 thereof,

Whereas:

(1) Annex XXI to the Agreement was amended by Decision of the EEA Joint Committee No 126/2006 of 22 September 2006 ([1]).

(2) Commission Regulation (EC) No 676/2006 of 2 May 2006 amending Regulation (EC) No 1980/2003 implementing Regulation (EC) No 1177/2003 of the European Parliament and of the Council concerning Community statistics on income and living conditions (EU-SILC) as regards definitions and updated definitions ([2]) is to be incorporated into the Agreement.

(3) Commission Regulation (EC) No 698/2006 of 5 May 2006 implementing Council Regulation (EC) No 530/1999 as regards quality evaluation of structural statistics on labour costs and earnings ([3]) is to be incorporated into the Agreement.

(4) Council Regulation (EC) No 701/2006 of 25 April 2006 laying down detailed rules for the implementation of Regulation (EC) No 2494/95 as regards the temporal coverage of price collection in the harmonised index of consumer prices ([4]) is to be incorporated into the Agreement.

(5) Regulation (EC) No 698/2006 repeals Commission Regulations (EC) Nos 452/2000 ([5]) and 72/2002 ([6]), which are incorporated into the Agreement and which are consequently to be repealed under the Agreement,

HAS DECIDED AS FOLLOWS:

Article 1

Annex XXI to the Agreement shall be amended as follows:

1. The following shall be added in point 18j (Commission Regulation (EC) No 1980/2003):

', as amended by:

— **32006 R 0676**: Commission Regulation (EC) No 676/2006 of 2 May 2006 (OJ L 118, 3.5.2006, p. 3).'

([1]) OJ L 333, 30.11.2006, p. 57.
([2]) OJ L 118, 3.5.2006, p. 3.
([3]) OJ L 121, 6.5.2006, p. 30.
([4]) OJ L 122, 9.5.2006, p. 3.
([5]) OJ L 55, 29.2.2000, p. 53.
([6]) OJ L 15, 17.1.2002, p. 7.

2. The text of point 18f (Commission Regulation (EC) No 72/2002) shall be replaced by the following:

   '**32006 R 0698**: Commission Regulation (EC) No 698/2006 of 5 May 2006 implementing Council Regulation (EC) No 530/1999 as regards quality evaluation of structural statistics on labour costs and earnings (OJ L 121, 6.5.2006, p. 30).'

3. The text of point 18da (Commission Regulation (EC) No 452/2000) shall be deleted.

4. The following point shall be inserted after point 19v (Commission Regulation (EC) No 1708/2005):

   '19w. **32006 R 0701**: Council Regulation (EC) No 701/2006 of 25 April 2006 laying down detailed rules for the implementation of Regulation (EC) No 2494/95 as regards the temporal coverage of price collection in the harmonized index of consumer prices (OJ L 122, 9.5.2006, p. 3).'

Article 2

The texts of Regulations (EC) No 676/2006, No 698/2006 and No 701/2006 in the Icelandic and Norwegian languages, to be published in the EEA Supplement to the *Official Journal of the European Union*, shall be authentic.

Article 3

This Decision shall enter into force on 28 October 2006, provided that all the notifications under Article 103 (1) of the Agreement have been made to the EEA Joint Committee (*).

Article 4

This Decision shall be published in the EEA Section of, and in the EEA Supplement to, the *Official Journal of the European Union*.

Done at Brussels, 27 October 2006.

For the EEA Joint Committee

The President

Oda Helen SLETNES

(*) Constitutional requirements indicated.

DECISION OF THE EEA JOINT COMMITTEE

No 137/2006

of 27 October 2006

amending Annex XXII (Company law) to the EEA Agreement

THE EEA JOINT COMMITTEE,

Having regard to the Agreement on the European Economic Area, as amended by the Protocol adjusting the Agreement on the European Economic Area, hereinafter referred to as 'the Agreement', and in particular Article 98 thereof,

Whereas:

(1) Annex XXII to the Agreement was amended by Decision of the EEA Joint Committee No 127/2006 of 22 September 2006 ([1]).

(2) Commission Regulation (EC) No 708/2006 of 8 May 2006 amending Regulation (EC) No 1725/2003 adopting certain international accounting standards in accordance with Regulation (EC) No 1606/2002 of the European Parliament and of the Council as regards International Accounting Standard (IAS) 21 and International Financial Reporting Interpretations Committee's (IFRIC) Interpretation 7 ([2]) is to be incorporated into the Agreement,

HAS DECIDED AS FOLLOWS:

Article 1

The following indent shall be added in point 10ba (Commission Regulation (EC) No 1725/2003) of Annex XXII to the Agreement:

'— **32006 R 0708**: Commission Regulation (EC) No 708/2006 of 8 May 2006 (OJ L 122, 9.5.2006, p. 19).'

Article 2

The texts of Regulation (EC) No 708/2006 in the Icelandic and Norwegian languages, to be published in the EEA Supplement to the *Official Journal of the European Union*, shall be authentic.

Article 3

This Decision shall enter into force 20 days after its adoption, provided that all the notifications under Article 103(1) of the Agreement have been made to the EEA Joint Committee (*).

([1]) OJ L 333, 30.11.2006, p. 59.
([2]) OJ L 122, 9.5.2006, p. 19.
(*) No Constitutional requirements indicated

Article 4

This Decision shall be published in the EEA Section of, and in the EEA Supplement to, the *Official Journal of the European Union*.

Done at Brussels, 27 October 2006.

For the EEA Joint Committee

The President

Oda Helen SLETNES

DECISION OF THE EEA JOINT COMMITTEE

No 138/2006

of 27 October 2006

amending Protocol 31 to the EEA Agreement, on cooperation in specific fields outside the four freedoms

THE EEA JOINT COMMITTEE,

Having regard to the Agreement on the European Economic Area, as amended by the Protocol adjusting the Agreement on the European Economic Area, hereinafter referred to as 'the Agreement', and in particular Articles 86 and 98 thereof,

Whereas:

(1) Protocol 31 to the Agreement was amended by Decision of the EEA Joint Committee No 39/2006 of 10 March 2006 [1].

(2) It is appropriate to extend the cooperation of the Contracting Parties to the Agreement to include Decision No 771/2006/EC of the European Parliament and of the Council of 17 May 2006 establishing the European Year of Equal Opportunities for All (2007) — towards a just society [2].

(3) Protocol 31 to the Agreement should therefore be amended in order to allow for this extended cooperation to take place with effect from 1 January 2007,

HAS DECIDED AS FOLLOWS:

Article 1

Article 5 of Protocol 31 to the Agreement shall be amended as follows:

1. Paragraph 5 shall be replaced by the following:

'5. The EFTA States shall participate in the Community programmes and actions referred to in the first two indents of paragraph 8 as from 1 January 1996, in the programme referred to in the third indent as from 1 January 2000, in the programme referred to in the fourth indent as from 1 January 2001, in the programmes referred to in the fifth and sixth indents as from 1 January 2002, in the programmes referred to in the seventh and eighth indents as from 1 January 2004 and in the programme referred to in the ninth indent as from 1 January 2007.'

2. The following indent shall be added in paragraph 8:

'— **32006 D 0771**: Decision No 771/2006/EC of the European Parliament and of the Council of 17 May 2006 establishing the European Year of Equal Opportunities for All (2007) — towards a just society (OJ L 146, 31.5.2006, p. 1).'

(1) OJ L 147, 1.6.2006, p. 61.
(2) OJ L 146, 31.5.2006, p. 1.

Article 2

This Decision shall enter into force on the day following the last notification to the EEA Joint Committee under Article 103(1) of the Agreement (*).

It shall apply from 1 January 2007.

Article 3

This Decision shall be published in the EEA Section of, and in the EEA Supplement to, the *Official Journal of the European Union*.

Done at Brussels, 27 October 2006.

For the EEA Joint Committee

The President

Oda Helen SLETNES

(*) No constitutional requirements indicated.

DECISION OF THE EEA JOINT COMMITTE

No 139/2006

of 27 October 2006

amending Protocol 31 to the EEA Agreement, on cooperation in specific fields outside the four freedoms

THE EEA JOINT COMMMITTEE,

Having regard to the Agreement on the European Economic Area, as amended by the Protocol adjusting the Agreement on the European Economic Area, hereinafter referred to as 'the Agreement', and in particular Articles 86 and 98 thereof,

Whereas:

(1) Protocol 31 to the Agreement was amended by Decision of the EEA Joint EEA Joint Committee No 90/2004 of 8 June 2004 ([1]).

(2) Decision of the EEA Joint Committee No 56/96 of 28 October 1996 ([2]) extended the cooperation between the Contracting Parties to the Agreement by including in Protocol 31 to the Agreement the European Employment Services network (Eures).

(3) Liechtenstein originally reserved its right to participate in Eures subject to the results of the joint review of the transitional measures in the field of free movement of persons as contained in Protocol 15 to the Agreement.

(4) On the basis of this joint review, Decision of the EEA Joint Committee No 191/1999 of 17 December 1999 ([3]) introduced new sectoral adaptations in Annexes V and VIII to the Agreement with regard to Liechtenstein, which restrict the taking up of residence in Liechtenstein.

(5) The reservation with regard to Liechtenstein's participation in Eures should no longer apply.

(6) Protocol 31 to the Agreement should therefore be amended in order to allow for the participation of Liechtenstein in Eures to take place with effect from 1 January 2007,

HAS DECIDED AS FOLLOWS:

Article 1

Article 15(4) of Protocol 31 to the Agreement shall be replaced by the following:

'4. Paragraphs 1 to 3 shall apply to Liechtenstein as from 1 January 2007.'

([1]) OJ L 349, 25.11.2004, p. 52.
([2]) OJ L 58, 27.2.1997, p. 50.
([3]) OJ L 74, 15.3.2001, p. 29.

Article 2

This Decision shall enter into force on the day following the last notification to the EEA Joint Committee under Article 103(1) of the Agreement (*).

It shall apply from 1 January 2007.

Article 3

This Decision shall be published in the EEA Section of, and in the EEA Supplement to, the *Official Journal of the European Union*.

Done at Brussels, 27 October 2006.

For the EEA Joint Committee

The President

Oda Helen SLETNES

(*) No constitutional requirements indicated.

EFTA SURVEILLANCE AUTHORITY

RECOMMENDATION OF THE EFTA SURVEILLANCE AUTHORITY

No 143/06/COL

of 11 May 2006

concerning a monitoring programme for 2006 to ensure compliance with maximum levels of pesticide residues in and on cereals and certain other products of plant origin and national monitoring programmes for 2007

THE EFTA SURVEILLANCE AUTHORITY,

Having regard to the Agreement on the European Economic Area (EEA), and in particular Article 109 and Protocol 1 thereof,

Having regard to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, and in particular Article 5(2)(b) and Protocol 1 thereof,

Having regard to the Act referred to at point 38 of Chapter XII of Annex II to the EEA Agreement (*Council Directive 86/362/EEC of 24 July 1986 on the fixing of maximum levels for pesticide residues in and on cereals*) [1], as last amended and adapted to the EEA Agreement by Protocol 1 thereto, and in particular Article 7(2)(b) thereof,

Having regard to the Act referred to at point 54 in Chapter XII of Annex II to the EEA Agreement (*Council Directive 90/642/EEC of 27 November 1990 on the fixing of maximum levels for pesticide residues in and on certain products of plant origin, including fruit and vegetables*) [2], as last amended and adapted to the EEA Agreement by Protocol 1 thereto, and in particular Article 4(2)(b) thereof,

Whereas:

(1) The EFTA Surveillance Authority should progressively work towards a system which would permit the estimation of dietary exposure to actual pesticides. To make realistic estimations possible, data on the monitoring of pesticide residues should be available in a number of food products which constitute major components of the European diet. It is generally recognised that major components of the European diet are constituted by some 20 to 30 food products.

In view of the resources available at national level for pesticide residue monitoring, the EFTA States are only able to analyse samples of eight products each year within a co-ordinated monitoring programme. Pesticide uses show changes within the timescale of the three-year cycles. Each pesticide should thus generally be monitored in 20 to 30 food products over a series of three-year cycles.

(2) Residues of all the pesticides covered by this Recommendation should be monitored in 2006, as this will allow using these data for the estimation of actual dietary exposure to them.

(3) A systematic statistical approach to numbers of samples to be taken in each monitoring exercise is necessary. Such an approach has been set out by the Codex Alimentarius Commission [3]. On the basis of a binomial probability distribution, it can be calculated that examination of 613 samples gives a confidence of more than 99 % for detecting one sample containing pesticide residues above the limit of determination (LOD), provided that less than 1 % of products of plant origin contain residues above that limit. Collection of these samples should be apportioned across the European Economic Area on the basis of population and consumer numbers, with a minimum of 12 samples per product and per year.

(4) Guidelines concerning 'Quality Control Procedures for Pesticide Residue Analysis' are published on the European Commission website [4]. It is agreed that these guidelines should be applied as far as possible by the analytical laboratories of the EFTA States and should be reviewed continuously in the light of experience gained in the monitoring programmes.

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(1) OJ L 221, 7.8.1986, p. 37. Directive as last amended by Commission Directive 2006/92/EC (OJ L 311, 10.11.2006, p. 31).

(2) OJ L 350, 14.12.1990, p. 71. Directive as last amended by Commission Directive 2006/92/EC.

(3) Codex Alimentarius, Pesticide Residues in Foodstuffs, Rome 1994, ISBN 92-5-203271-1; Vol.2, page 372.

(4) Doc. No SANCO/10476/2003, http://europa.eu.int/comm/food/fs/ph_ps/pest/index_en.htm.

(5) The sampling methods and procedures laid down in the Act referred to at point 54zz of Chapter XII of Annex II to the EEA Agreement (*Commission Directive 2002/63/EC of 11 July 2002 establishing Community methods of sampling for the official control of pesticide residues in and on products of plant and animal origin and repealing Directive 79/700/EEC* [5]) incorporate those recommended by the Codex Alimentarius Commission.

(6) Article 4(2)(a) of Directive 90/642/EEC and Article 7(2)(a) of Directive 86/362/EEC require the EFTA States to specify the criteria applied in drawing up their national inspection programmes. Such information should include the criteria applied in determining the numbers of samples to be taken and analyses to be carried out and the reporting levels applied, the criteria by which the reporting levels have been fixed and details of accreditation under the Act referred to at point 54n of Chapter XII of Annex II to the EEA Agreement (*Council Directive 93/99/EEC of 29 October 1993 on the subject of additional measures concerning the official control of foodstuffs* [6]), as amended. The number and type of infringements and the action taken should also be indicated.

(7) Maximum residue levels for baby food have been established in accordance with Article 6 of the Act referred to at point 54a in Chapter XII of Annex II to the EEA Agreement (*Commission Directive 91/321/EEC of 14 May 1991 on infant formulae and follow-on formulae* [7]), as amended, and Article 6 of the Act referred to at point 54zl in Chapter XII of Annex II to the EEA Agreement (*Commission Directive 96/5/EC, of 16 February 1996 on processed cereal-based foods and baby foods for infants and young children* [8]), as amended.

(8) Information on the results of monitoring programmes is particularly appropriate for treatment, storage and transmission by electronic methods. Formats have been developed for supply of data by e-mail from the EC Member States to the Commission. The EFTA States could use the same format and should therefore be able to send their reports to the EFTA Surveillance Authority in the standard format. The further development of such a standard format is most effectively undertaken by the development of guidelines.

(9) The measures provided for in this recommendation are in accordance with the opinion of the EFTA Foodstuffs Committee assisting the EFTA Surveillance Authority,

HEREBY RECOMMENDS THE EFTA STATES TO:

1. Sample and analyse for the product/pesticide residue combinations set out in the Annex I to this Recommendation, on the basis of the number of samples reflecting as appropriate, national, EEA and third country share of the EFTA State's market.

   The sampling procedure, including the number of units, should be in line with the Act referred to at point 54zz of Chapter XII of Annex II to the EEA Agreement (*Directive 2002/63/EC*.

2. For pesticides posing an acute risk i.e. where an ARfD is set (e.g. OP-esters, endosulfan and N-methylcarbamates) sampling should be done in such a way to allow the selection of two laboratory samples. If the first laboratory sample contains a detectable residue of a targeted pesticide, the units of the second sample should be analysed individually. This applies to the following products:

   — Aubergines

   — Grapes [9]

   — Bananas

   — Pepper.

   Of these products, a reasonable number of samples should also be subjected to individual analysis of the individual units within the second laboratory sample in case such pesticides are detected in the first sample and particularly if it is the produce of a single producer.

3. Of the total amount of samples as given according to Annex I, each EFTA State, take and analyse:

   (a) at least ten samples of baby food based mainly on vegetables, fruits or cereals;

   (b) a number of samples (with a minimum of one sample where available) from produce originating from organic farming that reflects the market share of organic produce in each EFTA State.

(5) OJ L 187, 16.7.2002, p. 30.

(6) OJ L 290, 24.11.1993, p. 14. Directive as amended by Regulation (EC) No 1882/2003 (OJ L 284 31.10.2003, p. 1).

(7) OJ L 175, 4.7.1991, p. 35. Directive as last amended by Directive 2003/14/EC (OJ L 41, 14.2.2003, p. 37).

(8) OJ L 49, 28.2.1996, p. 1. Directive as last amended by Directive 2003/13/EC (OJ L 41, 14.2.2003, p. 33).

(9) For grapes the unit (i.e. standard bunch) is considered to have a size of about 555 g.

4. Report the results of the analysis of samples tested for the product/pesticide residue combinations set out in the Annex I to this Recommendation, by 31 August 2007 at the latest, indicating:

   (a) the analytical methods used and reporting levels achieved, in accordance with the quality control procedures set out in the Quality Control Procedures for pesticide residue analysis;

   (b) the number and type of infringements and the action taken.

5. The report should be produced in a format, including the electronic format, conforming to the guidance [10] to the EEA States with regard to implementation of recommendations concerning monitoring programmes.

   The result on samples taken from produce originating from organic farming should be reported in a separate datasheet.

6. Send to the EFTA Surveillance Authority and to the other EFTA States, by 31 August 2006 at the latest, all the information as required by Article 7(3) of Directive 86/362/EEC and Article 4(3) of Directive 90/642/EEC concerning the 2005 monitoring exercise to ensure, at least by check sampling, compliance with maximum pesticide residue levels including:

   (a) the results of their national programmes concerning pesticide residues;

   (b) information on their laboratories' quality control procedures and, in particular, information concerning aspects of the guidelines concerning quality control procedures for pesticide residue analysis which they have not been able to apply or have had difficulty in applying;

   (c) information on accreditation in accordance with the provisions of Article 3 of Directive 93/99/EEC (including type of accreditation, accreditation body and copy of accreditation certificate) of the laboratories carrying out the analyses;

   (d) information about the proficiency tests and ring tests in which the laboratory has participated.

7. Send to the EFTA Surveillance Authority, by 30 September 2006 at the latest, their intended national programme for monitoring maximum pesticide residue levels fixed by Directives 90/642/EEC and 86/362/EEC for the year 2007, including information on:

   (a) the criteria applied in determining the number of samples to be taken and analyses to be carried out;

   (b) the reporting levels applied and the criteria by which the reporting levels have been fixed;

   (c) details of accreditation, under Directive 93/99/EEC, of the laboratories carrying out analyses.

This Recommendation is addressed to Iceland, Liechtenstein and Norway.

Done at Brussels, 11 May 2006.

For the EFTA Surveillance Authority
Kristján Andri STEFÁNSSON
College Member

Niels FENGER
Director

[10] Presented to and taken note of in the Standing Committee on the Food Chain and Animal Health (SCFCAH) every year.

ANNEX I

Pesticide/product combinations to be monitored

Pesticide residue to be analysed for	2006	2007 (*)	2008 (*)
Acephate	([b])	([c])	([a])
Acetamiprid		([c])	([a])
Aldicarb	([b])	([c])	([a])
Azinphos-methyl	([b])	([c])	([a])
Azoxystrobin	([b])	([c])	([a])
Benomyl group	([b])	([c])	([a])
Bifenthrin	([b])	([c])	([a])
Bromopropylate	([b])	([c])	([a])
Bupirimate	([b])	([c])	([a])
Buprofezin		([c])	([a])
Captan + Folpet Captan Folpet	([b])	([c])	([a])
Carbaryl	([b])	([c])	([a])
Chlormequat (**)	([b])	([c])	([a])
Chlorothalonil	([b])	([c])	([a])
Chlorpropham	([b])	([c])	([a])
Chlorpyriphos	([b])	([c])	([a])
Chlorpyriphos-methyl	([b])	([c])	([a])
Cypermethrin	([b])	([c])	([a])
Cyprodinil	([b])	([c])	([a])
Deltamethrin	([b])	([c])	([a])
Diazinon	([b])	([c])	([a])
Dichlofluanid	([b])	([c])	([a])
Dichlorvos		([c])	([a])
Dicofol	([b])	([c])	([a])
Dimethoate + Omethoate Dimethoate Omethoate	([b])	([c])	([a])
Diphenylamine	([b])	([c])	([a])

Pesticide residue to be analysed for	2006	2007 (*)	2008 (*)
Endosulfan	([b])	([c])	([a])
Fenhexamid	([b])	([c])	([a])
Fenitrothion		([c])	([a])
Fludioxinil	([b])	([c])	([a])
Imazalil	([b])	([c])	([a])
Imidacloprid	([b])	([c])	([a])
Indoxacarb		([c])	([a])
Iprodione	([b])	([c])	([a])
Iprovalicarb		([c])	([a])
Kresoxim-methyl	([b])	([c])	([a])
Lambda-cyhalothrin	([b])	([c])	([a])
Malathion	([b])	([c])	([a])
Maneb group	([b])	([c])	([a])
Mepanipyrim		([c])	([a])
Methamidophos	([b])	([c])	([a])
Metalaxyl	([b])	([c])	([a])
Methidathion	([b])	([c])	([a])
Methiocarb	([b])	([c])	([a])
Methomyl	([b])	([c])	([a])
Myclobutanil	([b])	([c])	([a])
Oxydemeton-methyl	([b])	([c])	([a])
Parathion	([b])	([c])	([a])
Penconazole		([c])	([a])
Phosalone	([b])	([c])	([a])
Pirimicarb	([b])	([c])	([a])
Pirimiphos-methyl	([b])	([c])	([a])
Prochloraz		([c])	([a])
Procymidone	([b])	([c])	([a])
Profenofos		([c])	([a])
Propargite	([b])	([c])	([a])

Pesticide residue to be analysed for	2006	2007 (*)	2008 (*)
Pyretrins	([b])	([c])	([a])
Pyrimethanil	([b])	([c])	([a])
Pyriproxyfen		([c])	([a])
Quenoxifen		([c])	([a])
Spiroxamine	([b])	([c])	([a])
Tebuconazole		([c])	([a])
Tebufenozoide		([c])	([a])
Thiabendazole	([b])	([c])	([a])
Tolcloflos-methyl	([b])	([c])	([a])
Tolylfluanid	([b])	([c])	([a])
Triadimefon + Triadimenol Triadimefon Triadimenol	([b])	([c])	([a])
Vinclozolin	([b])	([c])	([a])

(*) Indicative for 2007 and 2008, subject to programmes which will be recommended for these years.
(**) Chlormequat should be analysed in pears and cereals only.
([a]) Pears, beans (fresh or frozen), potatoes, carrots, oranges or mandarins, spinach (fresh or frozen), rice and cucumber.
([b]) Cauliflower, peppers (sweet), wheat, aubergines, grapes, peas (fresh/frozen, without pod), bananas and orange juice. For orange juice EFTA States should specify the source (concentrates or fresh fruits).
([c]) Apples, tomatoes, lettuce, strawberries, leek, head cabbage, rye or oats, peaches including nectarines and similar hybrids.

RECOMMENDATION OF THE EFTA SURVEILLANCE AUTHORITY

No 144/06/COL

of 11 May 2006

on the reduction of the presence of dioxins, furans and PCBs in feedingstuffs and foodstuffs

THE EFTA SURVEILLANCE AUTHORITY,

Having regard to the Agreement on the European Economic Area (EEA), and in particular Article 109 and Protocol 1 thereof,

Having regard to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, and in particular Article 5(2)(b) and Protocol 1 thereof,

Having regard to the Act referred to at point 33 of Chapter II of Annex I to the EEA Agreement (*Council Directive 2002/32/EC of 7 May 2002 on undesirable substances in animal feed* (1) as amended, and as adapted to the EEA Agreement by Protocol 1 thereto,

Having regard to Act referred to at point 54zn of Chapter XII of Annex II to the EEA Agreement (*Commission Regulation (EC) No 466/2001 of 8 March 2001 setting maximum levels for certain contaminants in foodstuffs* (2) as amended, and as adapted to the EEA Agreement by Protocol 1 thereto,

Having regard to the EFTA Surveillance Authority Decision 84/06/COL of 6 April 2006, whereby the competent Member of the College is instructed to adopt the Recommendation if the draft Recommendation is in accordance with the opinion of the EFTA Plants and Animal Feedingstuffs Committee and the EFTA Foodstuffs Committee,

Whereas:

(1) This Recommendation is a part of an overall strategy to reduce the presence of dioxins, furans and PCBs in environment, feed and food. Its purpose is to recommend action levels for feed and food.

(2) Although, from a toxicological point of view, any level should apply to dioxins and dioxin-like PCBs, maximum levels in foodstuffs were in 2001 set only for dioxins and not for dioxin-like PCBs given the very limited data available at that moment on the prevalence of the dioxin-like PCBs. Similarly, maximum levels in feedingstuffs were in 2001 set only for dioxins and not for dioxin-like PCBs in the Act referred to at point 33 of Chapter II of Annex I of the EEA Agreement (*Council Directive 2002/32/EC*).

(3) According to Regulation (EC) No 466/2001, the European Commission should review the provisions as regards dioxins in food for the first time by the end of 2004 in the light of new data on the presence of dioxins and dioxin-like PCBs, in particular with a view to the inclusion of dioxin-like PCBs in the levels to be set. The Act referred to at point 33 of Chapter II of Annex I of the EEA Agreement (*Directive 2002/32/EC*) contains a similar review clause as regards dioxins in feedingstuffs.

(4) In the meantime more data on the presence of dioxin-like PCBs in feed and food have been made available. As a consequence, maximum levels have been set for the sum of dioxins and dioxin-like PCBs expressed in World Health Organisation (WHO) toxic equivalents, using the WHO-TEFs as this is the most appropriate approach from a toxicological point. In order to ensure a smooth transition, existing maximum levels for dioxins should remain applicable for a transitional period in addition to the newly set levels for the sum of dioxins and dioxin-like PCBs.

(5) It is generally recognised that in order to actively reduce the presence of dioxins and dioxin-like PCBs in food and feed maximum levels should be accompanied by measures to stimulate a pro-active approach, including the setting of action levels for food and feed. These action levels should be a tool for competent authorities and operators to highlight those cases where it is appropriate to identify a source of contamination and to take measures for its reduction or elimination. Given the sources of dioxins and dioxin-like PCBs are different, it is appropriate that separate action levels are determined for dioxins on the one hand and for dioxin-like PCBs on the other hand.

(6) Furthermore, the action levels should be periodically adjusted in line with the downward trend in dioxin and dioxin-like PCB presence and the active approach pursued to gradually reduce their presence in feedingstuffs and foodstuffs.

(7) The participation of the EFTA States in the programmes within the scope of Annex I of this Recommendation will have to be evaluated with respect to their exemptions from Chapter II of Annex I to the EEA Agreement.

(1) OJ L 140, 30.5.2002, p. 10. Directive as last amended by Commission Directive 2006/77/EC (OJ L 271, 30.9.2006, p. 53).

(2) OJ L 77, 16.3.2001, p. 1. Regulation as last amended by Regulation (EC) No 199/2006 (OJ L 32, 4.2.2006, p. 34).

(8) The measures provided for in this Recommendation are in accordance with the opinion of the EFTA Foodstuffs Committee and the EFTA Plants and Animal Feedingstuffs Committee assisting the EFTA Surveillance Authority.

HEREBY RECOMMENDS:

(1) That the EFTA States perform, proportionate to their production, use and consumption of feed materials, feedingstuffs and foodstuffs, random monitoring of the presence of dioxins and dioxin-like PCBs and, if possible, non-dioxin-like PCBs in feed materials, feedingstuffs and foodstuffs.

This monitoring should be carried out according to EFTA Surveillance Authority Recommendation No 3/05/COL of 19 January 2005 on the monitoring of background levels of dioxins and dioxin-like PCBs in feedingstuffs and Commission Recommendation 2004/705/EC of 11 October 2004 on the monitoring of background levels of dioxin and dioxin-like PCBs in foodstuffs ([3]).

(2) That in cases of non-compliance with the provisions of the Act referred to at point 33 of Chapter II of Annex I of the EEA Agreement (*Directive 2002/32/EC*) and Regulation (EC) No 466/2001, and (subject to point 3) in cases where levels of dioxins and/or dioxin-like PCBs in excess of the action levels specified in Annex I to this Recommendation as regards foodstuffs and in Annex II of the Act referred to at point 33 of Chapter II of Annex I of the EEA Agreement. (*Directive 2002/32/EC*) as regards feedingstuffs are found, and in co-operation with operators,

(a) initiate investigations to identify the source of contamination,

(b) take measures to reduce or eliminate the source of contamination,

(c) check for the presence of non-dioxin-like PCBs.

(3) That the EFTA States in which background levels of dioxin and dioxin-like PCBs are particularly high, set national action levels for their domestic production of feed materials, feedingstuffs and foodstuffs, such that for about 5 % of the results obtained in the monitoring referred to in point 1, an investigation is undertaken to identify the source of contamination.

(4) That the EFTA States inform the EFTA Surveillance Authority and the other EFTA States of their findings, the results of their investigations and the measures taken to reduce or eliminate the source of contamination.

(9) That the EFTA States transmit the information referred to in point 4 by 31 March of each year at the latest for foodstuffs and as part of the annual report to be submitted to the Authority pursuant to Article 22(2) of the Act referred to at point 31a of Chapter II of Annex I to the EEA Agreement (*Council Directive 95/53/EC of 25 October 1995 fixing the principles governing the organization of official inspections in the field of animal nutrition* ([4]) for feedingstuffs, except where the information is of immediate relevance for the other EEA States in which case it should be transmitted immediately. In accordance with Article 2(1) of Protocol 1 of the Surveillance and Court Agreement, the EFTA Surveillance Authority shall pass on that information to the European Commission.

Done at Brussels, 11 May 2006.

For the EFTA Surveillance Authority
Kristján Andri STEFÁNSSON
College Member

Niels FENGER
Director

([3]) OJ L 321, 22.10.2004, p. 45.

([4]) OJ L 265, 08.11.1995, p. 17. Directive as last amended by Directive 2001/46/EC of the Européan parliament and of the Council (OJ L 234, 1. 9. 2001, p. 55).

ANNEX

Dioxins (sum of polychlorinated dibenzo-*para*-dioxins (PCDDs) and polychlorinated dibenzofurans (PCDFs), expressed in World Health Organisation (WHO) toxic equivalents using the WHO-TEFs (toxic equivalency factors, 1997)), and dioxin-like PCBs (sum of polychlorinated biphenyls, expressed in World Health Organisation (WHO) toxic equivalents using the WHO-TEFs (toxic equivalency factors, 1997)).

Food	Action level for dioxins + furans WHO-TEQ) (1)	Action level for dioxin-like PCBS (WHO-TEQ) (1)
Meat and meat products		
— of ruminants (bovine animals, sheep)	1,5 pg/g fat (2)	1,0 pg/g fat (2)
— of poultry and farmed game		
— of pigs	1,5 pg/g fat (2)	1,5 pg/g fat (2)
Liver and derived products of terrestrial animals	0,6 pg/g fat (2) 4,0 pg/g fat (2)	0,5 pg/g fat (2) 4,0 pg/g fat (2)
Muscle meat of fish and fishery products and products thereof, with the exception of eel (3) (4)	3,0 pg/g fresh weight	3,0 pg/g fresh weight
Muscle meat of eel (*Anguilla anguilla*) and products thereof (3) (4)	3,0 pg/g fresh weight	6,0 pg/g fresh weight
Milk and milk products, including butter fat	2,0 pg/g fat (2)	2,0 pg/g fat (2)
Hen eggs and egg products	2,0 pg/g fat (2)	2,0 pg/g fat (2)
Oils and fats		
— Animal fat		
— from ruminants	1,5 pg/g fat	1,0 pg/g fat
— from poultry and farmed game	1,5 pg/g fat	1,5 pg/g fat
— from pigs	0,6 pg/g fat	0,5 pg/g fat
— mixed animal fats	1,5 pg/g fat	0,75 pg/g fat
— Vegetable oil and fats	0,5 pg/g fat	0,5 pg/g fat
— Marine oil (fish body oil, fish liver oil and oils from other marine organisms intended for human consumption)	1,5 pg/g fat	6,0 pg/g fat
Fruits, vegetables and cereals	0,4 ng/kg product	0,2 ng/kg product

(1) Upperbound concentrations: upperbound concentrations are calculated assuming that all the values of the different congeners less than the limit of quantification are equal to the limit of quantification.
(2) The action levels are not applicable for food products containing < 1 % fat.
(3) Where fish are intended to be eaten whole, the action level shall apply to the whole fish.
(4) When the action level is exceeded, it will be in some cases not necessary to perform an investigation as regards the source of contamination as the background level in some areas for some fish species is close to or exceeding the action level. However it is appropriate in these cases where the action level is exceeded to record all information such as sampling period, geographic origin and fish species in view of future measures as regards the presence of dioxins and dioxin-like compounds in fish and fishery products.

RECOMMENDATION OF THE EFTA SURVEILLANCE AUTHORITY

No 150/06/COL

of 17 May 2006

concerning a coordinated inspection programme in the field of animal nutrition for the year 2006

THE EFTA SURVEILLANCE AUTHORITY,

Having regard to the Agreement on the European Economic Area, and in particular Article 109 and Protocol 1 thereof,

Having regard to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, and in particular Article 5(2)(b) and Protocol 1 thereof,

Having regard to the Act referred to at point 31a of Chapter II of Annex I to the EEA Agreement (*Council Directive 95/53/EC of 25 October 1995 fixing the principles governing the organization of inspections in the field of animal nutrition* [1]), as amended, and as adapted to the EEA Agreement by Protocol 1 thereto, and in particular Article 22(3) thereof,

Whereas:

(1) In 2005 the EFTA States identified certain issues as worthy of a coordinated inspection programme to be carried out in 2006.

(2) Although the Act referred to at point 33 of Chapter II of Annex I to the EEA Agreement (*Council Directive 2002/32/EC of the European Parliament and of the Council of 7 May 2002 on undesirable substances in animal feed* [2]), as amended, establishes maximum contents of aflatoxin B1 in feedingstuffs, there are no EEA rules for other mycotoxins, such as ochratoxin A, zearalenone, deoxynivalenol, fumonisins., T-2 and HT-2 toxins. Gathering information on the presence of those mycotoxins through random sampling could provide useful data for an assessment of the situation with a view to the development of the legislation. Furthermore, certain feed materials such as cereals and oil seeds are particularly exposed to mycotoxin contamination because of harvesting, storage and transport conditions. As mycotoxin concentration varies from year to year, it is appropriate to collect data from consecutive years for all mycotoxins mentioned.

(3) Previous results of checks for the presence of antibiotics and coccidiostats in certain feedingstuffs intended for animal species or category for which those active substances are not authorized indicate that this type of infringement still occurs. Furthermore, in accordance with the provisions of Article 11(2) of the Act referred to at point 1a of Chapter II of Annex I to the EEA Agreement (*Regulation (EC) No 1831/2003 of the European Parliament and of the Council of 22 September 2003 on additives for use in animal nutrition* [3]), it is important to ensure that the phasing out of antibiotic feed additives is effectively enforced.

(4) The participation of Norway and Iceland in the programmes within the scope of Annex II of this Recommendation concerning substances not authorised as feed additives will have to be evaluated with respect to their exemptions from Chapter II of Annex I to the EEA Agreement and, in particular, from the Act referred to at Point 1a of Chapter II of Annex I to the EEA Agreement, *Regulation (EC) No 1831/2003*.

(5) It is important to ensure that restrictions on the use of feed materials of animal origin in feedingstuffs, as laid down in relevant EEA legislation, are effectively enforced.

(6) The participation of Iceland in the programmes within the scope of Annex III of this Recommendation concerning restrictions on the production and use of feed materials of animal origin will have to be evaluated with respect to its exemptions from Chapter I of Annex I to the EEA Agreement.

(7) It is appropriate to ensure that the levels of the trace elements copper and zinc in compound feedingstuffs for pigs do not exceed the maximum content laid down by the Act referred to at Point 1zq of Chapter II of Annex I to the EEA Agreement (*Commission Regulation (EC) No 1334/2003 of 25 July 2003 amending the conditions for authorisation of a number of additives in feedingstuffs belonging to the group of trace elements* [4]), as amended. The participation of Norway in the programmes within the scope of Annex IV will have to be evaluated with respect to its exemptions from Chapter II of Annex I to the EEA Agreement.

The measures provided for in this Recommendation are in accordance with the opinion of the EFTA Plants and Animal Feedingstuffs Committee assisting the EFTA Surveillance Authority,

(1) OJ L 265, 8.11.1995, p. 17. Directive as last amended by Directive 2001/46/EC of the European Parliament and of the Council (OJ L 234, 1.9.2001, p. 55).

(2) OJ L 140, 30.5.2002, p. 10. Directive as last amended by Commission Directive 2006/77/EC (OJ L 271, 30.9.2006, p. 53).

(3) OJ L 268, 18.10.2003, p. 29. Regulation as amended by Commission Regulation (EC) No 378/2005 (OJ L 59, 5.3.2005, p. 8).

(4) OJ L 187, 26.7.2003, p. 11. Regulation as amended by Regulation (EC) No 1980/2005 (OJ L 318, 6.12.2005, p. 3).

HEREBY RECOMMENDS:

1. It is recommended that the EFTA States carry out during 2006 a coordinated inspection programme aimed to check:

   (a) the concentration of mycotoxins (aflatoxin B1, ochratoxin A, zearalenone, deoxynivalenol, fumonisins, T-2 and HT-2 toxins) in feedingstuffs, indicating the methods of analysis; the method of sampling should comprise both random and targeted sampling; in the case of targeted sampling, the samples should be feed materials suspected of containing higher concentrations of mycotoxins, such as cereal grains, oil seeds, oil fruits, their products and by-products, and feed materials stored for a long time or transported by sea over a long distance; in the case of aflatoxin B1, particular attention should also be paid to compound feedingstuffs for dairy animals other than dairy cattle; the results of the checks should be reported using the model set out in Annex I;

   (b) coccidiostats and/or histomonostats, whether or not authorised as feed additives for certain animal species and categories, that occur frequently in non-medicated pre-mixtures and compound feedingstuffs in which these substances are not authorised; the checks should target those substances in pre-mixtures and compound feedingstuffs if the competent authority considers that there is a greater probability of finding irregularities; the results of the checks should be reported using the model set out in Annex II;

   (c) the implementation of the phasing out of antibiotics as feed additives as set out in Annex II;

   (d) the implementation of restrictions on the production and use of feed materials of animal origin, as set out in Annex III;

   (e) the levels of copper and zinc in compound feedingstuffs for pigs, as set out in Annex IV.

2. It is recommended that EFTA States include the results of the coordinated inspection programme provided for in paragraph 1 in a separate Chapter in the annual report on inspection activities to be transmitted to the EFTA Surveillance Authority by 1 April 2007 in accordance with Article 22(2) of Act referred to at Point 31a of Chapter II of Annex I to the EEA Agreement (*Council Directive 95/53/EC*) and the latest version of the harmonised reporting model.

Done at Brussels, of 17 May 2006.

For the EFTA Surveillance Authority

Kristján Andri STEFÁNSSON

College Member

Niels FENGER

Director

ANNEX I

Concentration of certain mycotoxins (aflatoxin B1, ochratoxin A, zearalenone, deoxynivalenol, fumonisins, T-2 and HT-2-toxins) in feedingstuffs

Individual results of all tested samples; model for reports as referred to in paragraph 1(a)

Feedingstuffs			Sampling (random or targeted)	Type and concentration of mycotoxins (μg/kg relative to a feedingstuff with a moisture content of 12 %)					
Class [a]	Type [b]	Country of origin		Aflatoxin B1	Ochratoxin A	Zearalenone	Deoxynivalenol	Fumonisins [c]	T-2 and HT-2-toxins [d]

[a] Select one of the following classes: feed material, feed additive, premixture, complementary feed, complete feed, compound feed.
[b] Select one of the following types: (a) for feed materials, the name of the feed material as laid down in part B of the Annex to the Act referred to at point 14a of Chapter II of Annex I to the EEA Agreement (*Council Directive 96/25/EC of 29 April 1996 on the circulation of feed materials, amending Directives 70/524/EEC, 74/63/EEC, 82/471/EEC and 93/74/EEC and repealing Directive 77/101/EEC*); (b) for other feedingstuffs, the target species.
[c] The concentration of fumonisins B1 and B2 can be reported as the sum of both.
[d] The concentration of the T-2 and HT-2 toxins can be reported as the sum of both.

The competent authority should also indicate:

— the action taken when maximum levels for aflatoxin B1 are exceeded;

— the methods of analysis used;

— the limits of detection.

ANNEX II

Presence of certain medicinal substances not authorised as feed additives

Certain medicinal substances may be legally present as additives in pre-mixtures and compound feedingstuffs for certain species and categories of animals, when fulfilling the requirements of Article 10 of the Act referred to at Point 1a of Chapter II of Annex I to the EEA Agreement (*Regulation (EC) No 1831/2003*).

The presence of unauthorised medicinal substances in feedingstuffs constitutes an infringement.

The medicinal substances to be controlled should be chosen from the following:

1. Medicinal substances authorised as feed additives for certain animal species or categories only:

   decoquinate (Deccox)

   diclazuril (Clinacox 0,2 %)

   halofuginone hydrobromide (Stenorol)

   lasalocid A sodium (Avatec 15 %)

   maduramicin ammonium alpha(Cygro 1 %)

   monensin sodium (Elancoban G100, 100, G200, 200)

   narasin

   narasin — nicarbazin (Maxiban G160)

   robenidine hydrochloride (Cycostat 66G)

   salinomycin sodium (Sacox 120G, 120)

   semduramicin sodium (Aviaz 5 %)

2. Medicinal substances no longer authorised as feed additives:

   amprolium

   amprolium/ethopabate

   arprinocid

   avilamycin

   avoparcin

   carbadox

   dimetridazole

   dinitolmid

   flavophospholipol

   ipronidazol

   meticlorpindol

   meticlorpindol/methylbenzoquate

nicarbazin

nifursol

olaquindox

ronidazol

spiramycin

tetracyclines

tylosin phosphate

virginiamycin

zinc bacitracin

other antimicrobial substances

3. Medicinal substances never authorised as feed additives:

other substances

Individual results of all non-compliant samples; model for reports as referred to in paragraph 1(b)

Type of feedingstuff (animal species and category)	Substance detected	Level found	Reason for the infringement [a]	Action taken

[a] Reason leading to the presence of the unauthorised substance in the feedingstuff, as concluded after an investigation carried out by the competent authority.

The competent authority should also indicate:

— the total number of samples tested;

— the names of the substances which have been investigated;

— the methods of analysis used;

— the limits of detection.

ANNEX III

Restrictions on the production and use of feed materials of animal origin

Without prejudice to Articles 3 to 13 and 15 of Directive 95/53/EC, EFTA States should during 2006 undertake a coordinated inspection programme to determine whether restrictions on the production and use of feed materials of animal origin have been complied with.

In particular, in order to ensure that the ban on feeding processed animal protein to certain animals, as laid down in Annex IV of the Act referred to at Point 7.1.12 of Chapter I of Annex I to the EEA Agreement (*Regulation (EC) No 999/2001 of the European Parliament and of the Council of 22 May 2001 laying down rules for the prevention, control and eradication of certain transmissible spongiform encephalopathies* ([1])), are effectively applied, EFTA States should implement a specific control programme based on targeted controls. In accordance with Article 4 of Directive 95/53/EC, that control programme should be based on a risk-based strategy where all stages of production and all types of premises where feed is produced, handled and administered are included. The EFTA States should pay special attention to the definition of criteria that can be related to a risk. The weighting given to each criterion should be proportional to the risk. The inspection frequency and the number of samples analysed in the premises should be in correlation to the sum of weightings allocated to those premises.

The following indicative premises and criteria should be considered when drawing up a control programme:

Premises	*Criteria*	*Weighting*
Feed mills	— Double-stream feed mills producing ruminant compound feed and non-ruminant compound feed containing derogated processed animal proteins. — Feed mills with previous history, or suspicion, of non-compliance. — Feed mills with a large amount of imported feedingstuffs with high protein content such as fishmeal, soybean meal, corn gluten meal and protein concentrates. — Feed mills with a high production of compound feed. — Risk of cross-contamination resulting from internal operational procedures (dedication of silos, control of the effective separation of lines, control of ingredients, internal laboratory, sampling procedures).	
Border Inspection Posts and other points of entry into the Community	— Large/small amount of imports of feedingstuffs. — Feedingstuffs with high protein content.	
Farms	— Home mixers using derogated processed animal proteins. — Farms keeping ruminants and other species (risk of cross feeding). — Farms purchasing feedingstuffs in bulk.	
Dealers	— Warehouses and intermediate storage of feedingstuffs with high protein content. — High volume of bulk feedingstuffs traded. — Dealers in compound feedingstuffs produced abroad.	

([1]) OJ L 147, 31.5.2001, p. 1. Regulation as last amended by Commission Regulation (EC) No 1993/2004 (OJ L 344, 20.11.2004, p. 12).

Premises	*Criteria*	*Weighting*
Mobile mixers	— Mixers producing for both ruminants and non-ruminants. — Mixers with previous history, or suspicion, of non-compliance. — Mixers incorporating feedingstuffs with high protein content. — Mixers with high production of feedingstuffs. — Large number of farms served including farms which keep ruminants.	
Means of transportation	— Vehicles used for the transportation of processed animal proteins and feedingstuffs. — Vehicles with previous history, or suspicion, of non-compliance.	

As an alternative to these indicative premises and criteria, the EFTA States may forward their own risk assessment to the EFTA Surveillance Authority before 31 May 2006.

Sampling should be targeted on batches or events where cross-contamination with prohibited processed proteins is most likely (first batch after the transport of feedingstuffs containing animal protein prohibited in this batch, technical problems or changes in production lines, changes in storage bunkers or silos for bulk material).

Controls could also be extended to the analyses of dust in vehicles, manufacturing equipment and storage areas.

The minimum number of inspections per year in an EFTA State should be 10 per 100 000 tonnes of compound feed produced. The minimum number of official samples per year in an EFTA State should be 20 per 100 000 tonnes of compound feed produced. Pending the approval of alternative methods, microscopic identification and estimation as described in the Act referred to at Point 31i of Chapter II of Annex I to the EEA Agreement (Commission *Directive 2003/126/EC on the analytical method for the determination of constituents of animal origin for the official control of feedingstuffs* ([1])) should be used for analysing samples. Any presence of prohibited constituents of animal origin in feedingstuffs should be considered as a breach of the feed ban.

The results of the inspection programmes should be communicated to the EFTA Surveillance Authority using the following formats.

Summary of checks concerning feeding restrictions for feed of animal origin (feeding of prohibited processed animal proteins)

A. Documented inspections

Stage	Number of inspections comprising checks on the presence of processed animal proteins	Number of breaches based on documentary checks etc. rather than laboratory testing
Import of feed materials		
Storage of feed materials		
Feed mills		
Home mixers/mobile mixers		

([1]) OJ L 339, 24.12.2003, p. 78.

Stage	Number of inspections comprising checks on the presence of processed animal proteins	Number of breaches based on documentary checks etc. rather than laboratory testing
Intermediaries of feedingstuffs		
Means of transport		
Farms keeping non-ruminants		
Farms keeping ruminants		
Others:		

B. **Sampling and testing of feed materials and compound feedingstuffs for processed animal proteins**

Premises	Number of official samples tested for processed animal proteins			Number of non-compliant samples					
				Presence of processed animal protein from terrestrial animals			Presence of processed animal protein from fish		
	Feed materials	Compound feedingstuffs		Feed materials	Compound feedingstuffs		Feed materials	Compound feedingstuffs	
		for ruminants	for non-ruminants		for ruminants	for non-ruminants		for ruminants	for non-ruminants
At import									
Feed mills									
Intermediaries/storage									
Means of transport									
Home mixers/mobile mixers									
On farm									
Others:									

C. **Summary of prohibited processed animal proteins found in samples of feedingstuffs intended for ruminants**

	Month of sampling	Type degree and origin of contamination	Sanctions (or other measures) applied
1			
2			
3			
4			
5			
…			

ANNEX IV

Individual results of all samples (both compliant and non-compliant) concerning the content of copper and zinc in compound feedingstuffs for pigs

Type of compound feedingstuff (animal category)	Trace element (copper or zinc)	Level found (mg/kg of complete feedingstuff)	Reason for exceeding the maximum content [a]	Action taken

[a] As concluded after an investigation carried out by the competent authority.